

THE UNIVERSALITY OF HUMAN RIGHTS

DEVELOPING NARRATIVES TO OVERCOME POLARIZATION

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KEY MESSAGES

The universality of human rights is very often taken for granted. In official and diplomatic circles, it is treated as a self-evident, undisputed concept. In the practice of the Human Rights Council (HRC), particularly, universality is a recurrent, mostly inconsequential mantra repeated in almost every resolution.

Yet, several entrenched dynamics in international politics, visible in the doings of the HRC, pose important challenges to universality. One of them is the tendency to contest the limits of human rights by continuously expanding the scope of 'exceptional' limitations and derogations, thereby impairing the rights of certain persons or groups. This is often visible in matters related to freedom of expression in the context of digitalization and terrorism. Another cluster of challenges is the complete exclusion of human rights from applying to certain issues by means of technical or other arguments, as has often happened with climate change and international investment law.

And lastly, several forms of veiled relativism are recurrently upheld by certain actors, privileging some rights over others and claiming that the values underlying international human rights law are dependent on the specific cultural, social and political contexts of each country. Some accounts of the right to development and the rights of minorities in the works of the HRC clearly evidence this.

In face of these challenges, a revisited, strengthened narrative of human rights universality could be built on the notion of *equal human dignity* – the premise that every human being shares the same nature and, consequently, enjoys equal moral status. Far from novel, this notion lies at the core of the human rights project and as such is reflected in the language of many instruments and resolutions. However, its potential is greatly underestimated and even misused. Largely taken for granted – not unlike universality itself – the rationale of equal human dignity is capable of providing a unified rhetorical justification for potentially any human right along three fundamental values or topoi: individual autonomy, democratic procedure and equal capabilities. This means that through equal human dignity any challenge to the universality of human rights can be reduced to a question of equality among individuals and communities, which powerfully corners anyone seeking to question universality.

In this sense, a narrative of universality based on equal human dignity should be operationalized transversally across all human rights, reinforcing the idea of indivisibility. This could be done through the use of standard language based on equal human dignity and by bringing more than one value or topos into the analysis of a given issue, going beyond the traditional approaches to the right in question. In doing this, however, decision-makers should pay attention to the historical pitfalls of the narrative of universality. Among other things, this means to avoid portraying human rights as an unquestionable source of good, having all the answers to all problems and potentially justifying intervention.

1. INTRODUCTION

Human rights are universal. Anyone who has ever heard of human rights has surely also heard or read this idea.

Every document dealing with human rights – from international treaties and resolutions to primary school textbooks or banners in demonstrations – restates the notion that human rights apply to all people everywhere, as a sort of mantra from which it seems impossible to depart.¹ The Universal Declaration of Human Rights (UDHR), the founding document of international human rights law (IHRL) is called ‘universal’ precisely because it acknowledges that human rights apply to every human being. One would therefore have the impression that, given the UDHR’s canonical status, the universality of human rights is itself universally accepted and respected.

This is, however, not the case. Several undercurrents in the practice of human rights result in rights not being universally applicable. Some of them do not openly question whether human rights apply to every human being but exclude their application in given circumstances or with regard to certain people or communities. The result is that universality is emptied of any meaning – indeed, rendered moot in practice. Other undercurrents challenge universality more directly, questioning whether certain rights are relevant at all. This is particularly visible in an increasingly multipolar global context in which the rhetoric of human rights seems to be losing ground to other geopolitical interests or simply to populist bigotry – as evidenced by the withdrawal of the United States from the Human Rights Council during the Trump administration, or Russia’s senseless attempts to justify its invasion of Ukraine in February 2022.²

These challenges to universality can be grouped into three clusters for the purpose of understanding them better. The first concerns the contestation of the limits of human rights. Here, universality might not be explicitly questioned, but the dispute over the way human rights apply and are to be implemented vis-à-vis other legitimate aims hinders their protective scope to the detriment of certain groups of people. The second cluster of challenges is related to the denial or the evasion of the application of human rights to a given problem. Here, universality is hindered by the omission of a rights dimension altogether, leaving the people involved subject to rules that do not provide any sort of protection against injustice. And finally, the third cluster of challenges is that of relativism: the claim that values exogenous to human rights are more important, or that human rights apply differently to different communities.

1 M. Barraco, background paper, ‘The universality of human rights – the practice of the Human Rights Council’, p.5 (on file with the Geneva Academy).

2 F. Zarbiyev, ‘Of Bullshit, Lies and “Demonstrably Rubbish” Justifications in International Law’, *Völkerrechtsblog*, 18 March 2022, <https://voelkerrechtsblog.org/of-bullshit-lies-and-demonstrably-rubbi-sh-justifications-in-international-law/> (last accessed 18 August 2022). “plainCitation”: “Fuad Zarbiyev, ‘Of Bullshit, Lies and “Demonstrably Rubbish” Justifications in International Law’ (Völkerrechtsblog, 18 March 2022

All of these sources of defiance of universality exist in the practice of human rights. They are visible in the interactions of civil society with governments in every country, in domestic and international courts alike and, needless to say, in the course of international relations both between states and with other international actors. The United Nations human rights system and the Human Rights Council (HRC) in particular are certainly not an exception. It is likely that no state representative, UN public servant or NGO speaker has ever said at the Council that human rights should not be universal, and yet the challenges mentioned above are very much a reality in the daily work of the HRC and that of its subsidiary bodies.

This Academy Briefing pursues two main objectives. The first is to provide an account and contribute to a better understanding of these different challenges. To do this, it focuses on the practice of the HRC: its resolutions but also the work of its special procedures and their interactions with states. The second is to make suggestions on the basis of which a narrative for overcoming these challenges can be developed and put into practice. This narrative, it is argued, should have at its core the idea of *equal human dignity*, a concept that, both legally and rhetorically, lies at the heart of human rights but whose unifying potential seems to be greatly underestimated and even misused. In developing this idea, the briefing also reflects on the type of universality that the world should strive for, avoiding the same mistakes that critical and Third-World scholars have for some decades pointed out – namely the idolatry of human rights, the pretention that rights are politically neutral and the justification of hegemonic practices through human rights language.

Before jumping into all of this, however, there is one point that should not be taken for granted. This briefing seeks ultimately to defend the idea of the universality of human rights, indeed. But why make such effort in a world in which human rights might be said to be *legally universal*, but are certainly not *universally enjoyed* in practice? Poverty and extreme poverty, famine, political repression, gender, ethnical and many other forms of discrimination, climate injustice, lack of public health services and social security, corruption, war and a long list of evils are part of day-to-day life for a majority of humankind. Many people would therefore find the idea of the universality of human rights rather glib: what purpose does it serve to have a normative framework that is so ambitious in scope but that seems to achieve so little on the ground? From this perspective, the mantra of universality would seem to be a cover for a highly unequal reality rather than a mechanism for truly changing it.

This approach is misguided. The universality of human rights is and should be understood as a political project, not a moralistic dogma, and less so a mere legalistic formula. The idea that every human being enjoys equal dignity and is therefore entitled to equal rights has to be defended as a fundamentally wise and just political choice. A banner for persuasion rather than a rhetorical totem; a promise of a better world, accessible to everyone. And human rights are to be defended, too, because they are concrete, implementable tools designed to translate equal human dignity into law, and law into reality. With all their faults and unfulfilled promises, human rights are perhaps humankind’s first non-violent, truly secular and legally universal political means of achieving substantial equality. As such, the uni-

versality of human rights is a political project worth pursuing and bettering. It is precisely because of the distance between the theory and practice of human rights that discussing the workings of universality today is of fundamental importance.

The briefing is structured as follows. Section 2 reflects on the three abovementioned challenges to universality that are visible in the practice of human rights. In relation to each of them, two specific areas of contestation are discussed, focusing on topics of particular contemporary concern: with regard to the contestation of the limits of human rights, the issues of freedom of expression in the context of digitalization and measures to address terrorism provide the basis for discussion; for the exclusion of human rights, climate change and international investment law (IIL) offer very telling examples; and in relation to relativist accounts of human rights, focus is set on development and minority rights. Section 3 focuses on developing a narrative of universality based on equal human dignity. To do this, it first discusses several crucial academic critiques of universality, then delves into the philosophical and legal foundations that such a narrative could have, finally providing some insight into the way equal human dignity is already present in the practice of the HRC and suggesting ways in which it could be enhanced. The briefing concludes with concrete recommendations addressed to policy-makers and anyone involved in the practice of human rights.

2. CHALLENGES TO UNIVERSALITY

A. CONTESTING THE LIMITS OF HUMAN RIGHTS

A first and very widespread challenge to the universality of human rights is the contestation of the limits of rights.

This occurs when political decisions privilege other interests and values over certain human rights, or even particular human rights over others, using a relativizing logic. The line of argument in these cases is usually that certain anomalous circumstances require the prioritization of more fundamental rights over less pressing ones, for instance public order or national security as a means to safeguard the right to life, allowing restrictions on the freedom of movement. The recurrent narrative here is that rights are not absolute and that they are, in practice, limited by other rights and protected interests.

Now, limiting rights is in principle legitimate. Article 29 of the UDHR, Article 4 of the International Covenant on Civil and Political Rights (ICCPR) and a number of clauses within specific rights in most human rights treaties allow for derogations and limitations under exceptionalist rationales.³ The fulfilment of rights does at times require interest-ponderation and accommodation to the detriment of other rights. This might be due to a serious public emergency, where a given circumstance ‘constitutes a threat to the organised life of the community’ and the strict compliance with all human rights appears to limit the capacity of the state to properly address the crisis, therefore requiring temporary derogations from specific rights.⁴ Also, in less excruciating cases where different rights conflict, milder forms of limitations are also provided for by IHRL, subject to the specific requirements of the right in question. A complex doctrine of legitimacy of purpose, necessity and proportionality has been developed precisely to ensure that this balancing is done in the least rights-restrictive way possible.

Where, then, does the challenge to universality reside when we talk of prioritizing certain interests over given human rights, if prioritizing is both legal and necessary? The main issue with this type of narrative is not that it openly questions human rights but rather normalizes exceptionality. In other words, it erodes universality by persistently relativizing the worth of human rights in practice and by making it commonplace to sideline them.

One evident cause for concern in this regard is the outright abuse of limitations and derogations. As mentioned above, human rights treaties provide rightful grounds for restricting human rights in exceptional circumstances: public order,

³ F. Mégret, ‘Nature of Obligations’, in D. Moeckli, S. Shah and S. Sivakumaran (eds), *International Human Rights Law*, 3rd edn, Oxford University Press, 2017, pp99-104.

⁴ ECtHR, *Lawless v Ireland (No 3)*, Chamber, Judgment, App no 332/57, 1 July 1961 §28.

national security, public health and ‘morals’, among others. Yet, the exceptional oftentimes becomes the rule, and ‘temporary’ restrictions easily turn into a tool for thwarting rights at moments where exercising them is particularly important. This renders human rights inoperative and worthless. Where, for example, the right to demonstrate is limited due to alleged security concerns precisely in situations where the democratic legitimacy of a government is being questioned on the streets, the formal existence of this right becomes meaningless. Or, at times where freedom of expression would play a critical role in fostering an open, public debate on an issue of acute national interest, its limitation has dire consequences for democracy and society at large.

The derogation or limitation of rights in times of alleged emergency can therefore be used to undermine human rights and democracy more broadly. But less evident damage comes in the form of lighter exceptionality. For example, an argument for economic development is often made by governments and private companies when interfering with the livelihoods and environment of communities without conducting the proper consultations, assessments and grievance procedures. Or, a detainee can be left in pre-trial detention, isolated and without access to a lawyer, using the argument that the imputed crimes are particularly serious – for instance terrorism or organized crime. In another instance, an election might be suspended for long periods due to alleged political instability. The common denominator in all of these circumstances is that other interests are systematically privileged over human rights, without openly calling them into question. Again, the damage to universality is done by relativizing their worth.

A parallel danger in this context is what Susan Marks refers to as human rights being a ‘language of exoneration and justification’.⁵ In the binary logic of the prescriptive language used by the law, what is not prohibited is allowed. In Marks’ words, ‘to prohibit abuse is to authorise whatever does not constitute abuse’.⁶ This means that the fight over the limits of human rights might not only relativize their worth, but also provide a legal or moral argument to exculpate outcomes that are unjust despite their technical compatibility with human rights. Take, for example, the increasing inequality in many Western societies in terms of access to health services. The alleged freedom to acquire private health insurance, for instance in the US, means in practice the utter precarity of the health services available to those living in poverty. Samuel Moyn also warns of this when he states that ‘human rights, even perfectly realized human rights, are compatible with inequality, even radical inequality’.⁷ Moyn’s argument is that human rights have embraced a logic of ‘basic minimums’ and ‘alleviation of the suffering of the poor’.⁸ This hinders universality by rendering the idea of equality and non-discrimination, omnipresent in human rights narratives, devoid of meaning and even frivolous.

5 S. Marks, ‘Human Rights in Disastrous Times’, in J. Crawford and M. Koskeniemi (eds), *The Cambridge Companion to International Law*, Cambridge University Press, 2012, p 320.

6 Ibid.

7 S. Moyn, *Not Enough: Human Rights in an Unequal World*, Harvard University Press, 2018, p 213.

8 Ibid, pp119–145.

In what follows, two areas where the limits of human rights have been particularly contested in recent decades are discussed in more detail: freedom of expression in the context of digitalization, and measures to address terrorism and other threats to security. Both examples seek to illustrate the challenges to universality discussed above.

1. FREEDOM OF EXPRESSION IN THE CONTEXT OF DIGITALIZATION

Freedom of expression is one of the rights that is most often perceived as conflicting with other rights and interests. Discussions about its limits vis-à-vis freedom of religion, privacy, national security and a long etcetera have, for centuries, motivated long discussions. And if this has been the case with freedom of expression in the offline world, the transition to digitalization has, if anything, amplified these debates and made them even more pressing. Digital technology has created faster, broader and more accessible pathways for disseminating and obtaining information globally. As a result, the concern about the limits of freedom of expression is a topic of acute actuality, posing important challenges to the universality of human rights. Two topics have been particularly present in recent years: the spread of disinformation online and the regulation of hate speech.⁹ Each of these is briefly discussed below.

The spread of disinformation online is problematic for several reasons. First, because it generates mistrust among social actors and erodes the basis of democratic dialogue. This results in acute polarization, potentially leading to instances of discrimination and exacerbated confrontation. Second, because the fight against disinformation is very susceptible to censorship and other restrictions on freedom of expression, which is especially concerning in contexts where civic space and human rights are already restricted. This makes the task of regulating disinformation particularly complicated in terms of human rights. Finally, complicating matters even further, online disinformation is problematic because it can be good business for digital companies, and thus their algorithms and business models, when inadequately regulated, tend to foster the spread of disinformation.¹⁰

The HRC has addressed the issue in several resolutions, stating that ‘responses to the spread of disinformation and misinformation must be grounded in international human rights law, including the principles of lawfulness, legitimacy, necessity and proportionality, and underlining the importance of free, independent,

9 The UN Special Rapporteur has addressed these and other topics in several reports. See, in particular: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN doc A/HRC/38/35, 6 April 2018; on online hate speech, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN doc A/74/486, 9 October 2019; Disinformation and Freedom of Opinion and Expression: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN doc A/HRC/47/25, 13 April 2021.

10 See, e.g., Amnesty International, *Surveillance Giants: How the Business Model of Google and Facebook Threatens Human Rights*, 2019, <https://www.amnesty.org/en/wp-content/uploads/2021/05/POL3014042019ENGLISH.pdf> (last accessed 18 August 2022).

plural and diverse media'.¹¹ Yet, a good number of states continue to deal with disinformation in ways that hinder and relativize freedom of expression, ultimately eroding its universality. This is particularly visible in the wave of national laws and regulations on disinformation that has been adopted in many countries in recent years, whose provisions are extremely broad and often impose disproportionate sanctions.

Ethiopia, for example, replied to a communication sent by several UN special rapporteurs concerning the detention of a journalist and a lawyer who had posted allegedly false information regarding COVID on their social media, saying 'since hate speech and disinformation pose threat [*sic*] to social harmony, political stability, national unity, human dignity, diversity and equality, it has become necessary to prevent and suppress by law [their] deliberate dissemination'. As is evident, the ambiguity of these grounds makes the threshold of disinformation uncertain, and thus the risk of censorship very concerning. And to this, the disproportionality of the punishment has to be added: according to the reply, disseminating false information likely to cause 'public disturbance, riot, violence or conflict' is an offence that, when committed through social media with more than 5,000 followers, can lead to punishment of up to 3 years under Ethiopian law.¹²

Another example is a temporary shut-down of the internet in the provinces of Papua and West Papua by the central government of Indonesia, which it justified in a reply to several special rapporteurs saying that it was a 'lawful measure to prevent the spread of false news, hate messages and hoaxes that were used to incite violence in Papua', and that the Constitution of Indonesia 'guarantees the rights of citizens ... insofar as it [*sic*] does [not] contravene the rights of others and public interest'.¹³ In both this and the previous example, the generality of the language used to address disinformation and the disproportionality of the consequences is patent, and opens the door for abusive restrictions on freedom of expression. Other countries have also been addressed by special procedures mandate holders regarding similar concerns but have refused to engage in a dialogue.¹⁴

Hate speech is another topic which has gained prominence in discussions about the limits of freedom of expression in the context of digitalization. IHRL, and Article 20 (2) of the ICCPR in particular, prohibit the advocacy of national, racial or

11 HRC Res 44/12, 14 July 2020.

12 Communication from the Federal Democratic Republic of Ethiopia, Ref: 071/2020-A, 10 July 2020, Para 31, <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gld=35418> (last accessed 18 August 2022).

13 Communication from the Republic of Indonesia, Ref: 133/POL-II/IX/2019, 12 September 2019, <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gld=34873> (last accessed 18 August 2022).

14 Brazil and the United States are examples of this. See communications sent from the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights to the US, Ref: OL USA 20/2017, 24 August 2017, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=23304> (last accessed 18 August 2022); and to Brazil, Ref: OL BRA 6/2020, 3 July 2020, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25417> (last accessed 18 August 2022).

religious hatred when it incites discrimination, hostility or violence. The purpose of this provision is to protect vulnerable communities from attacks and to ensure equal participation in public life.¹⁵ The Rabat Plan of Action, a set of principles, definitions and thresholds proposed by the Office of the UN High Commissioner for Human Rights (OHCHR) after four regional expert workshops organized in 2011, is the most acknowledged interpretation of Article 20 (2).¹⁶ It defines 'hatred' and 'hostility' as 'intense and irrational emotions of opprobrium, enmity and detestation towards the target group', and requires criminalization to be left for the most serious forms of incitement under Article 20 (2).

Despite the existence of these agreed standards, many governments have implemented concepts of 'hate speech' in criminal codes as an all-encompassing legal notion that, despite the resemblance with Article 20 (2), is fraught with ambiguity.¹⁷ An example is Jordan's Cybercrime Law, to which an amendment was introduced in 2018 defining 'hate speech' as ' [e] very writing and every speech or action intended to provoke sectarian or racial sedition, advocate for violence or foster conflict between followers of different religions and various components of the nation'. A similar wording in the draft amendment was questioned by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression as providing 'excessive discretion to the authorities, which could be used to target legitimate expression' and capable of 'disproportionately suppress [ing] a wide range of expressive conduct that may not be suppressed or penalized in a democratic society, including criticism of the government, news reporting, political campaigning and the expression of unpopular, controversial or minority opinions'.¹⁸

A parallel problem is the regulation of incitement to hatred, discrimination and violence on social media and, more broadly, on the internet. Many laws worldwide endow internet companies and platforms with the responsibility to remove 'manifestly unlawful' speech within a certain period of time.¹⁹ While this is arguably the most efficient way of dealing with the issue, it has also led to instances where these platforms abuse their discretion and suppress LGBTI activism, criticism of repressive policies and reporting on racism and ethnic cleansing.²⁰ It also gives com-

15 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 2019, *supra* fn 9, §4.

16 Report of the United Nations High Commissioner for Human Rights on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred, UN doc A/HRC/22/17/Add.4, 11 January 2013.

17 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 2019, *supra* fn 9, §4.

18 Communication from the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the Government of Jordan, Ref: OL JOR 3/2018, 7 December 2018, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24228> (last accessed 18 August 2022).

19 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 2019, *supra* fn 9, §32.

20 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 2018, *supra* fn 9, §27.

panies the power to remove unilaterally or manipulate information that could constitute evidence in legal proceedings concerning human rights violations. This is why it is crucial that the power to supervise hate speech online is delegated to private actors under the oversight of independent judicial authorities. This issue arose, for example, in the context of a communication sent by special procedures mandate holders to France in 2019, expressing concern over the massive reliance on artificial intelligence to identify hate speech online and the risks this posed of online censorship.²¹ This shows that the potential for ‘normalizing’ the limitation of freedom of expression online can very well be present in the day-to-day life of anyone, anywhere.

2. TERRORISM AND OTHER THREATS TO SECURITY

Another serious challenge to human rights has stemmed from the so-called fight against terrorism, especially since the 9/11 attacks. As states seek to address the grave security concerns posed by the threat of terrorist attacks, a narrative has emerged – particularly within intelligence services, police agencies and the military, but also more broadly among decision-makers and in society – along the lines of an alleged mutual exclusivity between the protection of citizens’ security and human rights.²² In Western countries – mainly the US and the UK – the argument was and still is that terrorism poses a threat to democracy, and that IHRL, properly read, should be interpreted as allowing states to protect the state rather than as constraining their efforts.²³ Non-Western governments like those of Turkey, China, India and Egypt, for their part, regularly fan the narrative that human rights yield to public order and national security when it comes to counterterrorism. Terrorism and security are thus treated as powerful exceptions to or as trumping human rights.

The main manifestations of this backlash are in rights associated with civil and political rights: life, personal integrity, freedom of expression, freedom of assembly and association, access to information, privacy and due process.²⁴ But the effects are not only visible in the actual violation of these rights. Equally dangerously, counterterrorism has amplified the resonance of a view that portrays human rights as an unwarranted shield for wrongdoers – indeed as an obstacle rather than a means for justice. Narratives of counterterrorism thus retract the limits of human rights and relativize their value. In this sense, like the pressure on freedom of expression in the context of digitalization, narratives of counterterrorism constitute an important challenge to the universality of human rights.

The recent practice of the HRC reflects inconsistencies in ways of dealing with

21 Communication from the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the Government of France, Ref: OL FRA 6/2019, 20 August 2019, p 4, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24827> (last accessed 18 August 2022).

22 M. Nowak and A. Charbord (eds), *Using Human Rights to Counter Terrorism*, Edward Elgar Publishing, 2018, p 3.

23 *Ibid.*, p 12.

24 *Ibid.*, pp25–26.

the topic. There was until recently a stream of resolutions adopted without a vote stressing the importance of upholding human rights amid the efforts to counter terrorism. These resolutions are entitled Protection of Human Rights and Fundamental Freedoms While Countering Terrorism and were adopted at the Council since its birth in 2006 until 2017. They unambiguously place human rights as a priority in their first operative paragraphs, calling on states to ‘ensure that any measure taken to counter terrorism ... complies with international law, in particular international human rights law’, and expressing ‘serious concern at the violations of human rights and fundamental freedoms ... in the context of countering terrorism’.²⁵ They also denounce without nuances ‘measures that can undermine human rights and the rule of law, such as the detention of persons suspected of acts of terrorism in the absence of a legal basis for detention and due process guarantees’ as well as ‘the return of suspects to countries without individual assessment of the risk of ... torture, and limitations to effective scrutiny of counter-terrorism measures’.²⁶ While concerns for security are also included in the text of the resolution, they have a clearly secondary role.

The tone of these resolutions has shifted since 2018, reversing the order of priorities and placing concerns about security above human rights. First, the title has changed to Terrorism and Human Rights – removing the previous emphasis on the protection of rights in the context of counterterrorism. More meaningfully though, the first and second operative paragraphs have dropped the focus on counterterrorism and now ‘condemn ‘all terrorist acts as criminal and unjustifiable’, expressing ‘grave concern at their detrimental effects on the enjoyment of all human rights’, and stress ‘the responsibility of States to protect persons in their territory against such acts, in full compliance with their obligations under international law’.²⁷ Surprisingly, these resolutions continue to be adopted without a vote.

Equally telling is the fact that there have been several resolutions, adopted by divided votes, clearly prioritizing a narrative of security over human rights strictly speaking. For instance, the resolutions adopted under the heading Effects of Terrorism on the Enjoyment of all Human Rights start off with formulations such as ‘reaffirming the right of the people to live in peace, freedom and security and to be protected at all times from the threat of terrorism’, or ‘mindful that terrorism may destabilize Governments, undermine societies, jeopardize peace and security and threaten economic and social development’.²⁸ Even if they later include formulations such as ‘reaffirming the fundamental importance of respecting all human rights and fundamental freedoms and the rule of law’, the resolutions’ tone and structure clearly place the interests of security over human rights.

China has also been an active sponsor in recent years of resolutions at the HRC with similar undertones. Resolution 44/18 of 2020, entitled Enhancement of In-

25 HRC Res 35/34, 13 July 2017.

26 HRC Res 25/7, 11 April 2014, §15.

27 HRC Res 37/27, 13 April 2018.

28 HRC Res 34/8, 7 April 2017.

ternational Cooperation in the Field of Human Rights, includes a paragraph emphasizing ‘that acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening the territorial integrity and security of States and destabilizing legitimately constituted Governments’.²⁹ This wording clearly brings ambiguous and formally unrelated interests such as territorial integrity or the stability of governments into the equation of human rights, something which results, both narratively and in practice, in the retraction of the boundaries of human rights. This paragraph was also included more recently in Resolution 47/9 of 2021, which, like its predecessors, was adopted by a divided vote.

Beyond these problematic resolutions, two main challenges are reflected in other interactions of states within the framework of the HRC. One of them – also hinted at in the resolutions mentioned above – is the broadening of the concept of terrorism to include vague notions that can be used to restrict the legitimate exercise of rights. These are usually not directly linked to the actual risks posed by terrorist activities to human rights, as could be the loss of life and the chilling effects on civil rights. Rather, the concept of terrorism is enlarged to cover issues linked, for instance, to the stability of governments in power or the security of the state. In a reply to a letter from several mandate holders regarding its anti-terrorism legislation, the Algerian Government wrote: ‘la démocratie ... ne peut se fonder au nom de la liberté d’expression ... sur les logiques insidieuses de subversion ou d’appel à la rébellion voire la sécession’.³⁰ This hints at the ease with which opposition to the government can fall into the category of terrorism in some instances.

A similar process is visible in a much more strongly worded reply by China to several special rapporteurs, defending the inclusion of the ground of ‘subversion of state power’ under the concept of terrorism. China argued that the work of ‘so-called human rights defenders, journalists and social activists’ seeking to ‘overthrow the leadership of the Communist Party of China [and] undermine the socialist system’ in places like Hong Kong, Taiwan or Xinjiang is ‘obviously a crime of secession and subversion of State power’.³¹ It also justified its measures arguing that the unrest in Hong Kong during 2019 and 2020 ‘pos [ed] a serious threat to the national sovereignty, security and development interests of China ... bringing about serious harm to the rule of law’.³² Such expansive wording deeply distorts the idea of terrorism to the detriment of human rights, feeding a narrative that relativizes human rights and reduces their protective scope to zero.

A second and final challenge worth mentioning here is the lowering of the protec-

29 HRC Res 44/18, 23 July 2020, §14.

30 ‘Democracy... cannot be based in the name of freedom of expression... on the insidious logics of subversion, rebellion or even secession’ (author’s translation). Communication from the Government of Algeria, Ref: MPAG/1027/21, 4 January 2022, p 5 <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gld=36725> (last accessed 18 August 2022).

31 Communication from the People’s Republic of China, No. GJ/64/2020, 30 October 2020, p 6, <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gld=35721> (last accessed 18 August 2022).

32 Ibid, p 7.

tion of human rights through the argument of heightened risk posed by terrorism to society. The logic here is that the greater the risk, the lower the protective scope of rights becomes. A case in point is detention and due process standards. In a reply to special procedures mandate holders concerning its Counter-Terrorism and Sentencing Bill, the UK explained that this legislation was intended to ‘ensure that serious and dangerous terrorism offenders will spend longer in custody, properly reflecting the seriousness of the offences they have committed, and to ‘ensure that we have some of the strongest measures in the world to tackle the evolving threat that we face’.³³ The reply went on to explain, in substance, how the bill purported to actually lower the standard of proof required in criminal procedures concerning alleged crimes of terrorism from ‘balance of probabilities’ to ‘reasonable suspicion’.³⁴ This, according to the reply, was justified because of the gravity of the risks posed by terrorists to society. The erosion of the protective capacity of human rights is evident in this reasoning, as is its undermining of universality.

B. ‘DEAF EARS’ OR THE EXCLUSION OF HUMAN RIGHTS

The universality of human rights is also seriously challenged by the exclusion of human rights language from discussions on pressing global issues in which it could play an important role.

This is a strategy of deliberate avoidance of human rights – hence the metaphor ‘deaf ears’ – where rights are kept in the margins or entirely outside the contours of a narrative on a given topic. Excuses for this might vary. Sometimes, the technicality of the issue or field at hand might be used as a means of depicting human rights as legally irrelevant. This has been the case in discussions about human rights and international trade law, for example, where the alleged ‘self-contained’ nature of the trade regime has been used to fend off non-trade law narratives.³⁵ At other times, human rights are said to yield to another set of rules under a *lex specialis* rationale, as was for many years the case with regard to the relationship between IHRL and international humanitarian law (IHL).³⁶ Moreover, on other occasions, human rights are simply kept to the minimum or excluded from treaties, resolutions and other instruments with no reason provided. This has to a considerable extent been the case with the treatment of climate change and with the issue of IIL in the last three decades. These two examples will be discussed later in this section.

The reasons for keeping human rights out these discussions are, most of the time, unacknowledged. In part, it is an issue of realpolitik. Human rights carry with them

33 Communication from the Government of the United Kingdom, Note Verbale No. 318, 12 October 2020, p 1, <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gld=35635> (last accessed 18 August 2022).

34 Ibid, p 4.

35 A. Lindroos and M. Mehling, ‘Dispelling the Chimera of “Self-Contained Regimes” International Law and the WTO’, 16 *European Journal of International Law* 5 (2005).

36 D. Jinks, ‘International Human Rights Law in Time of Armed Conflict’, in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, 2014, pp663–666.

a series of discursive and legal implications that lead decision-makers to want to avoid them. To begin with, they entail a framework of clear legal obligations with clear rights-holders and obligation-bearers, often with actual procedures and institutions of enforcement. This opens pathways for grievance and contestation, both narratively and juridically. But human rights are also expansive: once they are said to apply in a given context, the whole catalogue of human rights becomes relevant and might be invoked. Obligations of states multiply. Consequently, states and other actors have a big incentive to dodge them when they are not self-evidently applicable to a legal question.

But not everything is political calculation. Disciplinary mindsets and cultures also play a role in the exclusion of human rights. Global matters call for technical expertise, and often this expertise is assumed to have or given epistemic monopoly over an issue.³⁷ Experts might then either fail to see the relevance of another vocabulary in their field or deem it prejudicial and therefore block it. This type of exclusion has been depicted by some authors as the potential trigger for the dreaded fragmentation of international law.³⁸

More relevant to the purpose of this briefing, however, is the challenge that the ‘deaf ears’ dynamic poses to the universality of human rights. As with the contestation of the limits of human rights in the previous section, here the risk is first and foremost practical, with only indirect – but powerful – ideational effects. Marginalizing human rights from the contemporary debates on pressing global issues has the effect of making human rights irrelevant. It confines them to their classic spheres of relevance in a seemingly instrumentalizing way: for example, freedom of expression as a means for independent journalism, or the right to vote as a means for representative democracy. This keeps them from being seen as an end in themselves in issues that affect humankind across the board, and that are of acute actuality. The result is that human rights get ‘packed up’ as a legal regime – that is, restricted to certain types of matters and therefore not universal in practice. They risk thereby becoming a mere sub-area of law that applies in specific situations, rather than the overarching ‘universal, indivisible, interdependent and interrelated’ structure of democratic governance that, both locally and globally, they are called on to be.³⁹

Climate change and the international investment regime are cases in point of this type of challenge. Both are analysed in greater detail below.

1. CLIMATE CHANGE

The link between climate change and human rights has until very recently been widely contested. In fact, the previous step of establishing a link between the envi-

37 A. Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking*, Oxford University Press, 2016, pp172–174.

38 M. Koskeniemi, ‘The Fate of Public International Law: Between Technique and Politics’, *70 Modern Law Review* 1 (2007) 4–9.

39 This formulation is recurrent in the resolutions of the HRC.

ronment and human rights took considerable efforts throughout the 1990s and the early 2000s. As early as 1990, the UN General Assembly (UNGA) recognized that ‘all individuals are entitled to live in an environment adequate for their health and well-being’.⁴⁰ Yet, it was only after significant advocacy by NGOs, experts at treaty bodies and diplomats of several countries that it was recognized in the mainstream that the enjoyment of a number of human rights depends on the preservation of the natural environment.⁴¹ In fact, only in 2021 did the HRC explicitly recognize ‘the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights’.⁴²

In the case of climate change and human rights, the process has been even slower and perhaps more politically demanding. Although signs of change have been visible recently, there remain important voices that continue to reject the articulation of narratives of human rights around climate change. Technical arguments have played a fundamental role in this exclusion, mostly in relation to the limitations of the classic framework of legal attribution under IHRL. In their classical conception, human rights entail a legal relationship between a state with territorial jurisdiction and the individuals physically present in that jurisdiction. In order for responsibility to emerge under this scheme, a direct and provable harm affecting the human rights of the individual is required, together with the geographical localizability of this harm within the jurisdiction of the state in question, so as to trigger its liability. Climate change, however, was and still is an odd fit for this framework because, even if present, concrete harms are becoming more evident by the day, its crucial impacts are expected to take place in the future and on a global scale. More importantly, global warming is the product of a number of entangled factors which are not easily attributable to specific states or third parties. Rather, climate change is the combined fault of a constellation of global actors who uphold an unsustainable global economic system in which we all take part.

One of the first attempts to try to surmount these legal hurdles was a petition by the Inuit Circumpolar Council in 2005 to the Inter-American Commission on Human Rights (IACHR). The petition documented the impacts of global warming on the Arctic environment and its consequences for the livelihoods and culture of the Inuit communities. By resorting to human rights, it sought to underline the US’s responsibility for climate change in the Arctic, arguing that the US was ‘by far the largest emitter of greenhouse gases’ and denouncing its ‘[refusal] to join the international effort to reduce emissions’.⁴³ Regrettably, the IACHR’s response came nearly a year later and in no more than six lines declared the petition inadmissible,

40 UNGA Res 45/94, 14 December 1990.

41 D. L. Shelton, ‘Human Rights and the Environment: Substantive Rights’, in M. Fitzmaurice, D. N. Ong and P. Merkouris (eds), *Research Handbook on International Environmental Law*, Edward Elgar Publishing, 2011, pp265–277.

42 HRC Res 48/13, 18 October 2021.

43 Inuit Circumpolar Council, ‘Inuit Petition Inter-American Commission On Human Rights To Oppose Climate Change Caused By The United States Of America’, 7 December 2005, <https://www.inuitcircumpolar.com/press-releases/inuit-petition-inter-american-commission-on-human-rights-to-oppose-climate-change-caused-by-the-united-states-of-america/> (last accessed 18 August 2022).

claiming that ‘the information provided [did] not enable [the Commission] to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration’.⁴⁴ Few forms of exclusion have been so shameless, the IACHR not even taking the time to explain why climate change would not characterize a violation of human rights.

A few years later, OHCHR produced a report that, much more constructively, provides a framework for construing the possible relation between human rights and climate change. The report was elaborated at the request of the HRC through resolution 7/23, adopted largely thanks to the lobbying and diplomatic work of the group of Small Island Developing States, led by the Maldives.⁴⁵ At its core, the report denies the existence of a specific right to a safe and healthy environment at the universal level – and thus a right to protection against climate change⁴⁶ – but explains in detail how global warming impacts the rights to life, adequate food, water, health, housing and self-determination, and has a particularly severe impact on certain vulnerable populations such as indigenous peoples, women and children.⁴⁷ This acknowledgement provided the basis on which the HRC would thereafter address the issue.

Since 2008 the HRC has adopted a series of thematic resolutions on climate change. Resolution 10/4 of 2009 endorses the main findings of OHCHR’s report in noting that climate change in itself is not a human rights violation, but its effects have ‘a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation’.⁴⁸ With the exception of 2012 and 2013, the HRC has since then adopted unanimous resolutions on climate change and human rights along these lines.⁴⁹ That is to say, through the notion of *human rights implications*, the Council has unambiguously established the link between climate change and human rights.

Another milestone in the HRC’s involvement in the topic was the appointment of a Special Rapporteur on the promotion and protection of human rights in the context of climate change in October 2021. Resolution 48/14, through which this was done, replicates the human rights implications approach and mandates the Special Rapporteur to, among other things, ‘study and identify how the adverse effects

44 Letter from Ariel E. Dulitzky, Assistant Executive Secretary, Organization of American States, to Paul Crowley, Legal Representative, 16 November 2006.

45 Male’ Declaration on the Human Dimension of Global Climate Change, 14 November 2007, http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf (last accessed 18 August 2022).

46 Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, UN doc A/HRC/10/61, 15 January 2009, §18.

47 Ibid, §§20–60.

48 HRC Res 10/4, 25 March 2009.

49 Based on M. Barraco, background paper, p.10–12 (see footnote 1).

of climate change, including sudden and slow onset disasters, affect the full and effective enjoyment of human rights and make recommendations on how to address and prevent these adverse effects’.⁵⁰ Before the creation of this mandate, several other special rapporteurs have touched upon climate change, mainly the special rapporteurs on human rights and the environment and on the right to health.

Worth noting, however, are some reservations that states have had when addressing climate change through the HRC. One has been the issue of binding obligations between states to cooperate in mitigation and adaptation efforts, something that OHCHR’s report advocates. Since Resolution 10/4 several developed countries have been careful to avoid this wording, threatening at times to erode support for the resolution.⁵¹ Another crucial matter, this time concerning developing countries, has been to make clear that the fight against climate change should not hinder their economic development. This has led to wording that sidelines human rights, for example: ‘responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impact on the latter’.⁵²

But the relative success with which the HRC has addressed climate change is exceptional. Perhaps the most striking example of the exclusion of human rights narratives is the Paris Agreement, adopted under the framework of the UN Framework Convention on Climate Change in 2015.⁵³ No mention of human rights is made whatsoever in the articles of this instrument, the only reference being a preambular paragraph ‘acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights’, something which many observers have already considered noteworthy. While the Paris Agreement is, without any doubt, a crucially important accomplishment in environmental terms, the almost complete exclusion of human rights is very telling in terms of the political hurdles that exist around articulating serious human rights narratives on climate change.

The position of several big global powers very likely explains this outcome. The US has historically been reluctant to incorporate human rights language into the discussion on climate change. In its inputs to OHCHR’s 2008 report discussed above, the US clearly stated that it ‘does not consider that a right to a “safe environment” ... exists under international law’ and that ‘a “human rights approach” to addressing climate change is unlikely to be effective’.⁵⁴ This position has barely changed since

50 HRC Res 48/14, 13 October 2021, §2 (a).

51 M. Limon, ‘Human Rights Obligations and Accountability in the Face of Climate Change’, 38 *Georgia Journal of International and Comparative Law* (2010) 566.

52 HRC Res 26/27, 15 July 2014.

53 A. Boyle, ‘Climate Change, the Paris Agreement and Human Rights’, 67 *International and Comparative Law Quarterly* 4 (2018) 759, 770.

54 Observations by the United States of America on the Relationship Between Climate Change and Human Rights, Para 4, <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/Submissions/USA.pdf> (last accessed 18 August 2022).

then, something confirmed by the US's lack of response to communications sent by special procedures mandate holders on the topic.⁵⁵ Similarly, China, which has historically favoured narratives of development – and more recently, sustainable development – around climate change, finds it unnecessary and undesirable to bring human rights into the equation.

The exclusion of human rights language in addressing climate change is also visible in the cycles of the Universal Periodic Review (UPR). Extremely few recommendations have been made in relation to climate change and the environment. According to the UPR Info database, recommendations concerning the environment accounted for 0.44% of all recommendations made during the first three cycles of the process, which means that the environment ranked 48th out of the 56 thematic issues listed.⁵⁶ Climate change recommendations are even more rare and mostly made by states particularly affected by this phenomenon, like the Maldives. This signals the extent to which most states are reluctant to engage with climate change through human rights as a matter of everyday multilateral diplomacy.

2. INTERNATIONAL INVESTMENT LAW

IIL, very much like other branches of international economic law, is a good example of the 'disciplinary' type of exclusion of human rights. Legal questions in IIL are most of the time exclusively addressed in terms of IIL, as if all the answers to any problem can be found within the boundaries of bilateral investment treaties (BITs) or free trade agreements (FTAs). This is to a large extent because a 'private legal culture' prevails in the field, something which is unsurprising in a system entirely dominated by arbitral adjudication.⁵⁷ Arbitrators in IIL are mandated to decide only the dispute presented before them, applying in theory only the law that the parties have chosen for it. Yet, investment disputes are not just any civil disputes between private parties. Arbitrators and lawyers are most of the time presented with claims that confront states and foreign investors on matters linked to public interest, governmental policies and, on occasion, deeper questions about national macroeconomics. In this sense, pretending that a dispute can be narrowly decided on the basis of a BIT or an FTA without looking beyond is both legally reductionist and democratically problematic.⁵⁸

Human rights in particular should play a more prominent role in assessing the way host states treat foreign investors, and even the way foreign investors behave. They could help frame the state's function in regulating foreign investment so as to ensure it truly serves the public interest and does not lead to further inequality. They could also contribute to nuancing the false assumption that foreign invest-

55 See, e.g., correspondence from special rapporteurs to the US, Ref: AL USA 16/2020, 15 December 2020, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25381> (last accessed 18 August 2022).

56 Reference in M.Barraco, background paper, (see footnote 1).

57 M. Hirsch, 'Social Movements, Reframing Investment Relations, and Enhancing the Application of Human Rights Norms in International Investment Law', 34 *Leiden Journal of International Law* 1 (2020) 143.

58 M. Feria-Tinta, 'Like Oil and Water? Human Rights in Investment Arbitration in the Wake of Philip Morris v. Uruguay', 34 *Journal of International Arbitration* 4 (2017) 1, 2.

ment is, in and of itself, beneficial for host countries and thus it makes sense to protect the interests of investors under any circumstance.

Regrettably, this has only happened in a handful of cases, if one excludes instances in which investors invoke human rights to substantiate claims of violations of substantive investment protection standards, which are less uncommon.⁵⁹ For example, in *Phillip Morris v Uruguay* the tribunal upheld Uruguay's argument that its anti-tobacco regulation did not constitute indirect expropriation because it had the purpose of protecting public health, as mandated by the human right to health in the Uruguayan Constitution.⁶⁰ Another case in point is *Urbaser v Argentina*, where the tribunal acknowledged the necessity of taking into account human rights when interpreting BITs and went remarkably far in establishing that corporations have 'commitments to comply with human rights' under international law – even though in the end it discarded the respondent's argument.⁶¹ But these cases are isolated instances; in the overwhelming majority of cases, IIL does not deal with human rights. Tribunals often acknowledge openly that they fail to see how human rights could be relevant in the context of an investment dispute, or simply say they lack jurisdiction to decide on human rights matters.⁶²

This issue has been addressed on several occasions in the UN human rights system. The Committee on Economic, Social and Cultural Rights said, for instance, in its General Comment No. 24 that 'the interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United Nations and with the specific nature of human rights obligations'.⁶³ Similarly, the UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises recently recommended that states ' [e] mbed human rights explicitly in all trade or investment agreements to preserve regulatory space and require investors to comply with all applicable national and international human rights norms'.⁶⁴ Several special procedures mandate holders, too, have addressed the issue, expressing critical opinions on the exclusion of human rights narratives in IIL practice. Particularly noteworthy are the 2011 report of the Special Rapporteur on the right to food, a series of reports on the issue by the Special Rapporteur on the rights of indigenous peoples in 2015 and 2016⁶⁵ and a report by the Indepen-

59 S. Steininger, 'What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration', 31 *Leiden Journal of International Law* 1 (2018) 33, 39.

60 ICSID, *Phillip Morris v Uruguay*, Award, Case no ARB/10/7, 8 July 2016, §5302, 305.

61 ICSID, *Urbaser v Argentina*, Award, Case no ARB/07/26, 8 December 2016, §1195.

62 Steininger, 'What's Human Rights Got To Do With It?', supra fn 60, 52.

63 Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 24 on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN doc E/C.12/GC/24, 10 August 2017, §13.

64 Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN doc A/72/162, 18 July 2017, § 86 (i).

65 Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples on the Impact of International Investment and Free Trade on the Rights of Indigenous Peoples, UN doc A/70/301, 7 August 2015; Report of the Special Rapporteur on the Rights of Indigenous Peoples, UN doc A/HRC/33/42, 11 August 2016.

dent Expert on the promotion of a democratic and equitable international order in 2016.⁶⁶

Despite these efforts, states have proven very reluctant to discuss the issue. At the HRC, no resolution has addressed the global investment regime beyond isolated references to some of the work of special rapporteurs mentioned above.⁶⁷ Moreover, it is very telling in this regard that out of 63 identical communications sent by several special procedures mandate holders to states calling for the inclusion of human rights in the discussions of the UN Commission on International Trade Law's (UNCITRAL) Working Group III: Investor-State Dispute Settlement Reform in 2019, only six replies were received, out of which only one, Mexico's, seriously engaged with the substance of the letter's concern – in fact, defending the exclusion of human rights from IIL.⁶⁸ By the same token, in the note by UNCITRAL's secretariat, setting the framework for Working Group III, human rights are not mentioned whatsoever, even if reference to the Sustainable Development Goals is made, in particular 'reducing poverty and hunger, empowerment of indigenous peoples, promoting decent work, access to affordable energy and water, and reversing environmental degradation and climate change'.⁶⁹ The fact that these elements are mentioned without reference to human rights, points to the desire to avoid any narrative linking them to investment. This is further corroborated by the exclusion of the consideration of IIL's substantive standards from the scope of the Working Group's mandate.⁷⁰

Some winds of change are visible in the field, nonetheless.⁷¹ There has been a clear trend in the investment jurisprudence for at least 15 years of allocating significantly more space to public interest in IIL, which has indirectly made room for human rights-related considerations.⁷² No less relevant is that certain investment treaties have started to include provisions referring to human rights, like the EU-Canada Comprehensive and Economic Trade Agreement as well as several model BITs.⁷³ These, however, are not sufficient to say that a solid human rights narrative on investment is emerging. In sum, the universality of human rights is not yet a reality when it comes to IIL.

66 Report of the Independent Expert on the promotion of a democratic and equitable International Order, UN doc A/HRC/33/40, 12 July 2016.

67 See, e.g., HRC Res 30/29, 13 October 2015.

68 Informe Del Estado Mexicano (Comunicación Conjunta OL MEX 3/19), 24 January 2020, <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gld=35129> (last accessed 18 August 2022).

69 UN Commission on International Trade Law (UNCITRAL), 'Possible Reform of Investor-State Dispute Settlement (ISDS): Note by the Secretariat, UN doc A/CN.9/WG.III/WP.166, 30 July 2019, §11.

70 Ibid, §7.

71 Hirsch, 'Social Movements, Reframing Investment Relations, and Enhancing the Application of Human Rights Norms in International Investment Law', supra fn 58, 127, 128.

72 E. De Brabandere, 'States' Reassertion of Control over International Investment Law: (Re) Defining "Fair and Equitable Treatment" and "Indirect Expropriation"', in A. Kulick (ed), *Reassertion of Control Over the Investment Treaty Regime*, Cambridge University Press, 2016; J. Paine, 'On Investment Law and Questions of Change', 19 *The Journal of World Investment & Trade* 2 (2018) 173.

73 Hirsch, 'Social Movements, Reframing Investment Relations, and Enhancing the Application of Human Rights Norms in International Investment Law', supra fn 58, 131.

C. RELATIVISM: WHOSE HUMAN RIGHTS ARE VALID?

The last type of challenge to the universality of human rights is relativism. Relativism is the idea that ethical beliefs and values are dependent on the specific cultural, social and local political contexts of each human community.

Those contexts relate to the micro, mezzo and macro levels.⁷⁴ The obvious implication of this, as Marie-Bénédicte Dembour puts it, is that 'different cultures produce different moralities', and thus attempting to universalize a given morality is both artificial and potentially hegemonical.⁷⁵ Human rights, under the lens of a relativist critique, appear as products of a particular culture – i.e. Western culture – which are presented as universal even though they are not shared by other cultures and communities. To use Boaventura de Sousa Santos' term, the cultural relativist sees human rights as an illegitimate 'globalized localism' of the West.⁷⁶

There are two forms of relativism: strong relativism and weak relativism.⁷⁷ The former is more radical in holding that all values are culturally relative and that, in consequence, it is simply not possible to apply them to other cultures without illegitimately imposing them. Universal human rights, in this view, would be an illusion or even a sham. The latter, in contrast, holds that even if values are indeed culturally relative in principle, ethical systems often overlap and consequently it is possible to find common ground under which shared moral understandings are feasible. Here, human rights could be a synthesis of the commonalities between different moralities, or even a culturally determined morality that should ideally remain open to complementation by other moralities. The weak relativist critique would therefore be that the mainstream version of universal human rights is not truly open to complementarity but rather seeks to impose values. True universality would require local interpretations of the universal.

Both forms of relativism exist in the global debates on human rights, although the most consequential challenges to universality tend to be somewhere in the middle. Especially when it comes to state positions in international fora like the UN, it is politically untenable to break altogether with human rights and endorse the strong relativist argument. Most challenges in these circles acknowledge human rights as a whole but claim that their scope, content and hierarchy depend on the local cultural, religious and political practices.⁷⁸ In other words, the concept of human rights is seldom challenged as such in diplomatic and multilateral fora, but

74 The Executive Board, American Anthropological Association, 'Statement on Human Rights', 49 *American Anthropologist* 4 (1947) 539, 542.

75 M.-B. Dembour, 'Critiques', in D. Moeckli, S. Shah and S. Sivakumaran (eds), *International Human Rights Law*, 2nd edn, Oxford University Press, 2013, p 63.

76 B. de Sousa Santos, 'Hacia una concepción multicultural de los derechos humanos', 28 *El otro Derecho* (2002) 66.

77 C. Good, 'Human Rights and Relativism', 19 *Macalester Journal of Philosophy* 1 (2010) 27.

78 F. R. Tesón, 'International Human Rights and Cultural Relativism', 25 *Virginia Journal of International Law* 869 (1984–1985) 380.

their application and interpretation is subjected to a series of alleged axiological and political particularisms.

The risks that these types of relativist arguments pose to the universality of human rights are evident: they openly discard universality, and they claim that both the content and the benchmarks for compliance of human rights vary from one society to another, making it very hard, if not impossible, to assess whether they are complied with or not. This hinders the rhetorical force of human rights and the already scarce possibilities of international and national accountability. When a government is permitted to say in an international forum that what looks like a human rights violation is in fact not so because it is understood differently by that state, the utility of IHRL is entirely lost. Compliance with human rights becomes a matter of self-judgement, invariably leading to global unevenness in the enjoyment of human rights. Surely, human rights are in practice not enjoyed evenly at the global level because they are conceived as universal, but accepting relativist arguments tends to justify this unevenness. Human rights therefore risk becoming not only practically impotent, but also rhetorically powerless.

Now, relativism can be sincerely meant when true cultural values collide. A great example is the well-known uneasiness among many Muslims about the disrespectful depiction of Prophet Mohammed in the Western press. What seems like a completely legitimate exercise of freedom of expression to many, might be perceived by others as a deep form of spiritual harm.⁷⁹ This issue motivated a strong diplomatic mobilization of Islamic states at the HRC which led to the adoption of the very controversial resolutions on the ‘defamation of religions’ from 1999 to 2010.⁸⁰ While the content of these resolutions was certainly misguided for its focus on the integrity of religious dogma and not individuals or communities, their underlying relativist concerns seemed at the very least understandable, if one considers the meaning of insult in Islam.⁸¹ No easy answer to this type of issue exists, but if universality is to have any currency, human rights ought to enable dialogues that take everyone’s values seriously. The Rabat Plan of Action, mentioned in the discussion on hate speech section 1 above, is a great example of this type of attempt.⁸²

But relativism can also be used to justify authoritarian policies and human rights abuses. Arguments of cultural difference are often used to cover up clear attempts to disregard rights and silence criticism. Perhaps the most widespread example globally is the open systemic discrimination women face in the legal systems of so many countries. Sexual violence, limited access to education and labour, discriminatory property and inheritance laws and a long list of issues are often incorporated into domestic legislation under arguments of custom and community identity.

79 A. Saeed, *Human Rights and Islam: An Introduction to Key Debates between Islamic Law and International Human Rights Law*, Edward Elgar Publishing, 2018, p 182.

80 See, e.g., HRC Res 7/19, 27 March 2008, §10.

81 A. F. March, ‘The Maqsad of Hifz Al-Din: Is Liberal Religious Freedom Sufficient for the Shari’ah?’ 2 *Islam and Civilizational Renewal Journal* 2 (2011) 363.

82 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 2019, supra fn 9.

This does nothing but perpetuate patriarchy, benefitting men at the expense of women. India’s reservation towards Article 5 (a) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides a blunt illustration. This provision binds states parties to take measures to ‘modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes’. India’s reservation subjects this crucial obligation to the conformity of any measure in its ‘policy of non-interference in the personal affairs of any community without its initiative and consent’.⁸³ Cultural self-determination is thereby used as an alibi for an entire system of discrimination.

The following subsections zoom into two areas of human rights where relativist challenges are particularly insightful and relevant in contemporary politics: the debate around development and its relation to human rights, and minority rights.

1. DEVELOPMENT

Development has always had a complex relationship with human rights, sometimes rivalling, at times hijacking and at other times genuinely embracing them. Originally understood as international assistance meant to foster economic growth in disadvantaged countries, the concept of development was conceived in the post-war years as a ‘different’ type of economics – different, in any case, from the liberal *laissez faire* model.⁸⁴ At its basis, the idea behind it was to stimulate national economies through external or domestic financial and technical intervention, especially in countries facing rural backwardness and late industrialization.⁸⁵ Today, development is understood more broadly as the process ‘whereby simple, low-income national economies are transformed into modern industrial economies’.⁸⁶

Until the 1970s, however, development had fundamentally nothing to do with human rights. It was only in 1972 that it was coupled to human rights discourse. Kéba M’Baye introduced the concept of the ‘right to development’ in an effort to add weight to the crusade by developing countries to negotiate reforms in the global political economy – the New International Economic Order (NIEO) movement.⁸⁷ The right to development acquired considerable momentum thereafter, even after the NIEO started to fade. In its Resolution 41/128 of 1986, the UNGA adopted the Declaration on the Right to Development, which recognized and articulated at full

83 See Convention on the Elimination of all Forms of Discrimination against Women, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women> (last accessed 18 August 2022).

84 C. R. Unger, *International Development: A Postwar History*, Bloomsbury Academic, 2018, pp15, 16.

85 J. M. Hodge, ‘Writing the History of Development (Part 1: The First Wave)’, 6 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 3 (2015) 429, 432.

86 H. Myint and A. O. Krueger, ‘Economic Development’, *Encyclopedia Britannica*, 2016, <https://www.britannica.com/topic/economic-development> (last accessed 18 August 2022).

87 P. Uvin, ‘From the Right to Development to the Rights-Based Approach: How “Human Rights” Entered Development’, 17 *Development in Practice* 4–5 (2007) 598.

length the premises of such a right, defining it as the ‘inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized’. According to this logic, development is a necessary condition for the realization of every other human right.

The Vienna Declaration and Programme of Action of 1993 further cemented this integrative approach, emphasizing that ‘democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing’ and introducing the now deeply embedded mantra of all human rights being ‘universal, indivisible and interdependent and interrelated’. Accordingly, the right to development came to be portrayed as an overarching precondition for human rights, a rationale that is still widely embraced nowadays, including by institutions like the World Bank.⁸⁸

But while these narratives most of the time sincerely seek accommodation and complementarity between development and human rights, a parallel rhetoric advocating some sort of functional precedence of development has also been present for several decades. Underscoring that development is a necessary condition for human rights, these narratives contend that the former should in fact take primacy over the latter. Or more specifically, that economic, social and cultural rights – the rights most closely linked to the idea of development – should be accorded priority over civil and political rights. This argument was and still is typical of governments with poor democratic records, who continue to use the success of welfare policies as a means to counterbalance accusations of political repression and single-party politics.

The Bangkok Declaration of 1993 – the outcome of a meeting of Asian governments prior to the Vienna World Conference on Human Rights of 1993 – is paradigmatic of this relativist narrative, placing development first.⁸⁹ Only two rights are explicitly mentioned in its main body: self-determination and the right to development – remarkable in a general statement on human rights. Its second operative paragraph stresses ‘the essential need to create favourable conditions for effective enjoyment of human rights at both the national and international levels’.⁹⁰ The Declaration later emphasizes, before saying anything about any right, the ‘principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure’.⁹¹ It then states, categorically, that ‘while

88 A. Gaeta and M. Vasilara, *Development and Human Rights: The Role of the World Bank*, International Bank for Reconstruction and Development / World Bank, 1998.

89 R. Coomaraswamy, ‘The Contemporary Challenges to International Human Rights’, in S. Sheeran and Sir N. Rodley (eds), *Routledge Handbook of International Human Rights Law*, Routledge, 2012, p. 128.

90 Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, §2, 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, 7 April 1993.

91 Ibid, §5.

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’.⁹² The Declaration reaffirms the right to development and emphasizes that it is ‘a universal and inalienable right and an integral part of fundamental human rights, which must be realized through international cooperation, respect for fundamental human rights, the establishment of a monitoring mechanism’.⁹³

To be sure, the Bangkok Declaration does not break with human rights, at least not explicitly. Yet, it unambiguously articulates a narrative strongly privileging economic development over any specific human right, while simultaneously making an open call for cultural relativism, sovereignty and non-intervention.

This approach has resonated widely among several states all over the world, and increasingly so among certain rising powers, most importantly China. Since the publication of its first White Paper in 1991, the Chinese Government has used the label of human rights to present its political programme to the rest of the world in a relativist guise.⁹⁴ In a nutshell, its approach is based on the premise that, while human rights discourse has been universally accepted – for instance, through the UDHR – there exist different cultural understandings of it.⁹⁵ In its particular understanding, China sees the ‘right to subsistence and to development’ as the ‘basic human rights of paramount importance’, even with the caveat that ‘human rights are an all-encompassing concept [that includes] civil and political rights as well as economic, social and cultural rights’.⁹⁶ As explained by Liu Hainian – citing President Xi Jinping – rights understood in this manner are an expression of the idea of ‘Socialism with Chinese characteristics’, the corollary of which is that human rights in China ‘place the people first’ and require, above all, ‘national independence’.⁹⁷

More recently, Russia and China have voiced similar relativist approaches to human rights in a joint statement, International Relations Entering a New Era and the Global Sustainable Development, dated 4 February 2022. In it, the two countries list what they consider to be the ‘universal human values’ that all nations

92 Ibid §8.

93 Ibid, §17.

94 A. Kent, ‘China’s Human Rights in “the Asian Century”’, in T. W. D. Davis and B. Galligan (eds), *Human Rights in Asia*, Edward Elgar Publishing, 2011.

95 H. Zhipeng, ‘Cultural Conflicts in Human Rights and Their Solutions’, China Society for Human Rights Studies, 20 February 2020, http://www.chinahumanrights.org/html/2020/PAPERS_0220/14744.html (last accessed 18 August 2022).

96 Ministry of Foreign Affairs of the People’s Republic of China, ‘A People-Centered Approach for Global Human Rights Progress (Remarks by H. E. Wang Yi, State Councilor and Foreign Minister of the People’s Republic of China at the High-Level Segment of the 46th Session of the United Nations Human Rights Council)’, 22 February 2021, https://www.fmprc.gov.cn/mfa_eng/wjz_663304/wjz_663308/2461_663310/202102/t20210222_9889339.html (last accessed 18 August 2022).

97 Ibid.

should champion: ‘peace, development, equality, justice, democracy and freedom, respect the rights of peoples to independently determine the development paths of their countries and the sovereignty and the security and development interests of States’.⁹⁸ The absence of the notion of human rights is remarkable, as is the subordinate position of equality, democracy and freedom vis-à-vis peace and development. Later in the joint statement the relativization of democracy and human rights is further deepened, for instance in the statements: ‘A nation can choose such forms and methods of implementing democracy that would best suit its particular state, based on its social and political system’, and ‘as every nation has its own unique national features, history, culture, social system and level of social and economic development, universal [*sic*] nature of human rights should be seen through the prism of the real situation in every particular country, and human rights should be protected in accordance with the specific situation in each country and the needs of its population’.⁹⁹

These views have also been reflected in a series of resolutions of the HRC entitled ‘Promoting Mutually Beneficial Cooperation in the Field of Human Rights’, adopted through divided votes since 2018. At face value, the resolutions do not make the case for the relativism of human rights. In fact, they affirm that ‘all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis’, following the language of the Vienna Declaration and Programme of Action, and even make the point that ‘while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, all States, regardless of their political, economic and cultural systems, have the duty to promote and protect all human rights’.¹⁰⁰ Yet, the resolutions advocate a narrative of accord among states that eschews the language of rights violations and advances a rationale of ‘constructive cooperation’ based on ‘universality, indivisibility, non-selectivity, nonpoliticization, equality and mutual respect’. They further make the point that ‘dialogue among religions, cultures and civilizations in the field of human rights could contribute greatly to the enhancement of international cooperation in this field and facilitate building a *community of shared future* for human beings in which human rights are enjoyed by all’.¹⁰¹ This language fosters a non-confrontative, exclusively inter-state approach to human rights that is prone to condoning violations under the logic of mutual respect and cooperation. It discards the idea of accountability, trading it for an inconsequential ‘win-win’ collaboration among states. Moreover, the only right explicitly mentioned in the resolutions is, unsurprisingly, the right to development, something that narratively relativizes the rest of the human rights catalogue.

98 President of Russia, ‘Joint Statement of the Russian Federation and the People’s Republic of China on the International Relations Entering a New Era and the Global Sustainable Development’, 4 February 2022, <http://en.kremlin.ru/supplement/5770> (last accessed 18 August 2022).

99 Ibid.

100 HRC Res 46/13, 31 March 2021.

101 Ibid (emphasis added).

The implications of such a rationale are also visible in the attitudes of some states at different UN fora. For instance, in his intervention at the UNGA, the then President of Sri Lanka made the case for a development agenda based on shared values and said, with regard to human rights, that ‘external intervention without adequate consideration of the structures in a society and cultural traditions of the countries where such interventions take place, inevitably results in destabilization’.¹⁰² Similarly, to a letter addressed to China from several UN special rapporteurs concerning the arbitrary detention and enforced disappearance of a Tibetan monk and a Tibetan scholar, the Chinese Government replied denying the allegations and explaining in detail how ‘the living standards of the people of all ethnic groups in Tibet are comprehensively improving and the poor are being lifted out of poverty’.¹⁰³ These are just two examples of how narratives based on arguments of development are sometimes deployed as a means to relativize human rights. The underlying logic of this rhetoric is, however, sometimes less explicit than in these examples and more operational in the overall approach of states to human rights.¹⁰⁴

2. MINORITY RIGHTS

The protection of minorities has historically been a very prominent matter on the UN human rights agenda. As early as 1947, the Sub-Commission on Prevention of Discrimination and Protection of Minorities was established under the umbrella of the then Commission on Human Rights, having a broad mandate to address the protection of racial, national, religious and linguistic minorities. This provided an institutional framework through which minority issues were addressed at the UN, at a time when the human rights machinery was significantly less developed than today. Since the transformation of the Commission into the HRC, however, the framework for the protection of human rights has expanded considerably. Together with the Forum on Minority Issues, the mandate of the Special Rapporteur on minority issues – created in the last year of the Commission’s existence – has provided a platform from which to address issues and develop standards on the matter. The HRC has also adopted many thematic and country-specific resolutions concerning minorities.¹⁰⁵

Fundamental in these endeavours has been the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the UNGA in 1992. It provides the legal framework under which minorities are protected in IHRL, establishing in its first article the duty of states to ‘protect the existence and the national or ethnic, cultural, religious and linguistic identity of

102 ‘Statement by H. E. Mahinda Rajapaksa, President of the Democratic Socialist Republic of Sri Lanka, During the General Debate of the 69th Session of the United Nations General Assembly’, 24 September 2014, https://gadebate.un.org/sites/default/files/gastatements/69/LK_en.pdf (last accessed 18 August 2022).

103 Letter from the People’s Republic of China, *supra* fn 31.

104 See L. D. Rivers, ‘The BRICS and the Global Human Rights Regime: Is an Alternative Norms Regime in Our Future?’, Honors theses, Union College, NY, June 2015, <https://digitalworks.union.edu/cgi/viewcontent.cgi?article=1382&context=theses> (last accessed 18 August 2022).

105 See, e.g., HRC Res 37/14, 19 March 2018.

minorities within their respective territories’ as well as ‘encourage conditions for the promotion of that identity’.¹⁰⁶ The main rationale behind these endeavours is, as the wording of this article evidences, that collective identity is meaningful and deserves special protection beyond the base-line safeguards that the catalogue of individual civil and political rights present.¹⁰⁷ This has provided a crucially important legal framework to counter cultural homogenization in all its forms, from the protection of minority languages to creating safeguards against ethnic cleansing or religious persecution.

While collective identity has been at the centre of the discussion of minority rights, a parallel narrative of protection of vulnerable minoritarian groups – without the element of collective identity – has also taken form under the aegis of the concept of ‘minority rights’. This concerns individuals sharing a common trait of identity for which they are discriminated against, regardless of whether or not this trait is linked to belonging to a cultural collective. In contrast with the issue of collective identity, where the cultural preservation of the group is deemed the main object of protection, here the individual human rights of the discriminated against individuals are at the core. Vulnerable minorities in this sense can be, for instance, people with disabilities or persons discriminated against because of their gender or sexual orientation, who require a heightened shielding of their individual rights due to the position of disadvantage they face in society.¹⁰⁸ This protection at times requires *affirmative action*, or positive differentiation in favour of these groups in order to place them at an equivalent level of enjoyment of rights as the rest of society.¹⁰⁹

Both the protection of collective identities and of vulnerable groups face challenges linked to relativist arguments that hinder the universality of human rights. With regard to collective identity, although resolutions are passed on a regular basis at the HRC upholding its importance, many pernicious practices hinder this protection. Morocco, for example, has rejected the use of the terms minority and Sahrawi when confronted with allegations of the arrest of human rights defenders from Western Sahara. In a reply to a letter from special procedures mandate holders, Morocco explained that the term Sahrawi is the Arabic demonym for anyone coming from the desert, and that since Morocco’s territory is in good part composed of the Sahara Desert, it is evident that the population living there is Sahrawi and that under its Constitution they too are Moroccans.¹¹⁰ The Special Rapporteur’s use of the term minority to refer to the Sahrawis was thereby deemed to be

106 UNGA Res 47/135, 3 February 1993.

107 W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford University Press, 1996, pp1–9.

108 CESCR, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art.2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN doc E/C.12/GC/20, 2 July 2009, §§36, 39.

109 N. Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, 2nd edn, Cambridge University Press, 2017, pp.141, 142.

110 Kingdom of Morocco, ‘Observations des Autorités Marocaines relatives à la communication conjointe relative au cas de M. Khatri Dadda’, Ref: AL MAR 3/2020, 19 October 2020, pp1, 2, <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gld=35625> (last accessed 8 August 2022).

‘unfounded’ and ‘tendentious’. This argument denies the cultural and ethnic identity of the original inhabitants of the Western Sahara, and in doing so challenges the enjoyment of minority rights by these people.

Another example is Uzbekistan’s reply to a communication expressing concern over its law On Freedom of Conscience and Religious Organizations, adopted in July 2021. This law prohibits all forms of non-Muslim missionary activity in the country, potentially covering any form of communication or religious teachings. In its reply, however, the Government of Uzbekistan seriously undermined the universality of rights by arguing that

attempts by members of other faiths to impose their religious views on the people of Uzbekistan, 94 per cent of whom are Muslim, have caused serious religious, ethnic and national discord among the population [which is why] the prohibition of missionary work and proselytism in the law guarantees further strengthening of relations based on mutual friendship and harmony among the multi-ethnic, multi-faith people of Uzbekistan and respect for and observance of the values, customs and traditions associated with their religious beliefs.¹¹¹

This amounts to saying that the fact that a wide majority of the Uzbek population is Muslim justifies the prohibition of religious expression by non-Muslims, clearly denying these minorities the possibility of embracing their religion and collective identity.

Also telling in this regard is the reply by Sudan to a communication by several special rapporteurs concerning the arrest and trial of 27 persons on charges of apostasy, in connection to their participation in a public event deemed to be ‘contrary to the faith and to the Sunna of the Prophet’. Sudan replied merely recalling that apostasy is a crime under the Sudanese Criminal Code, that they had been heard in a public trial, and, without further explanation, that they did ‘not belong to any religious, ethnic, racial, linguistic or other minority’.¹¹²

Some states, moreover, chose not to reply to communications regarding the violation of the rights of minorities, which indirectly poses a challenge to universality. Israel is a case in point in this regard. In response to a communication expressing concerns over the adoption of the Basic Law: Israel as the Nation-State of the Jewish People in 2018, which affirms the exclusively Jewish character of the State of Israel without reference to minority rights, the Government of Israel stayed silent.¹¹³ It also did not reply to a communication expressing concerns about instances of advocacy of hatred, death threats and targeted violence against religious

111 Communication from the Republic of Uzbekistan, HRC/NONE/SP/2021/82, 24 October 2021, Para 8.1, <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gld=36607> (last accessed 18 August 2022).

112 Communication from the Republic of Sudan, Ref: SMG/43.16, 29 April 2016, <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gld=31659> (last accessed 18 August 2022).

113 Joint communication from special procedures mandate holders to Israel, Ref: OL ISR 12/2018, 2 November 2018, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24098> (last accessed 18 August 2022).

minorities and Muslims in particular.¹¹⁴ And a recent communication concerning violence and discrimination against Palestinian-Israeli citizens in the context of the Ramadan celebrations in 2021 again received no answer.¹¹⁵

With regard to vulnerable non-identarian minorities, the HRC has undertaken many efforts.¹¹⁶ Mandates have been created to address the following situations and vulnerable groups: sale of children, child prostitution and child pornography; violence against women; indigenous peoples; people of African descent; internally displaced persons; trafficking of persons, especially women and children; discrimination against women in law and practice; older persons; rights of persons with disabilities; persons with albinism and violence and discrimination based on sexual orientation and gender identity. Many initiatives regarding the creation of standards and the organization of fora touching upon these matters take place regularly at the HRC and its subsidiary organs.¹¹⁷

This notwithstanding, there are several examples of instances where the rights of these vulnerable minorities have been neglected on the basis of relativist arguments. On the occasion of the panel discussion where OHCHR presented its 2012 report on Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity, commissioned by HRC Resolution 17/19, the Organisation of Islamic Cooperation (OIC) stated that the concept of sexual orientation had no foundations in IHRL, and that devoting time to discussing this issue lost precious time for discussing other recognized grounds of discrimination. These OIC Member States further wished ‘to record [their] consistent and firm opposition to the subject under discussion in the work of the HRC’.¹¹⁸ Similar arguments have been advanced at the HRC in the discussions concerning the resolutions on the issue of sexual orientation and gender identity, namely resolutions 27/32 of 2014, 32/2 of 2016 and 41/18 of 2019, all of which have been adopted by divided votes. The recurrent argument has been that sexual orientation falls beyond the four grounds for minority protection under the Declaration on Minorities, namely national or ethnic, cultural, religious and linguistic identity.

At the UPR, too, many states have rejected or dismissed recommendations concerning sexual orientation with relativist arguments. Antigua and Barbuda did so

114 Joint communication from special procedures mandate holders to Israel, Ref: AL ISR 5/2021, 2 July 2021, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=26510> (last accessed 18 August 2022).

115 Joint communication from special procedures mandate holders to Israel, Ref: UA ISR 3/2021, 27 May 2021, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=26448> (last accessed 18 August 2022).

116 This part borrows from M.Barraco, background paper, (see footnote 1).

117 See M.Barraco, background paper, p.26-45, (see footnote 1).

118 Human Rights Council Panel on Ending Violence and Discrimination Against Individuals Based on Their Sexual Orientation and Gender Identity (Summary of Discussion), <https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/LGBT/SummaryHRC19Panel.pdf> (last accessed 10 April 2022).

‘given the current predisposition of its people and their religious influences’, and Botswana with the argument that ‘as a predominantly Christian nation Botswana had not reached a stage where it could accept same-sex activities’.¹¹⁹ Iraq accepted a recommendation to end violence towards and killings of LGBTIQ+ persons saying that ‘this does not amount to legal recognition of homosexuality no [r] does it mean that, as such, they have rights’, claiming that homosexuality was against the conservative nature of their society and religion.¹²⁰ Bangladesh, similarly, dismissed part of a recommendation to train judicial officers on human rights that include elements of sexual orientation on the basis that the country’s society had ‘strong traditional and cultural values’ and that ‘same-sex activity is not an acceptable norm to any community in the country’.¹²¹

The lack of reply from certain states to special procedures mandate holders also poses a challenge to universality. For instance, a communication concerning the deeply misogynistic and discriminatory policy of the Government of Tanzania to expel and reject pregnant girls and adolescent mothers from public schools, as well as bar the dissemination of materials relevant to birth control, received no reply.¹²² Unsurprisingly, the same was the case for a communication from several special rapporteurs to the Taliban authorities in Afghanistan, concerning the dramatic restriction of women’s rights since their taking power in 2021.¹²³ The Mexican Government also failed to reply to a communication concerning the unjustified dissolution of the National Council for Persons with Disabilities in 2019.¹²⁴

119 Report of the Working Group on the Universal Periodic Review: Botswana, UN doc A/HRC/23/7, 22 March 2013, §91.

120 Report of the Working Group on the Universal Periodic Review: Iraq, UN doc A/HRC/43/14/Add.1, 26 December 2019, p 10.

121 Report of the Working Group on the Universal Periodic Review: Bangladesh, UN doc A/HRC/11/18/Add.1, 9 June 2009, Recommendation 27.

122 Joint communication from special procedures mandate holders to the Government of Tanzania, Ref: TZA 1/2018, 22 February 2018, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=23657> (last accessed 18 August 2022).

123 Joint communication from special procedures mandate holders to the Government of Afghanistan, Ref: AL AFG 2/2021, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=26425> (last accessed 18 August 2022).

124 Communication from the Special Rapporteur on the rights of persons with disabilities to the Government of Mexico, Ref: OL MEX 6/2019, 3 May 2019, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24574> (last accessed 18 August 2022).

3. A NEW TAKE ON UNIVERSALITY

Having reviewed some of the most pressing challenges to the universality of human rights, the second part of this briefing sets out to explore the possibilities for a revised narrative of universality. The aim is to find a workable means to address these challenges in a way that takes criticisms of universality seriously, and at the same time provides a useful tool for policy-makers.

In order to do this, section 3A starts by reflecting on the type of universality that government officials, activists and other human rights constituencies should aim for. This requires revisiting some of the contemporary criticism that exists in different academic camps around the idea of universality, mainly Critical Legal Studies (CLS) and Third World Approaches to International Law (TWAIL). Section 3B sets out the philosophical and legal basis on which a revised narrative of universality could be built. The fundamental argument to be defended here is that the universality of human rights should be articulated on the basis of the idea of equal human dignity – a claim that is not novel but is yet to display its full potential. Finally, section C reflects on the ways in which such a revised narrative of universality could be made operational and on its possible rejoinders to the challenges outlined in the first half of the briefing.

A. SETTING THE GROUND: WHAT SHOULD UNIVERSALITY AVOID?

Most of the time, the universality of human rights is thought of, at least in the mainstream, as an inherently good thing. Diplomats, politicians and policy-makers repeat ad infinitum the mantra of universality without asking what it means and what it implies. But it should not be taken for granted. Any discussion on the prospects for a revised narrative of universality should begin by establishing what the purpose of universality is, and what its potential pitfalls are. Therefore, in addition to the challenges discussed above, it seems pertinent to briefly discuss here some of the questions that CLS and TWAIL scholars have raised around the idea of universality, asking whether it is not self-defeating, colonial or even imperialist.

1. THE CLS CRITIQUE

CLS as an academic movement is vast and has dealt mainly with issues concerning legal theory.¹²⁵ On IHRL, however, CLS has also had its say, raising some questions that are fundamental for properly situating the universality of human rights as a project worth pursuing. Two main objections lie at the core of CLS's critique of human rights.

125 N. Purvis, 'Critical Legal Studies in Public International Law', 32 *Harvard International Law Journal* (1991) 81, 89.

The first is what David Kennedy has called the 'idolatry' of human rights. According to his definition, 'idolatry' means the positioning of a set of ideas as a source of unambiguous virtue, overestimating its singularity and overlooking its costs.¹²⁶ This has happened to IHRL in contemporary times, Kennedy argues, to the extent that human rights have 'occupied the field of emancipatory possibility'.¹²⁷ In his view, this has been a deep social and political process. Human rights discourse captures all the institutional and civic emancipatory energy that exists in contemporary politics, leaving no space for other understandings of justice and giving the impression that all answers must come from human rights alone. Upendra Baxi has echoed these views, saying for instance that human rights present themselves as omnipresent but in fact do not capture every form of human violation.¹²⁸ There exist forms of injustice that have nothing to do with human rights, and forms of political activism that fall outside their scope but are nonetheless pertinent and legitimate.

The second critique, related to the first, has to do with the embeddedness of human rights in legal discourse, and the related pretention of their being apolitical and non-ideological. This is a critique that CLS makes of the whole of international law, but has particular implications in the case of human rights.¹²⁹ Their pretended neutrality delegitimizes other emancipatory strategies that do not hide their political and ideological motivations.¹³⁰ The effect of this is that the exercise of plural debate and persuasion, crucial in democracies and in politics in general, is thwarted by the rigidity of legalism. Non-conforming claims are easily excluded for lacking the forms of legal argument – positivity, bindingness, entitlement, standing and so forth. This discards potentially valuable political ideas and, at the same time, weakens human rights by making them a matter of technicality and not of democratic choice.

The idea of universality can play a negative role in cementing human rights idolatry and in 'neutralizing' the politics of human rights to the extent that it creates an aura of ontological necessity around them. Used without a certain degree of caution, universality makes human rights look as if no choice exists and thus nothing need be debated. This hides the obvious fact that human rights have not always existed, and that political projects other than human rights have virtues and are capable of legitimately complementing rather than contaminating them. Proper universality should therefore focus on the reach of rights entitlements to every hu-

126 D. Kennedy, 'The International Human Rights Regime: Still Part of the Problem?', in R. Dickinson, E. Katselli, C. Murray and O. W. Pederson (eds), *Examining Critical Perspectives on Human Rights*, Cambridge University Press, 2012, p 24.

127 D. Kennedy, 'The International Human Rights Movement: Part of the Problem?', 15 *Harvard Human Rights Journal* (2002) 101, 108.

128 U. Baxi, *The Future of Human Rights*, 3rd edn, Oxford University Press, 2012, p 7.

129 Bianchi, *International Law Theories*, supra fn 37, p 136.

130 Kennedy, 'The International Human Rights Movement', supra fn 133, 108, 109; C. A. Odinkalu, 'Why More Africans Don't Use Human Rights Language', 2 *Human Rights Dialogue* 1 (Winter 2000) https://www.carnegiecouncil.org/publications/archive/dialogue/2_01/articles/602 (last accessed 18 August 2022).

man being, rather than on a pretended epistemological and moral omnipresence of human rights. Human rights ought to remain open to the legitimacy of other forms of political argument and be ready to persuade with good arguments rather than exclude through dogmatism and formalism.

2. THE TWAIL CRITIQUE

Though diverse, the TWAIL movement is mainly concerned with the structures of international law that have historically subordinated and that continue to subordinate people living in the Third World or, to use more contemporary terminology, the Global South.¹³¹ Within this broad analytical horizon, TWAILers have dealt considerably with human rights, offering an indispensable critique of the idea of universality.

TWAIL's central point on human rights builds on the CLS observation, mentioned above, that the alleged neutrality and non-politicization of human rights is for the most part deceitful. Yet, TWAILers go deeper into this point and argue that human rights are not only not neutral, but are also the touchstone of a distinctively Western, liberal project based on the idea of individual rights.¹³² This individualistic framework, based on a hard notion of the rule of law, favours civil and political rights – seen as truly enforceable – above economic, social and cultural rights – seen at best as programmatic rights. The result is that human rights are seen as paving the way for a neo-liberal conception of politics.¹³³

The problem with this liberal inspiration for human rights, TWAILers contend, is not so much its cultural specificity as its pretended universality. When liberal politics become a universally applicable threshold, those states, societies and communities seen as non-compliant become the target of intervention. The idea of 'good governance' exemplifies this well.¹³⁴ Where governance is considered suboptimal according to the liberal yardstick of human rights, interference becomes necessary. And this interference might come in different forms. Through the avenue of global financial institutions, for instance, when neo-liberal reforms are demanded from developing countries in order for them to access financial aid. Or, through the trade policy of Global North countries, which often couple the advocacy of privatization and deregulation with arguments linked to human rights, like the rule of law.¹³⁵ More explicitly, intervention might also come through the waging of war under the alibi of humanitarian intervention or other supposedly democratic ends.

131 A. Anghie, B. Chimni, K. Mickelson and O. Okafor (eds), *The Third World and International Order: Law, Politics and Globalization*, Brill, 2003, p vii; L. Eslava, 'TWAIL Coordinates', *Critical Legal Thinking*, 2 April 2019, <https://criticallegalthinking.com/2019/04/02/twail-coordinates/> (last accessed 18 August 2022).

132 M. W. Mutua, 'Is the Age of Human Rights Over?', in S. A. McClennen and A. Schultheis Moore (eds), *Routledge Companion to Literature and Human Rights*, Routledge 2016.

133 B. S. Chimni, 'Third World Approaches to International Law: A Manifesto', in Anghie et al, *The Third World and International Order*, supra fn 137, pp47, 56.

134 Ibid, p 61.

135 J. Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism*, Verso, 2019, p 227.

TWAILers thus argue that the aspiration of universality makes of human rights a potential tool of hegemony¹³⁶ – indeed, a 'vehicle, rather than an antidote to empire', to quote David Kennedy.¹³⁷ The liberal aims behind human rights represent a 'subtle continuum of the civilizing mission of the West against its former colonial possessions in the Global South', in the words of Makau Mutua.¹³⁸ That is to say, a means through which the Global North continues to tell the Global South what to do – and take advantage of it.

This critique ought to be taken seriously. A starting point is to acknowledge the fact that human rights have been and continue to be used on a daily basis as an instrument of power diplomacy, often with hegemonical or interventionist purposes. It also has to be acknowledged that human rights did play an important role in the deployment of neo-liberal economic programmes in the 1980s and have continued to do so until this day.¹³⁹ These have been misuses of human rights to the extent that they have covered up hidden, imposed political agendas, and have cherry-picked elements of some rights and purposefully shaded others. Universality should be taken as meaning that every human being is entitled to the full catalogue of human rights – both civil and political rights and economic, social, and cultural rights, not as a *carte blanche* in international politics. Misuses and double agendas should be denounced as such, but without discarding on the whole a normative framework that also provides invaluable ammunition against injustice. And human rights should remain non-dogmatic and open to debate – their benefits and pitfalls should be a matter of public discussion in every society, not an untouchable taboo.

B. EQUAL HUMAN DIGNITY AS A NEW TAKE ON UNIVERSALITY

Universality, then, should not mean idolatry, legal formalism or hegemony. But what *should* it mean? Universality, it is suggested here, could be based on the idea of equal human dignity. This would arguably contribute to the universal understanding and the appropriation of *all* human rights, as opposed to the erosive cherry-picking that is observable in contemporary human rights politics. This is fundamentally because equal human dignity is an idea to which the great majority of the main contemporary systems of thought can relate to. In addition, equal human dignity is an overarching notion capable of substantiating any human right, and thus delivers a unified rhetorical basis for all human rights, as will be explained below.

136 B. Rajagopal, 'Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy', *27 Third World Quarterly* 5 (2006) 769.

137 Kennedy, 'The International Human Rights Regime', supra fn 132, p 26.

138 Mutua, 'Is the Age of Human Rights Over?', supra fn 138, p 455.

139 D. M. Lantigua, 'Neoliberalism, Human Rights, and the Theology of Liberation in Latin America', in D. Steinmetz-Jenkins and S. Shortall (eds), *Christianity and Human Rights Reconsidered*, Cambridge University Press, 2020, pp242-244.

1. THE MEANING AND BACKGROUND OF EQUAL HUMAN DIGNITY

At its base, human rights universality is the moral and legal aspiration that human rights should belong to everyone on an equal basis.¹⁴⁰ The principle behind it is equal human dignity. According to this, human nature, whatever it may be, is common to every human being, by virtue of which every person enjoys equal moral status.¹⁴¹ Ethnic, material, social, gender or any other sort of difference among people does not and should not imply a difference in moral worth.¹⁴² Dignity, and consequently entitlement to rights, resides in the sole fact of being human.

This very basic idea, revisited, could serve as the touchstone of a new take on the universality of human rights. All the more so because the idea of equality has spanned history, cultures and religions, playing a crucial role in all sorts of debates about morality.¹⁴³ This means that, from a historical and sociological perspective, equality has a solid claim to universality because it is overwhelmingly accepted at the global scale – at least discursively.

But what would it mean to build a ‘new’ narrative of universality based on equal human dignity, if equal human dignity has always been there? Indeed, Article 1 of the UDHR, perhaps the cornerstone of the whole edifice of human rights since 1948, states that ‘[a]ll human beings are born free and equal in dignity and rights’. There is little new in this notion, but rather a longstanding foundation. Yet, it appears, the notion of equal human dignity has never really been elaborated to its full rhetorical potential. The apparent gap that exists between civil and political rights on the one hand, and economic, social and cultural rights on the other – made bigger by the ideological and political standoffs of the Cold War and the recent rise of China as a superpower – has more often than not conveyed the impression that two camps exist and that each of them rests on different and potentially conflicting rhetorical and moral grounds, one based on classic, liberal individualism and the other on socialist and welfare ideals. As if the right to freedom of expression has nothing to do with the right to housing, or due process with the right to food. Human rights are seldom understood and made operational through a unified rhetorical mechanism.

Equal human dignity, however, can be used as a heuristic key that unifies the whole spectrum of human rights. As such, it is full of narrative potential. This is an idea that Jürgen Habermas has explained at length. In his view, ‘human dignity forms the “portal” through which the egalitarian and universalistic substance of

140 S. Besson, ‘Justifications’, in D. Moeckli et al, *International Human Rights Law*, supra fn 78, p 44; A. Clapham, *Human Rights: A Very Short Introduction*, 2nd edn, Oxford University Press, 2015, p 16.

141 J. Tasioulas, ‘On the Foundations of Human Rights’, in S. M. Liao, R. Cruft and M. Renzo (eds), *Philosophical Foundations of Human Rights*, Oxford University Press, 2015, pp54,55; see also M. Kumm, ‘The Turn to Justification’, in A. Etinson (ed), *Human Rights: Moral or Political?*, Oxford University Press, 2018, p 239.

142 Baxi, *The Future of Human Rights*, supra fn 134, p 15.

143 M. Ishay, ‘What Are Human Rights? Six Historical Controversies’, 3 *Journal of Human Rights* (2004) 359; D. Moeckli, ‘Equality and Non-Discrimination’, in Moeckli et al, *International Human Rights Law*, supra fn 78, p 157.

morality is imported into law’.¹⁴⁴ It is a deeply democratic argument that Habermas makes here: if all the members of a political community are morally equal, the legal order that governs them must be one based on ‘just those rights that the citizens of a political community must grant themselves if they are to be able to respect one another as members of a voluntary association of free and equal persons’.¹⁴⁵ These rights are precisely human rights, and equal human dignity is the rhetorical pivot that structures and renders them coherent.

This structure is based on three rhetorical axes, or *topoi*.¹⁴⁶ The first is *individual autonomy*. If equal human dignity implies that every human is of worth in themselves, then it is apparent that dignity rests originally in the individual. This has two crucial moral implications. On the one hand, all humans being equal in dignity, no one has a priori the right to impose ideas, tasks, suffering or any external burden on a peer. Every individual is capable, both materially and ethically, of defining their place within society on their own.¹⁴⁷ On the other hand, as Luigi Ferrajoli explains, the premise that every human being is of equal worthy implies that *our differences are equal*.¹⁴⁸ That is to say, since every individual and every community is different in terms of identity but not dignity, every selfhood – be it individual or collective – is valid and should be allowed to take part in society on an equal basis. Hence, equality means autonomy: individuals and communities can freely decide who they want to be and how they want to live, and their choice should not compromise their belonging to the broader community. Autonomy therefore implies plurality.

The second *topos* of equal human dignity is *democratic procedure*. This is closely linked to individual autonomy, but more focused on the dynamics of politics. If every individual is equal in dignity and is thus morally autonomous, it is ineluctable that any form of social organization has to emerge from the coordinated and free will of all individuals in society.¹⁴⁹ In other words, an individual should only be

144 J. Habermas, ‘The Concept of Human Dignity and the Realistic Utopia of Human Rights’, 41 *Metaphilosophy* 4 (2010) 464, 469.

145 Ibid.

146 It was Aristotle who first used the term in his ‘Rhetoric’ – in a rather metaphorical sense – as the ‘location’ or ‘place’ from which the premises for a rhetorical argument are drawn. These ‘places’ are nothing but the common beliefs or assumptions which enjoy a presumption of plausibility within a given community. See: C. Rapp, ‘Aristotle’s Rhetoric’, *Stanford Encyclopedia of Philosophy*, revised March 2022, <https://plato.stanford.edu/entries/aristotle-rhetoric/> (last accessed 18 August 2022); I. Scobbie, ‘Rhetoric, Persuasion, and Interpretation in International Law’, in A. Bianchi, D. Peat and M. Windsor (eds), *Interpretation in International Law*, Oxford University Press, 2015, p 66; T. Viehweg, *Topics and Law: A Contribution to Basic Research in Law*, trans W. Cole Durham, Peter Lang 1993, p 85; S. D. Sastre, ‘La tópic como método en el Derecho público’, 1 *Revista de Derecho Público: Teoría y Método* (2020).

147 A. Biletzki, *Philosophy of Human Rights*, Routledge, 2019, pp47-53.

148 L. Ferrajoli, ‘Derechos fundamentales’, in A. de Cabo and G. Pisarello (eds), *Los fundamentos de los derechos fundamentales*, 4th edn, Trotta, 2001, p 35.

149 De Sousa Santos, ‘Hacia una concepción multicultural de los derechos humanos’, supra fn 79, 67.

bound by rules whose origin can be traced back to their free choice.¹⁵⁰ This implies that every individual is entitled, first, to take part in collective decisions either directly or through representatives; second, to have the means to access information about the exercise of power and form his or her own opinion; and third, to hold those in power accountable, both politically and legally. This is the premise of contractualism and the rule of law. The fact that everyone should be allowed to participate in the exercise of power also means that the state should remain open and, in fact, protect diversity in societies through mechanisms like laicity.¹⁵¹ Equal human dignity therefore has meaningful political implications that determine the procedure through which public power is supposed to emerge and be exercised.

However, equal human dignity requires more than that, and therefore a third topoi is called for: *equal capabilities*. This concept, suggested by Amartya Sen and Martha Nussbaum, builds on the socialist critique of liberal rights.¹⁵² *Difference should not mean inequality*. Since every human is equal in dignity, every human deserves the same opportunities to develop, despite the sometimes radical background differences that exist among them.¹⁵³ And since material inequality is pervasive in contemporary societies, equal dignity implies a moral imperative to level the playing field for those who are disadvantaged. This is done by creating the material conditions that enable the exercise of individual autonomy and democratic procedure: ensuring access to a livelihood, to basic services such as health and sanitation, to public education and so on. Isaiah Berlin refers to this as ‘positive freedom’: the idea that a minimum standard of living should enable every person to pursue their wellbeing, within their particular circumstances.¹⁵⁴ To cite Sen on this point, equal human dignity requires the ‘freedom of effective choice’, and not only the abstract possibility of choosing.¹⁵⁵ When translated into rights, therefore, this view of human dignity requires that public power be used actively to secure equal capabilities.

Each of these topoi is crucial for the fulfilment of equal human dignity. If one is absent in a given context, the other dimensions become meaningless. Equal human dignity is consequently indivisible, and human rights faithfully reflect this: they are a combination of individual autonomy, democratic procedure and equal capa-

150 S. Wheatley, ‘The Construction of the Constitutional Essentials of Democratic Politics by the European Court of Human Rights Following Sejdíć and Finci’, in Dickinson et al, *Examining Critical Perspectives on Human Rights*, supra fn 132, pp154, 155.

151 P. S. Ugarte, ‘Laicidad y democracia constitucional’, *Isonomía* 24 (2006) 37, 38.

152 A. Sen, ‘Elements of a Theory of Human Rights’, 32 *Philosophy & Public Affairs* (2004) 315, 334, 335; M. C. Nussbaum, *Women and Human Development: The Capabilities Approach*, Cambridge University Press, 2000, p 5.

153 T. Campbell, *The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights*, Routledge & Kegan Paul, 1983, p 213; G. Claey's, ‘Socialism and the Language of Rights: The Origins and Implications of Economic Rights’, in M. Halme-Tuomisaari and P. Slotte (eds), *Revisiting the Origins of Human Rights*, Cambridge University Press, 2015, pp214, 215.

154 I. Berlin, *Liberty*, ed H. Hardy, Oxford University Press, 2002, p 179; M. P. Lara, ‘La libertad como horizonte normativo de la modernidad’, *Filosofía política I: Ideas políticas y movimientos sociales*, vol 13, Trotta, 2002, pp117, 118.

155 Sen, ‘Elements of a Theory of Human Rights’, supra fn 159, 336.

bilities.¹⁵⁶ Civil rights implement individual autonomy: the prohibition of torture, inhumane and ill-treatment, as well as of slavery; the rights to integrity and security of person; freedom of movement; the rights to personhood and privacy; freedom of thought, conscience and religion, of opinion and expression and of assembly and association; the prohibition of incitement to hatred; the right to cultural identity and the protection of the family and reproductive and sexual rights – all of these capture the premise that every individual is and should be autonomous and free of arbitrary coercion. The rights to effective remedy, to due process guarantees, to access to information, to vote and be voted for and other political rights implement the topos of democratic procedure. Lastly, equal capabilities is reflected in the rights to work, to social security, to an adequate standard of living, to the highest attainable standard of health, to education, and to participation in cultural life, plus their many derived rights – the right to water, to housing and so forth.

All of these rights, together, substantiate equal human dignity and turn it into a workable, implementable legal system. The power of this idea is precisely that it links them all; it provides a common, agreeable basis for every human right. As such, equal human dignity is particularly promising for rethinking the universality of human rights. It helps transcend both the liberal bias behind civil and political rights and the socialist bias towards economic, social and cultural rights by building a unified floor from which all rights can be argued. And it does so without hiding in a purportedly ‘neutral’ or ‘apolitical’ narrative of legal formalism which CLS and TWAIL critics have denounced in mainstream human rights rhetoric. Equal human dignity is first and foremost an idea of political morality – a concept in which most modern traditions of political thought are reconciled. It does not deny its political stance. On the contrary, it is straightforward and even confrontational in wielding it: every human being has equal moral worth, and this should be the cardinal principle of our international legal system. Therein, precisely, lies its value as a potential key to a revised narrative of universality.

2. EQUAL HUMAN DIGNITY IN IHRL

Equal human dignity is, in fact, already a key concept in positive IHRL. From a legal standpoint, it is the centre of gravity of the field and a very important principle of international law – arguably a rule of *jus cogens*.¹⁵⁷ The preamble of the UN Charter begins ‘WE THE PEOPLES OF THE UNITED NATIONS DETERMINED ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small’. This formula is restated in a host of treaties and other instruments. More importantly, perhaps, Article 1 of the UDHR enshrines the fundamental idea that ‘all human beings are born free and equal in dignity and rights’. This provision is hermeneutically and customarily the starting point of international human rights

156 Habermas, ‘The Concept of Human Dignity and the Realistic Utopia of Human Rights’, supra fn 151, 168.

157 H. Charlesworth and C. Chinkin, ‘The Gender of Jus Cogens’, 15 *Human Rights Quarterly* (1993) 63; A. Bianchi, ‘Human Rights and the Magic of Jus Cogens’, 19 *European Journal of International Law* 3 (2008).

and, as such, this wording plays a structuring role across the whole of IHRL.¹⁵⁸ Crucial to understanding this function is also a preambular paragraph of the UDHR which states that the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’. The spirit of this wording attests to the fact that the notions of shared essence among human beings and the resulting equal moral status provide the foundation for all freedoms, principles of justice and peace – the very core of human rights.¹⁵⁹

The centrality of equal human dignity is reflected in the preambles of several crucial human rights instruments. The ICCPR restates in its preamble the wording of the UDHR, stressing that ‘the inherent dignity and ... the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’, and further recognizes that ‘rights derive from the inherent dignity of the human person’. The preamble of the International Covenant on Economic, Social and Economic Rights (ICESCR), too, restates the UDHR’s mention of inherent dignity, and the preamble of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) refers to the UDHR and the UN Charter to reaffirm the ‘principles of the dignity and equality inherent in all human beings’ and the premise that ‘all human beings are born free and equal in dignity and rights’. The preamble of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) mentions the UN Charter in recognizing that ‘recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’, and that ‘those rights derive from the inherent dignity of the human person’.

CEDAW uses a similar wording in its preamble, making reference to the UDHR in affirming ‘the principle of the inadmissibility of discrimination’ and proclaiming ‘that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex’. The preamble of the Convention on the Rights of the Child (CRC) makes similar remarks and stresses the faith of the ‘peoples of the United Nations ... in the dignity and worth of the human person’. The Convention on the Rights of Persons with Disabilities (CRPD) makes a similar reference to the UDHR and the UN Charter in its preamble.

These preambular references to equal human dignity are operationalized in each treaty by a host of articles, most importantly the provisions on non-discrimination in each of them. Article 2 (1) of the ICCPR and 2 (2) of the ICESCR, to begin with, oblige state parties to ensure that rights are enjoyed ‘without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. These provisions rest on the premise that none of these grounds of human diversity alter the fundamental

158 O. Schachter, ‘Human Dignity as a Normative Concept’, 77 *The American Journal of International Law* 4 (1983) 848, 848, 849.

159 J. R. May and E. Daly, ‘Why Dignity Rights Matter’, 129 *European Human Rights Law Review* (2019) 129.

equal dignity of every person. CERD, CEDAW and the CRPD, moreover, are treaties fully dedicated to the correction of specific types of inequalities vis-à-vis specific groups of people. For instance, the definition of ‘racial discrimination’ in Article 1 of CERD – ‘any distinction, exclusion, restriction or preference based on race ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms’ – is entirely built on the premise that every human being enjoys equal moral status. The same can be said about the definition ‘discrimination against women’ in Article 1 of CEDAW or, for example, Article 3 which imposes positive obligations on states to take action to guarantee women the ‘exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men’. The CRPD, for its part, emphasizes in Articles 1 and 3 the ‘inherent dignity’ of persons with disabilities, as a way of highlighting the fact that a disability does not in any way curtail the humanity of a person, and therefore a person with disability enjoys the same dignity as anyone else.

Equal human dignity is also present in a number of human rights declarations on diverse topics. An early example is the Universal Declaration on the Eradication of Hunger and Malnutrition, endorsed by UNGA Resolution 3348 (XXIX) of 17 December 1974, which begins with the argument that the inequality of the global food system ‘is not only fraught with grave economic and social implications, but also acutely jeopardizes the most fundamental principles and values associated with the right to life and human dignity as enshrined in the UDHR’. The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the UNGA through Resolution 47/135 of 1992 is another good example. On the premise, expressed in its preamble, that ‘men and women and ... nations large and small’ enjoy equal rights, dignity and human worth, the Declaration seeks to protect the enjoyment of the cultural identity of people belonging to minorities ‘freely and without interference or any form of discrimination’. Similarly, the Principles for Older Persons, adopted through UNGA Resolution 46/91 of 1991, stress in their first preambular paragraph their ‘faith in fundamental human rights, in the dignity and worth of the human person [and] in the equal rights of men and women’, then establish in Principle 17 that ‘[o]lder persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse’.

More importantly, perhaps, the Vienna Declaration and Programme of Action of 1993 also builds on the idea of dignity, recognizing in its preamble ‘that all human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms’. Central here is the unifying ethos of the Vienna Declaration, which unambiguously grounds *all* human rights in the notion of human dignity, seeking to bridge the gap between civil and political rights on the one hand, and economic, social and cultural rights on the other.

More recent and also telling is the UN Declaration on the Rights of Indigenous Peoples of 2007, which affirms in its preamble that ‘indigenous peoples are equal to all other peoples’ and yet have the ‘right ... to be different, to consider themselves

different, and to be respected as such'. The preamble also states 'that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust'. Underlying these statements is a clear notion of equal moral worth among peoples and individuals, which is more expressly stated in Article 15. This provision establishes that 'indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information'.

All of these instruments and declarations confirm that equal human dignity, while seldom stated with the straightforwardness of Article 1 of the UDHR, is indeed a common root of the whole of IHRL – an overarching principle which every rule of IHRL can be traced back to. Thus, the legal basis on which a narrative of universality based on this idea would rest is sound and solid.

C. A NARRATIVE OF EQUAL HUMAN DIGNITY IN PRACTICE

1. SOME POSSIBLE REJOINDERS TO CHALLENGES

How would a narrative of universality based on equal human dignity look like in practice? Arguably, any question of human rights can be reduced to an issue of equal human dignity. This means that it should be possible, not only in theory but also in practice, to make an argument about any human right on the common basis of equal human dignity. By the same token, any contestation of human rights that confronts this narrative should face the rhetorical burden of equality. That is to say, any narrative attempting to challenge human rights should be ultimately cornered to sustain its challenge by denying equal human dignity – something that is discursively untenable nowadays. In this sense, a narrative of universality based on equal human dignity can be operationalized by instituting a diplomatic, institutional, judicial and activist practice of basing human rights arguments – *any* human right argument – on the idea that every human is equal in dignity and therefore in rights.

For example, in response to the rollback of freedom of expression in the digital space through overtly broad concepts of false information or hate speech, one could make the following argument. If every person is equal in dignity, no one's voice should have the privilege of silencing others or imposing itself through coercion over the rest – everyone should be allowed the space to think for themselves. The state can legitimately limit the possibility of expression, but only exceptionally in cases where precisely one voice arbitrarily imposes itself over the others, thus risking disrupting the equilibrium and generating inequality. This censorship can, however, be carried out wherever a severe and immediate harm is foreseeable, and only through a test of legitimacy, necessity and proportionality. Because everyone's voice deserves equal respect in principle and potentially contributes equally to public debates, it is the duty of the state and society at large to protect it. This renders blanket prohibitions and internet bans inegalitarian policy tools.

To the issue of terrorism and the privileging of arguments of national security, stability, territorial integrity and so forth, a narrative of equal human dignity would have a twofold response. The first, and most evident, is that terrorists, despite their frightful crimes, remain human beings and, as such, equal to everyone else in dignity. This means that the barbarity of their acts does not push them outside the law to an area where they can be barbarically punished. Their penalty ought to be that established by the institutions that they themselves, as equal members of society, take part in – together with everyone else. The second rejoinder, perhaps less evident, is that while terrorism indeed represents a very serious challenge for governments, the social burden of the measures to fight it should not be greater than that of terrorism itself. If terrorist acts are undoubtedly undemocratic, a government cannot react to them in an undemocratic way. This would inevitably lead to unjustified restrictions on the rights of some – or many – clearly undermining their equal dignity. Moreover, the definition of terrorism must be restrained to the most extreme forms of violence intended to shock the public, and not extend to any form of legitimate dissent, no matter how radical it may be. That results in serious participatory inequality.

To the discursive exclusion of human rights from issues like climate change or investment law, a narrative of equal human dignity could articulate several rejoinders. Regarding climate change, the first thing to note is that equal human dignity provides a useful framework of assessment precisely because it allows a zooming into the differentiated impacts that every individual and community might face in a given context. Climate change has dissimilar consequences for people, depending on their geographical location, socioeconomic position, mode of livelihood, gender and a host of other factors. Addressing these impacts therefore demands that the needs and circumstances of every person be taken into account, and a narrative of equal human dignity delivers this. In addition, human rights understood through this lens substantiate the demands of climate justice inasmuch as equal human dignity implies a duty of no harm among peers. This narrative approach to climate change allocates differentiated responsibility to those actors that have provoked and benefited from it, very much in line with the common but differentiated responsibilities rationale.

In the case of the exclusion of human rights from investment law, a narrative of equal human dignity would make a straightforward counter-argument. Equal human dignity requires the fulfilment of democratic procedures and the pursuance of equal capabilities – on top of the protection of individual autonomy, which seems less relevant here. In terms of democratic procedure, the regulation of foreign investment necessitates not only that the rights of investors are respected, but more importantly that society can decide, with full authority, the modalities through which private profit can be sought and the ways in which investors – both national and foreign – should retribute society. Equal human dignity requires that the common good dictates the conditions under which the private good is to be pursued while neither suppressing the right of investors to profit nor erasing their legal protections, but making sure these are not transformed into privileges. The opposite – namely the prevalence of private interest over the public interest – generates clearly unequal outcomes, which is the fundamental criticism made of the

international investment system. The inclusion of a universalist narrative of human rights based on equal human dignity would help correct some of the unjust features of this system.

As to the relativist challenges posed by the narratives on development and those negating certain minorities, equal human dignity provides a series of compelling ripostes. With regard to the rhetoric of the functional precedence of development over certain human rights – notably civil and political rights – the first thing to say is that there is no question that development as such can contribute to equal capabilities and thus the ideal of equal human dignity. The problem starts when the benefits of development are held argumentatively against the exercise of other rights. When, for instance, the struggle against poverty is said to justify single-party politics, or when opposition to the construction of infrastructure is deemed criminal for impeding ‘national development’. Clearly, economic development is not the only thing that matters in a plural society: different people and different communities have different needs – or different notions of development – and their voices ought to be part of the public debate on an equal basis. Suppressing some rights through the logic of development hampers equal human dignity because the autonomy to decide one’s fate is annulled. Equal human dignity demands that the pursuance of development considers the voices and accommodates the needs of every social actor to the greatest extent possible, and that the adoption of restrictive decisions only takes place through democratic means and with democratic safeguards. Every human right is therefore relevant to development.

On the issue of minorities, equal human dignity demands the acknowledgement of the particularities of every social group, majoritarian or minoritarian. This means that every group identity is valid and therefore entitled to cultural survival; the ethnical, historical or religious backgrounds of a group are all equal in dignity, and the members of those groups should be able to embrace these identities at will – or reject them if they choose to do so. As for non-identarian, vulnerable minorities, equal human dignity also demands that their differences vis-à-vis the rest do not become a social or political handicap, and that they are able to exercise their individual autonomy like anyone else. Affirmative action becomes necessary here: equal human dignity demands that society provides the means to overcome these vulnerabilities. This certainly applies not only to the catalogue of minorities in the UN Declaration on Minorities – national, ethnic, religious and linguistic – but to all minority groups who face some form of discrimination, including on the grounds of gender and sexual orientation. The only limits to minority protection under the perspective of equal human dignity are the human rights of others. If a minority group embraces discriminating practices, for example, these practices should fall outside the scope of protection of human rights.

These rejoinders are neither groundbreaking nor revolutionary. They build on long-settled readings of human rights. As pointed out above, equal human dignity is not new; on the contrary, it is very much at the heart of the political project of international human rights, at least since the adoption of the UDHR. The purpose here is only to bring to the fore the rhetorical elements that could help reshape current narratives on universality by making equal human dignity more present and

persuasive. These lines of argument could be particularly useful in the practice of human rights diplomacy, both at the HRC or other fora. The following section explores current practices at the Council and some possibilities for enhancing them through a narrative of equal human dignity.

2. EQUAL HUMAN DIGNITY IN THE PRACTICE OF THE HRC

This closing section sets out some possible ways of implementing equal human dignity in the practice of the HRC. Before doing this, however, it briefly explores the current state of HRC practice with regard to equal human dignity.

The rhetoric of dignity has been present in the resolutions of the HRC since the outset. Yet, it has historically been mostly used in regard to issues related to economic, social and cultural rights, along the lines of the topos of equal capabilities. Paradigmatic examples of this are the resolutions on the Question of the Realization in all Countries of Economic, Social and Cultural Rights. Dated 2007, the first of these resolutions in the post-Human Rights Commission era reads in its first paragraph: ‘in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his or her economic, social and cultural rights, as well as his or her civil and political rights’, further underlining that ‘all persons in all countries are entitled to the realization of their economic, social and cultural rights, which are indispensable to their dignity and the free development of their personality’.¹⁶⁰ While this exact wording has not been replicated in more recent resolutions on the topic, the use of the notion of dignity paired with that of equality has been a constant to this day. The 2021 resolution on the matter, for instance, reaffirms that ‘all human beings are born free and equal in dignity and rights’, adding that ‘these rights derive from the inherent dignity of the human person’.¹⁶¹

Many other resolutions using the ideas of dignity and equality in issues of economic, social and cultural rights have been adopted at the HRC. Those related to the Social Forum – a yearly meeting convened by the HRC to discuss issues related to social rights – include wording like: ‘Bearing in mind that the reduction of poverty and the elimination of extreme poverty remain an ethical and moral imperative of humankind, based on respect for human dignity’.¹⁶² Likewise, the resolutions on the right to health have long included paragraphs strongly informed by equal human dignity, for example: ‘Reaffirming further that all human beings are born free and equal in dignity and rights, and recognizing that these rights derive from the inherent dignity of the human person’.¹⁶³ On the right to food, too, similar language is commonly used. The resolution on this right of 2021 reaffirms ‘that hunger constitutes an outrage and a violation of human dignity, and therefore re-

¹⁶⁰ HRC Res 4/1, 23 March 2007.

¹⁶¹ HRC Res 46/10, 1 April 2021.

¹⁶² HRC Res 13/17, 15 April 2010.

¹⁶³ HRC Res 35/23, 12 July 2017.

quires the adoption of urgent measures at the national, regional and international levels for its elimination'.¹⁶⁴

Some longstanding resolutions not expressly linked to economic, social and cultural rights but related to them by their language and political background, also employ to some extent the notion of dignity. The resolutions on Enhancement of International Cooperation in the Field of Human Rights, traditionally sponsored by the Non-Aligned Movement, usually include a paragraph urging 'all actors on the international scene to build an international order based on inclusion, justice, equality and equity, human dignity, mutual understanding and promotion of and respect for cultural diversity and universal human rights'.¹⁶⁵ The resolutions on the Promotion of a Democratic and Equitable International Order, also sponsored by the Non-Aligned Movement, employ similar language. For instance, Resolution 25/15 of 2014 states in a preambular paragraph: 'considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind'.¹⁶⁶ Even closer to the concept of equal human dignity, the China-sponsored resolutions on Promoting Mutually Beneficial Cooperation in the Field of Human Rights – the so called 'win-win' resolutions – often contain a paragraph 'reaffirming ... that all human rights derive from the dignity and worth inherent in the human person and that the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in the realization of these rights and freedoms'.¹⁶⁷

The ideas of dignity and equality have also been present in issues other than economic, social and cultural rights, albeit to a lesser extent. Resolutions on the topic of Protection of the Human Rights of Migrants usually state that 'all migrants, regardless of their migration status, are human rights holders', and reaffirm 'the need to protect their safety, dignity and human rights and fundamental freedoms'.¹⁶⁸ On cultural heritage, the Council has also emphasized the equal dignity of different cultures: 'each culture has a dignity and value which must be respected and preserved, and that respect for the diversity of belief, culture and language promotes a culture of peace and dialogue among all civilizations'.¹⁶⁹ On HIV, similarly, it has borrowed from the UDHR: 'all human beings are born free and equal in dignity and rights, and ... these rights derive from the inherent dignity of the human person'.¹⁷⁰ And even in a number of country-specific resolutions, the language of dignity has been present. A good example are the resolutions on South Sudan, which reaffirm

164 HRC Res 46/19, 1 April 2021.

165 HRC Res 16/22, 12 April 2011.

166 HRC Res 25/15, 15 April 2014.

167 HRC Res 46/13, *supra* fn 104.

168 HRC Res 35/17, 6 July 2017.

169 HRC Res 6/11, 28 September 2007.

170 HRC Res 47/14, 27 July 2021.

that 'all human beings are born free and equal in dignity and rights, and ... everyone is entitled to all the rights and freedoms set forth in the Universal Declaration of Human Rights'.¹⁷¹

The language of equal human dignity tends to be significantly less used in matters related to civil and political rights, perhaps with the exceptions of issues of discrimination, personal integrity and torture. By way of illustration, the resolutions on Human Rights, Sexual Orientation and Gender Identity – no longer adopted by the Council since 2016¹⁷² – used to emphasize that 'all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind'.¹⁷³ Something similar has traditionally been done in the resolutions on people of African descent, which also build on the language of the UDHR.¹⁷⁴ And on personal integrity, many resolutions have discussed the role of law enforcement forces using the concept of dignity. An example is the recent resolution on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: The Roles and Responsibilities of Police and Other Law Enforcement Officials, which calls on police and other law enforcement officials to take 'effective measures to protect the human rights, dignity and integrity of all persons', and establishes that 'conditions of detention, including in police custody, must respect the dignity and human rights of persons deprived of their liberty'.¹⁷⁵ These resolutions, however, remain exceptional. The pronouncements of the HRC on matters of classic civil and political rights, such as freedom of expression or freedom of religion, tend not to use this type of language.

How would a policy of equal human dignity in the HRC look? To begin with, it should operate transversally along the whole spectrum of human rights, and not only focus on economic, social and cultural rights. That is to say, it would be necessary to use the logic of equal human dignity with regard to civil and political rights, too. This is a key point. To some extent, as the recent practice of the HRC reveals, the language of equality and dignity seems to have been embraced mostly by non-Western states, namely the Non-Aligned Movement and China. The point of bringing this language to civil and political rights – usually a priority for Western diplomats – is to import a logic validated by illiberal governments into fields where they tend to lag behind. By the same token, the acknowledgement of equal human dignity by liberal states should bring them closer to a narrative of social justice, which should impact positively on their record on economic, social and cultural rights.

171 HRC Res 46/23, 30 March 2021.

172 The last one, referenced in the next footnote, was adopted in 2016. After that, there has been only a very compact resolution renewing the SOGI (sexual orientation and gender identity) mandate in 2019, (HRC Res 41/18, 19 July 2019).

173 HRC Res 17/19, 14 July 2011.

174 HRC Res 47/21, 26 July 2021.

175 HRC Res 46/15, 1 April 2021.

It would be crucial, however, to be careful to use not only the same concept – equal human dignity – in addressing different human rights issues, but also very similar language. This is important to make it clear that the same logic substantiates every human right. Thus, for example, a common opening paragraph to use in any resolution on any topic could read as follows:

Affirming that equal human dignity constitutes the non-negotiable basis of all human rights and that equal dignity implies, simultaneously and indivisibly, the capacity of every person and every community to self-determine and to participate in society through democratic means, as well as the provision of a common social floor enabling material equality and equal capabilities among all persons.

This wording would incorporate the three topoi discussed above – individual autonomy, democratic procedure and equal capabilities – under the same banner. Then, a derivative paragraph should adapt this language to the issue at stake. The common references to equal human dignity would need to be compact but at the same time substantial; avoid sounding abstract or superficial and be easily relatable to the practical matters discussed in the resolution. Similarly, they should avoid using the word ‘dignity’ on its own, without the idea of ‘equal’, as many resolutions do today. A resolution related to civil and political rights could say, for example:

Emphasizes that equal human dignity constitutes the non-negotiable basis of all human rights and that, in the context of [elections, regulation of online content, etc.], it demands equal participation in democratic processes by every member of society, including the possibility to express freely, as well as to assemble, vote and hold authorities accountable.

Another potentially interesting rhetorical element is to bring more than one topoi into the same issue, making it clear how equal human dignity operates transversally and how the principle of indivisibility of human rights can be put into practice. An example of good practices in this sense is provided by Resolution 35/18 of 2017 on the topic of Elimination of Discrimination Against Women and Girls:

Reaffirming that the human rights of women include a woman’s right to have control over and to decide freely and responsibly on matters related to her sexuality, including sexual and reproductive health, free of coercion, discrimination and violence, and that equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the dignity, integrity and autonomy of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences.

This wording is particularly positive because it expresses the substance of individual autonomy with remarkable depth and yet consistency on an issue of discrimination, at the same time providing an egalitarian dimension by elaborating how relationships between men and women should be.

The same could be done, for example, with regard to economic, social and cultural rights. The work of FIAN International in the field of the right to food is a great

model to follow.¹⁷⁶ FIAN’s approach has consisted of using a gender perspective to argue that the right to food is not merely a right to freedom from hunger, as a mainstream approach would tend to suggest.¹⁷⁷ Instead, FIAN denounces gender discrimination and patriarchal structures in women’s access to food, construing this right as a ‘right to feed oneself’ – a right to nourish oneself by means freely chosen.¹⁷⁸ This perspective balances individual autonomy with an area of IHRL dominated by the rationale of equal capabilities, making the point that fulfilling material needs is not enough in a context dominated by discrimination and disempowerment – a case that can be made about gender, but also about racism, classism and other forms of systemic discrimination.

This type of rhetoric could be added to processes of resolution drafting at the HRC. The 2021 resolution on the right to food provides a good basis for discussion.¹⁷⁹ This resolution states in a very comprehensive operative paragraph:

[The Human Rights Council ...] 6. *Encourages* all States to mainstream a gender perspective in food security programmes and to take action to address de jure and de facto gender inequality and discrimination against women, in particular where such inequality and discrimination contribute to the malnutrition of women and girls, including by taking measures to ensure the full and equal realization of the right to food and ensuring that women and girls have equal access to social protection and resources, including income, land and water, and their ownership, and full and equal access to health care, education, science and technology, to enable them to feed themselves and their families, and in this regard stresses the need to empower women and to strengthen their role in decision-making.

This paragraph balances several elements akin to individual autonomy that are very interesting. Yet, this rhetoric is not really reflected in the rest of the resolution. It seems rather a convoluted and isolated paragraph, unrelated in substance to the other 51 paragraphs of the document. The definition of the right to food in the resolution, in fact, defines it as ‘the right of every individual, alone or in community with others, to have physical and economic access at all times to sufficient, adequate and nutritious food, in conformity with, inter alia, the culture, beliefs, traditions, dietary habits and preferences of individuals, and that is produced and consumed sustainably’. This has little to do with the ‘right to feed oneself’ advocated in the paragraph cited above. If the definition adopted some of these elements,

176 See, e.g., FIAN Colombia, *El Derecho a la Alimentación y nutrición adecuada de las mujeres: una ampliación de horizonte hacia la construcción de una ciudadanía plena*, 2014, pp72, 73, <https://fianbrasil.org.br/wp-content/uploads/2016/08/Cartilla-FIAN-DA-Mujeres-2014-WEB.pdf> (last accessed 18 August 2022).

177 OHCHR and Food and Agriculture Organization, *The Right to Adequate Food*, Fact Sheet no 34, 2010, p 2, <https://www.ohchr.org/Documents/Publications/FactSheet34en.pdf> (last accessed 18 August 2022). The Right to Adequate Food \u0026amp;#171; (2010)

178 R. Künnemann, ‘A Coherent Approach to Human Rights’, 17 *Human Rights Quarterly* (1995) 323, 234. See also R. Künnemann and S. Epal-Ratjen, *The Right to Food: A Resource Manual for NGOs*, American Association for the Advancement of Science, Science and Human Rights Program, 2004, https://www.aas.org/sites/default/files/RT_Food.pdf (last accessed 18 August 2022).

179 HRC Res 46/19, supra fn 171 (original emphasis).

the narrative of right-indivisibility combining the topoi of individual autonomy with equal capabilities could play a structuring role in the resolution. That way, the text would not just be an assembly of different, unrelated ideas but would truly uphold a comprehensive narrative of equal human dignity. According to such a rationale, a possible amended definition of the right to food could be:

The right of every individual, alone or in community with others, to have physical and economic access at all times to sufficient, adequate and nutritious food, on the basis of equal human dignity, free from gender and other forms of discrimination, in conformity with, inter alia, the culture, beliefs, traditions, dietary habits and preferences of individuals, and produced and consumed sustainably.

The minor addition in this definition could pave the way for more paragraphs, like the one cited previously, delving into the substance of the ‘right to feed oneself’. This would add coherence and strength to the message conveyed in the resolution. Something similar could be reproduced in the resolutions on other economic, social and cultural rights.

In sum, implementing a narrative of equal human dignity in the practice of the HRC would require, first, the use of the language of equality, employing the topoi of individual autonomy, democratic procedure and equal capabilities across the whole spectrum of human rights. Second, it would require that this rhetoric is devised in a compact but substantial way, through general formulas based on equal human dignity heading resolutions, but also concrete language suited to the particular context of a given resolution. Articulating equal human dignity, not as an isolated definition, but rather as the inner logic of the whole body of resolutions would add a lot of clarity and coherence to these documents. Third, implementing this narrative would require understanding rights through a transversal logic of the indivisibility of rights, whereby the three topoi of individual autonomy, democratic procedure and equal capabilities are relevant not for given, specific rights, but for every right at the same time.

4. KEY FINDINGS AND RECOMMENDATIONS

One. The universality of human rights is largely taken for granted in the current practice of the HRC. Yet, below the surface significant challenges exist.

HRC resolutions very often state and restate the universality of human rights, for instance reaffirming that ‘all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing’ – a formulation taken verbatim from the Council’s mandate under UNGA Resolution 60/251. These recurrent references, however, very seldom elaborate the idea of universality. Rather, they seem to take it for granted as a self-evident, collectively acknowledged, mostly inconsequential dogmatic concept. In fact, though, not only is the idea of universality inconsequential in these resolutions, but there exist several entrenched dynamics in the practice of the HRC that actually challenge universality. These fall under three main clusters: the contestation of the limits of human rights; the exclusion of human rights from certain issues and frameworks; and the relativization of the validity or importance of human rights within certain communities.

Overall, the challenges to universality entail two important risks. First, human rights are enjoyed less in practice. More people are vulnerable to violations, and the narrative of human rights, together with the legal framework of IHRL, simply becomes unavailable as a means of defence and redress. Second, the continuous sidelining and marginalizing of human rights discourse erodes in the long term its strength as a global rhetoric of justice and emancipation. Human rights thus risk shifting from being a feared global mechanism of transparency, accountability, freedom and democratic control, to being a means of exoneration of abuse and complacency for the powerful. A true and meaningful universality of human rights, therefore, is crucial in the struggle for global justice.

Two. The contestation of the limits of human rights is often used to impair their application to certain persons or groups, undermining universality.

In principle, limiting rights is exceptionally valid under IHRL when it is necessary to accommodate other legitimate interests and values, provided that it is done in a proportionate manner. But in some contexts, limitations tend to be too broad, last too long or be unnecessarily severe. Exceptionality is thereby normalized, making human rights non-universal in practice, and rendering the idea of universality sterile. Moreover, allegedly legitimate limitations are often abused by authorities, for instance when seeking to silence opposition.

Illustrations of this are visible in the relatively frequent restrictions on freedom of expression in the context of digitalization, with justifications such as the prevention of the spread of disinformation and hate speech. Likewise, the fight against terrorism and other alleged threats to national security often motivate protracted

suspensions of human rights or particularly restrictive measures, targeting mostly civil and political rights. Both practices are noticeable in some of the work of the HRC on resolutions concerning these issues, and in the interactions of states with UN special rapporteurs.

Three. Human rights are sometimes excluded altogether from applying to certain issues by means of technical or other arguments, undermining universality

The exclusion of human rights language from discussions on pressing global issues that are clearly impacting human rights is another form of challenge to universality. This is typically done through technical, legalistic or specialization arguments, the result being that the application of human rights is simply overlooked, conveying the message that rights are not universal and leaving people and communities unprotected.

Climate change and international investment law are two very clear instances of this. Human rights narratives on climate change have been evaded by many states – most notably the major CO₂ emitting economies – through legalistic arguments. While the HRC has been generally receptive on this point, other fora like the UN Framework Convention on Climate Change have been much less so. In international investment, too, a professional culture of speciality and the configuration of the legal regime of investment tend to exclude human rights arguments, resulting in the forestalling of public interest in cases concerning crucial governmental policy decisions. Here, the evasiveness of states and other actors taking part in investor-state dispute settlement reform mechanisms regarding engagement with the HRC special procedures is very concerning.

Four. Several forms of veiled relativism exist in the current practice of the HRC, undermining universality

Important challenges to universality also come by way of relativist arguments. These generally make the claim that values, including those underlying human rights, are dependent on the specific cultural, social and political contexts of each human community. Thus, human rights are said not to be applicable in given contexts, or they are said to be applicable in a different way. This undermines universality in a very practical way by introducing different standards by which to assess compliance. But it also dissolves rhetorically the value of universality by relativizing the importance of certain rights in certain contexts.

In the context of the HRC's practice, this is visible in resolutions that contend that, indeed, matters such as development can legitimately take precedence in the human rights approach of states – resulting inevitably in the sidelining of rights, especially civil and political rights. Moreover, with regard to the rights of minorities, some states at the HRC regularly make the argument that certain traits of minorities are culturally incompatible with the beliefs of their societies, and thus cannot be protected. Minority religions and sexual orientation are clear examples of this. Relativism is therefore prone to translate into very concrete forms of harm for individuals and communities.

Five. The notion of equal human dignity could serve as the base for a revisited, strengthened narrative of human rights universality

Equal human dignity entails the idea that every human being shares the same nature and, consequently, everyone enjoys equal moral status. Far from novel, this notion lies at the core of the project of human rights. In fact, the very idea of the universality of human rights presupposes it: every person enjoys every human right on an equal basis precisely because every person is equal in dignity. Yet, even if sometimes hinted at in resolutions through neighbouring concepts such as 'human dignity', 'equal dignity' or 'inherent dignity', the idea of equal moral status is very much relegated to the background of current human rights practices and narratives. Instead, fragmented axiological sources are thought to inspire different rights – liberalism on the side of civil and political rights, and socialism on the side of economic, social and cultural rights – eroding the cohesion of human rights and making it easier for political actors to discard some and embrace others, hindering universality.

The notion of equal human dignity speaks directly to this issue and, in this sense, it promises a solid basis for a revised, strengthened narrative of the universality of human rights. Its force is twofold. First, it is powerful because the great majority of the contemporary systems of thought can relate to it. It lies at the crossroads of many contemporary ideologies, religions and theories of justice, which promises true universal plausibility. Second, equal human dignity unfolds neatly into the three rhetorical cores – or topoi – that animate the different parts of the human rights spectrum: individual autonomy, democratic procedure and equal capabilities. These topoi can all be traced back to equal human dignity, which in turn enables a common defence for every human right. Thus, it could provide the key to a genuine, credible and operational narrative of universality.

Accordingly, it is advisable for states, international organizations, agencies, NGOs and other actors engaging with IHRL to use it as a central component of their human rights strategies.

Six. A narrative of universality based on equal human dignity should be used transversally across all human rights and reinforce indivisibility

A revised narrative of universality based on equal human dignity could be operationalized through two main narrative strategies in the practice of the HRC and beyond. The first of these is to employ similar and sometimes identical language and rationales across the entire catalogue of human rights, on issues as distinct as terrorism or the right to housing. It is advisable in this regard to use common wordings for headings or opening paragraphs in resolutions on any topic, namely stating that equal human dignity is the basis of all rights and that it entails, simultaneously and indivisibly, the autonomy of all individuals and communities to self-determine, the participation of all in society through democratic means and the provision of a common social floor enabling material equality and equal capabilities. This practice would help cement the universality and indivisibility of the three topoi of individual autonomy, democratic procedure and equal capabilities

– conveying the message that discarding one right or one topos means discarding the rest too.

Another useful strategy in this regard could be to bring more than one topos into the analysis and substance of an issue, going beyond traditional approaches. This would put transversality and indivisibility into action. For example, the right to food, an archetypically social right, can be simultaneously seen from the perspectives of equal capabilities and individual autonomy. Equal capabilities is in fact the conventional approach to it: most documents on the topic would describe it as the *right to be free from hunger*. But approached from the perspective of individual autonomy, the right to food can be seen as a *right to feed oneself*, which would focus on individual or community agency over food systems – *how* food is accessed instead of *whether* it is accessed or not. The example is attributable to FIAN International, an organization denouncing structures of gender discrimination around women's access to food. A similar strategy could be used with any other right across the entire spectrum of IHRL.

In this sense, it would be advisable to engage in this type of approach throughout the whole body of resolutions and not only in individual paragraphs.

Seven. Equal human dignity has a solid basis in current IHRL

The notion of equal human dignity is fully grounded in positive IHRL. The UN Charter affirms in its opening preambular paragraph the 'dignity and worth of the human person', while Article 1 of the UDHR acknowledges that 'all human beings are born free and equal in dignity and rights'. This is reflected in a host of universal human rights treaties. The ICCPR and ICESCR stress the 'inherent dignity and ... equal and inalienable rights of all members of the human family' in their preambles and operationalize equal human dignity through their various provisions on non-discrimination. Something similar can be said of conventions like CERD, CAT, CEDAW, the CRC and CRPD. Moreover, the centrality of equal human dignity in IHRL is attested by its restatement in a number of crucially important resolutions adopted by the UNGA, such as the Universal Declaration on the Eradication of Hunger and Malnutrition, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the Principles for Older Persons, the Vienna Declaration and Programme of Action or the Declaration on the Rights of Indigenous Peoples, among others.

All of these instruments confirm the role equal human dignity plays as a key overarching principle of IHRL. They also corroborate its solid customary basis in international law as well as its possible *jus cogens* status. Hence, implementing a revised narrative of universality on this basis would be, from a legal standpoint, fully justified.

Eight. A narrative of universality based on equal human dignity should avoid idolatry, formalism and hegemonical arguments

The idea of the universality of human rights is not, as Third-World and critical legal scholars have rightly pointed out, bulletproof against potential harmful devi-

ations. These should be avoided in any effort to revisit the idea of universality. The first is the idolatry of human rights – the tendency to think that human rights are the only valid language of justice and emancipation, marginalizing claims that do not conform with them. The second is legal formalism, which consists in thinking of human rights exclusively as apolitical and non-ideological rules of international law, excluding anything that fails to conform to the criteria of legal positivity, bindingness, attribution, entitlement, standing and so on – hiding in passing the strong moral and ideological preferences behind IHRL. And the third problematic detour of universality is the hegemonical use of human rights as a justification both for intervention and exoneration, especially by the Global North vis-à-vis the Global South.

A revised narrative of universality based on equal human dignity ought to avoid these deviations if it is to stay credible. A first step in that direction is to acknowledge that not every laudable understanding of justice has to be articulated through human rights. In this sense, the emphasis when articulating a narrative of equal human dignity should be on the element of *equality* rather than on an a priori meaning of *human dignity*. The three topoi – individual autonomy, democratic procedure and equal capabilities – are to be used as functions of meaningful equality rather than of pre-fixed ideas of dignity. It is only in this sense that they can aspire to true universality. But in relation to this, a narrative of equal human dignity must stay open to any other potential topos akin to equality that seeks to complement it. Human rights ought to be used as a tool for dialogue and persuasion, rather than as an unquestionable dogma.

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