

**THE GRADUATE INSTITUTE** | GENEVA  
INSTITUT DE HAUTES ETUDES  
INTERNATIONALES ET DU DÉVELOPPEMENT  
GRADUATE INSTITUTE OF INTERNATIONAL  
AND DEVELOPMENT STUDIES

## **PROTECTING UNIVERSALITY**

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## I. The topic, the critique, the structure

Addressing the shortcomings of a paper in its introductory paragraphs is undoubtedly as wrong as starting a discourse with an apology. Nonetheless, the belief in the usefulness of this exercise – which breaks with the sound rules of writing – is stronger than the conformism impetus. Along these lines, the current paper discussing the need for protecting the universality of human rights appears to be at least anachronic, if not misplaced or obsolete.

Anachronic... While addressing the protection role of the world body, most critics of the UN system today point out – or point the finger to – the ‘too much talk’ and its correlate aspect, deficiency in action. Paradoxically without intending to contradict the all too often true critique of the United Nations<sup>1</sup>, the present paper will insist on the importance of reinforcing the ‘universality talk’.

Misplaced... Having Darfur in mind and other Darfur-like situations, some might argue that grave breaches of human rights should be urgently addressed in practice, whereas discussing principles of universality should get a backseat position on the international agenda. However, protecting the universality of human rights and protecting the humans’ rights *in practice* need not be competing activities. Indeed, this essay will suggest that ‘universality talk’ and norm enforcement should be complementary actions.

Obsolete... A look at the ratification status of the core human rights instruments is rather promising with the majority of the members of the international community seemingly upholding human rights and hence their universality. This quick look however is insufficient and risks not taking into consideration the impact of the many reservations and declarations made by states upon signature or ratification or the effect of other arrangements, which in turn can significantly interpret the concept of universality.

The above triadic critique represents the background against which this essay is written hence it will come in the forefront time and again to challenge the arguments put forward and in this way enrich the discussion.

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<sup>1</sup> In this phrase, the term United Nations is to be understood equally as: a). the international organization the purpose of which is “promoting and encouraging respect for human rights and for fundamental freedoms”, see UN Charter, Art.1.3.; b). as well as its member nations.

Structurally, the paper has three interdependent parts. In a first segment, the concept of universality will be revisited with a focus on the necessity to expand protection to the universality principle *per se*; the second part will look at the mandate of the United Nations High Commissioner for Human Rights and make a case for this institution's role as the legitimate 'protector of universality'. The last section builds on the findings of the previous chapters and submits the concept of universality to the test of the Cairo Declaration on Human Rights in Islam. The impact of this document on the universality principle and the actions of the institution designed to uphold all rights for all will be analyzed. The final paragraphs will conclude with the serious problematique posed by ignoring the need to protect the universality concept.

## **II. The universality of human rights**

Similar to the concept of democracy, the universality of human rights made a fulminatory career on the international scene. In spite of the fact, or precisely because, it is so often taken up in political discourse its scope and content remain most of the times unclear. In respect to democracy, Robert Dahl's solution was to construct the concept of polyarchy, which he considered a more appropriate term to describe the state of politically advanced countries that cumulated certain 'democratic' principles.<sup>2</sup> Despite the fascination brought with it by the construction of new concepts, Dahl's example will not be pursued by this paper. Instead, an understanding of what universality is taken to mean in today's international law will be carved out by looking at the emergence of the concept and its development, and at its relation with the notion of particularity.

### **II. 1. Emergence and development**

The roots of human rights can arguably be traced to early religious and philosophical writings of Western thought, as well as of Confucian, Hindu or Buddhist traditions. Similarly, the Bible or the Koran can be read to proclaim not only duties but also rights.<sup>3</sup> Proclamations and texts from the 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> centuries can also be seen as containing human rights seeds,

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<sup>2</sup> See Robert A. Dahl (1989), *Democracy and its Critics*, (New Haven: Yale University Press).

<sup>3</sup> Andrew Clapham (2007), *Human Rights: A Very Short Introduction*, (New York: Oxford University Press), at 5.

however their reading entailed different ‘degrees of universality’, i.e. excluding few or many categories of human beings.<sup>4</sup>

Be it as it may, the formal acknowledgement of the universal character of human rights is incontestable a modern achievement.<sup>5</sup> This development needs to be understood against the horrific events of World War II<sup>6</sup>, which taught humankind and the then leaders what can happen if human rights are not constructed as generally applicable and inclusive of all human beings.<sup>7</sup> As such, the promotion and encouragement of “*universal* respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion” became a pillar purpose of the World Organization.<sup>8</sup> It is in 1948, with the adoption by the UN General Assembly of the Universal Declaration of Human Rights (UDHR) that the doctrine of universality of human rights was officially embraced.<sup>9</sup> As the title suggests and its content upholds, the UDHR represents a “manifesto advocating the universality of human rights.”<sup>10</sup> As opposed to past declarations, universality here does not limit itself to *some* human beings but expressly encompasses the humanity by way of *each* individual’s inherent dignity, “without distinction of any kind”.<sup>11</sup> Moreover, Christian Tomuschat stresses that the human rights instruments agreed to by the international community in the aftermath of the Universal Declaration are consistent with the “everyone philosophy” firstly enunciated by the UDHR. Hence, since 1966 binding documents such as the International Covenant on Civil and Political Rights (ICCPR) and the International Convent on Economic, Social and Cultural Rights (ICESC) proclaim that “everyone” shall

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<sup>4</sup> Eva Brems (2001), *Human Rights: Universality and Diversity*, (The Hague: Martinus Nijhoff Publishers), at 17-19. See also Georges Abi-Saab (1994), “International Law and the International Community: The Long Road to Universality”, in Ronald St. John Macdonald (ed), *Essays in the Honor of Wang Tieya*, (The Hague: Martinus Nijhoff), at 37-39.

<sup>5</sup> In the view of this author, the late ‘formal acknowledgment’ of the universal character of human rights does not contradict theories which explain the concept of universality of human rights as a distillation of century-old contributions made by all cultures. See on the concept of human rights as part of the intellectual patrimony of humankind Bertrand G. Ramcharan, “The Universality of Human Rights”, *International Commission of Jurists Review*, 1994, at 105.

<sup>6</sup> References to World War II in this paper necessarily need to be understood as including the Holocaust.

<sup>7</sup> John P. Humphrey (1979), “The Universal Declaration of Human Rights: its history, impact and juridical character”, in B.G. Ramcharan (ed), *Human Rights: thirty years after the universal declaration*, (The Hague: Martinus Nijhoff), as quoted in Eva Brems, op.cit., at 20.

<sup>8</sup> UN Charter, Art. 1.3 (emphasis added).

<sup>9</sup> Eva Brems, op.cit., at 20.

<sup>10</sup> Christian Tomuschat (2003), *Human Rights: Between Idealism and Realism*, (Oxford: Oxford University Press), at 58.

<sup>11</sup> Universal Declaration of Human Rights, Art. 1 and 2.

enjoy certain rights or that “no one” shall be subjected to a specific treatment contradictory to human dignity.<sup>12</sup>

The slogan of the UDHR “all human rights for all” reveals another element, the principle of indivisibility. Some authors – and this paper subscribes to such a position – consider indivisibility as an aspect or variant of the universality principle; the main argument supporting such claims is one of consistency: all-inclusiveness and non-discrimination are applied to human rights themselves.<sup>13</sup>

As pointed out above, with the adoption of the UDHR, a landslide victory was achieved. Nonetheless, it is important to emphasize – although it is obvious for every person with minimal historical knowledge – that the UDHR constitutes the beginning of the universal application of human rights in practice and by no means the ultimate fulfillment. As Eva Brems underlines, the history of human rights is one of progressive inclusion in the rights protection paradigm of categories previously barred of rights<sup>14</sup>, i.e. slaves, “primitives” and “barbarians”<sup>15</sup>, ethnic minorities, women, children, indigenous people, migrant workers, persons with disabilities, sexual minorities.

Universality at normative level appears to have achieved an incontestable status with the explicit endorsement by the 1993 World Conference on Human Rights in Vienna: “The universal nature of these rights and freedoms is beyond question”.<sup>16</sup> Despite this encouraging declaration, attentive observers caution from excessive enthusiasm. The argument goes as follows: the Vienna Declaration reasserts “general principles open to varying interpretations and omits any reference to the ICCPR *per se* and to the rights of the individual *qua* individual.”<sup>17</sup> Far from being an accident, this omission seems to be the result of tough negotiation for a compromise, allegedly given the Asian block’s wish to distance itself from

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<sup>12</sup> Christian Tomuschat, *op.cit.*, at 58. See for example ICCPR Art. 6, 9.1, 12.1, 2, 14.2 or ICESCR Art. 6.1, 7, 8, 9, 11.1. and 11.2, 12.1, 13.1, 15.1.

<sup>13</sup> Eva Brems (2001) *Human Rights: Universality and Diversity*, (The Hague: Martinus Nijhoff Publishers), at 14.

<sup>14</sup> Eva Brems, *op.cit.*, at 21.

<sup>15</sup> Needless to say that the use of the terms “primitives” and “barbarians” is intended to recall a tragic part of the history of humanity and by no means does it intend to humiliate the addressees.

<sup>16</sup> World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 25 June 1993, Section I, Para 1, available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument), (last visited 20 November 2007).

<sup>17</sup> Adamantia Pollis, “Cultural Relativism Revisited: Through a State Prism”, 18 2 *Human Rights Quarterly*, 1996, at 330-331.

the ICCPR.<sup>18</sup> Nonetheless, the exact same adherence to universality as in the Vienna Declaration appears in the 2005 World Summit Outcome.<sup>19</sup> Naming the final document of such an historic gathering ‘outcome’, as opposed to at least ‘declaration’ is however symbolic of the intended binding nature (or lack thereof) of the adhered commitment. In the end, intuition and empirical observation suggest that there is little doubt that the struggle for universality is ongoing, or in other words, the history of inclusion continues to be written today.

The historical perspective permits the clarification of another aspect; a differentiation between the normative-theoretical level of universality and the level of day-to-day state (and in the view of some authors of non-state actor’s) practice needs to be made. Challenges to the principle of universality are addressed both at theoretical and at observance level, both being dangerous for the integrity of the human rights system. This paper will however focus on the former, since it mirrors the lesson of World War II: if universality is not the principle at normative level, abuses of human rights in practice risk to remain unsanctioned.

Concluding, the brief historical segment clearly underlines that the struggle of universalization stays at the forefront of the human rights movement, therefore it is not far fetched to admit to an intrinsic link between human rights and universality. In the words of former UN Secretary General Kofi Annan, “[i]t is the universality of human rights that gives them their strength. It endows them with the power to cross any border, climb any wall, defy any force.”<sup>20</sup>

## **II. 2. Universality and particularity**

The above brief historical encounter appears to prove that universality is a crucially important concept and its value as a ‘good’ or ‘right’ development is unquestionable. In academic or political spheres, questions did and do arise.

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<sup>18</sup> Tomuschat (2003), *Human Rights: Between Idealism and Realism*, (Oxford: Oxford University Press), at 60.

<sup>19</sup> 2005 World Summit, *2005 World Summit Outcome*, 15 September 2005, Para. 120., available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement>, (last visited 20 November 2007).

<sup>20</sup> UN, “Universality of Human Rights Gives Them Power, Secretary-General Says, in Message on 50th Anniversary Year of Human Rights Declaration”, *Press Release*, 5 December 1997, available at <http://www.un.org/News/Press/docs/1997/19971205.SGSM6414.html>, (last visited 20 November 2007).

An anthropologic school meant to combat evolutionary and ethnocentric ideas, suggested in 1947 that it is impossible to have a normative common denominator of human rights given the many different cultures, languages and religions existing in the world.<sup>21</sup> Alison Dundes Renteln argues that essentially relativism and universality need not be contradictory concepts, rather misrepresentations of the former lead to the perception of incompatibility.<sup>22</sup> Other authors see relativism as essential for the human rights movement since it serves as a reminder that context matters; human rights are not abstracts, on the contrary, their force lies in their application, and therefore, they must be made meaningful in particular social conditions.<sup>23</sup> By appeal to the *Evans* case<sup>24</sup>, Andrew Clapham shows how questions regarding such fundamental rights as the right to life are acknowledged by the European Court of Human Rights to be answered in different ways by different countries in Europe.<sup>25</sup> “[I]n the absence of any European consensus on the scientific and legal definition of the beginning of life” the case at hand is settled by deferring to the national legislators, in conformity with the margin of appreciation doctrine.<sup>26</sup> More generally, it is obvious that even in the *espace juridique européen*, by some perceived as a Judeo-Christian monolith, cultural and national differences exist and are taken into consideration when human rights law is implemented.

Another critique exposes universality as a concept representative of Western thought with the fundamental human rights instruments being drafted at a time when most of Asia and Africa were emergent from or still under colonial rule.<sup>27</sup> Indeed a troubling argument if one considers that universality strives for inclusion whereas its content might be exclusionary. Usually two main counter-claims are put forward in response. One refers to the important

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<sup>21</sup> The Executive Board, American Anthropological Association, “Statement on Human Rights”, 49 4 *American Anthropologist*, Oct.-Dec. 1947, at 539-543.

<sup>22</sup> Alison Dundes Renteln, “Relativism and the Search for Human Rights”, 90 1 *American Anthropologist*, March 1988, at 56-72.

<sup>23</sup> Susan Marks & Andrew Clapham (2005), *International Human Rights Lexicon*, (New York: Oxford University Press), at 388.

<sup>24</sup> Mrs. Evans complained to the ECtHR that requiring the father’s consent for the continued storage and implantation of the fertilized eggs was in breach of her rights under Articles 8 (right to respect for her private and family life) and 14 (non-discrimination clause) of the Convention and the rights of the embryos, under Article 2 (right to life). See *Evans vs. the United Kingdom*, (Application no. 6339/05), Judgment, Strasbourg, 7 March 2006 upheld in *Evans vs. the United Kingdom*, (Application no. 6339/05), Judgment, Strasbourg, 10 April 2007.

<sup>25</sup> Andrew Clapham (2007), *Human Rights: A Very Short Introduction*, (New York: Oxford University Press), at 47.

<sup>26</sup> *Evans vs. the United Kingdom*, (Application no. 6339/05), Judgment, Strasbourg, 7 March 2006.

<sup>27</sup> Susan Marks & Andrew Clapham (2005), *International Human Rights Lexicon*, (New York: Oxford University Press), at 387.

contribution to the drafting process of the few non-Western participants.<sup>28</sup> The other is the theory according to which the UDHR and the 1966 Covenants represent a “distillation” of the interaction of many cultures over time, hence these texts cannot be the depiction of only one stream of thought.<sup>29</sup>

As suggested in earlier paragraphs, despite the explicit endorsement of universality in the Vienna Declaration, in political discourse objections continue to be raised. Much has been said and written about the Asian emphasis on community rather than on the individual and the primacy of economic development, whereas political rights are given a backseat. Political discourses in the ‘Western space’ – for example USA’s rejection of economic, social and cultural rights – and Latin America – in respect to the rights of indigenous people – pose challenges to the concept of universality, maybe as strong as the emblematic Asian speech. It is argued by some, that the discourse of cultural diversity does not have its roots in contextuality but in the arbitrariness of leaders who seek to shield their domination from any kind of opposition.<sup>30</sup>

The ‘high’ spheres of political discourse have to be juxtaposed with the day-to-day human being’s concerns. It is doubtful that human beings in Africa, the Americas, Asia, Europe, the Middle East or elsewhere will answer “the irrefutable democratic test” in a different manner: “[j]ust ask any human being: Would you like to live or be killed? Would you like to be tortured or enslaved? Would you like to live freely or in bondage? Would you like to have a say in how you are governed?”<sup>31</sup> Indeed, this asserts the concept of “universality as an existential reality”.<sup>32</sup>

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<sup>28</sup> Charles Habib Malik of Lebanon, Chang Peng-Chung of China, and Mrs. Metha from India are mentioned as essential contributors during the drafting process of the UDHR. A rather important objection to the ‘Western birth defect’ of the UDHR is made by Tomuschat who acknowledges the strong presence and influence of the socialist states in the General Assembly and Human Rights Commission, hence the impossibility to have a document expressing exclusively Western traditions. Christian Tomuschat (2003), *Human Rights: Between Idealism and Realism*, (Oxford: Oxford University Press), at 63; Andrew Clapham (2007), *Human Rights: A Very Short Introduction*, (New York: Oxford University Press), at 43.

<sup>29</sup> Bertrand Ramcharan, “The Universality of Human Rights”, *International Commission of Jurists Review*, 1994, at 105; *Statement by Mary Robinson*, United Nations High Commissioner for Human Rights, during the conference “The Universality of Human Rights” organized by Weltachsen 2000, Bonn, 11 November 1999.

<sup>30</sup> Adamantia Pollis, “Cultural Relativism Revisited: Through a State Prism”, 18 *2 Human Rights Quarterly*, 1996, at 330-331; Christian Tomuschat, *op.cit.*, at 77.

<sup>31</sup> Bertrand G. Ramcharan, “The Universality of Human Rights”, *International Commission of Jurists Review*, 1994, at 105.

<sup>32</sup> Clarence J Dias as quoted in Eva Brems (2001) *Human Rights: Universality and Diversity*, (The Hague: Martinus Nijhoff Publishers), at 10.

Considering all objections as illegitimate would mean however to persist in a somewhat imperialist endeavor. The feeling of lack of cultural legitimacy of international human rights should be addressed; An-Na'im suggests that cultural legitimacy – the extent to which standards are perceived as justified, proper and appropriate – can be addressed through a “cross-cultural critique of behaviour which builds on locally accepted norms.”<sup>33</sup> The logic behind such attempts is not necessarily to undo a past wrong, i.e. the lack of representation in the early days of the human rights movement, but rather to construct universal appreciation for human rights through enlightened interpretations of cultural norms.<sup>34</sup> In the same time, it is important to mention that the construction of legitimacy does not amount to a quest for universalism. Universalism implies eliminating particularity and achieving uniformity at global level, whereas universality is “the attempt to bring about and develop the global resonance of particular ideas”<sup>35</sup>. Hence not uniformity but generality is sought; the advantage of seeking generality is that the possibility of change is acknowledged both in the sense of accommodating particularity within the principle of universality and adjusting the particularity to conform to universality.

### **II. 3. Concluding with the need for protection**

The historical section and the one discussing the relation between universality and particularity reveal three main aspects. The first is the meaning of universality as general and worldwide applicability or all inclusiveness. Secondly, the intrinsic relation between the concept of universality and international human rights was underlined. The third finding amounts to some sort of paradox. Although largely embraced by the international community universality continues to be challenged both at normative and at implementation level. Whereas some criticism seeks to widen the cultural legitimacy of the concept by including particular rights or by stressing the need for attention to national and cultural contexts, other claims function as justifications of human rights abuses in the name of cultural diversity. To draw the distinction between legitimate claims and manipulation attempts cannot be an easy task. However, not differentiating means making the universality principle an easy target. The consequences of such an attitude need not be dark but if history is to teach us something then

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<sup>33</sup> Cf. Andrew Clapham (2007), *Human Rights: A Very Short Introduction*, (New York: Oxford University Press), at 44-43; Susan Marks & Andrew Clapham (2005), *International Human Rights Lexicon*, (New York: Oxford University Press), at 395.

<sup>34</sup> See supra note 33.

<sup>35</sup> Susan Marks & Andrew Clapham (2005), *International Human Rights Lexicon*, (New York: Oxford University Press), at 398.

it is the fact that they can be dark. In the view of their intrinsic relationship, weakening the principle of universality would in turn weaken human rights.

International protection of human rights is “firmly established in international law”; it has become to be regarded as a necessity and as practice shows it is an activity performed by the United Nations bodies and beyond.<sup>36</sup> As a corollary and given the above conclusions, it is not sufficient to seek the protection of human rights, the principle of universality of human rights must be equally protected against unjustified weakening attempts, hence universality *per se* must become the object of protection. Such protection is crucial for the enjoyment of all human rights by all.

### **III. The United Nations High Commissioner for Human Rights as protector of universality**

The current section of the paper will look at the United Nations High Commissioner for Human Rights (UN HCHR)<sup>37</sup> and make a case for his/her responsibility to protect the principle of universality as a pillar of the human rights regime. A short history of the vision of a High Commissioner and the actual establishing of the post will be presented, as well as the mandate and elements of past activity of the UN HCHR.

#### **III.1. The vision of a High Commissioner for Human Rights**

It was not until 1993 that the post of the UN HCHR was established, but projects envisaging a human rights commissioner or an ombudsman long predated the actual founding. Ever since the adoption of the UDHR, discussions have been ongoing in the UN Commission on Human Rights as well as in the General Assembly and not least in NGO circles.<sup>38</sup>

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<sup>36</sup> B.G. Ramcharan (1989), *The Concept and Present Status of the International Protection of Human Rights: Forty Years after the Universal Declaration*, (Dordrecht: Martinus Nijhoff Publishers), at 9 and 17-36.

<sup>37</sup> Although it is acknowledged that the personality of the HCHR is a significant factor in the manner he/she fulfills the mandate, this paper will try to avoid as much as possible reference to specific High Commissioners, i.e. avoid personalization of the function, merits and eventual faults, and rather deal with the post.

<sup>38</sup> Felice D. Gaer, “Review of *The United Nations High Commissioner for Human Rights* by Bertrand Ramacharan”, 98 2 *The American Journal of International Law*, April 2004, at 391. See also Roger Stenson Clark (1972), *A United Nations High Commissioners for Human Rights*, (The Hague: Martinus Nijhoff Publishers).

One writer identifies the cause of non-materialization of these projects in the polarized world of the Cold War period.<sup>39</sup> Such assessment may indeed be consistent with the *Realpolitik* of that time in which human rights were utilized as a tool in the fight for supremacy and less as a goal worth promoting or protecting for its value *per se*. As a corollary, it is suggested that an independent high commissioner for human rights, given its potential power, was perceived as threatening the larger economic and political interests of many states.<sup>40</sup> Another cause and in the same time legitimation for the reluctance might be found in the early interpretation of Article 2.7 of the UN Charter. The UN is prohibited from intervening “in matters which are essentially in the domestic jurisdiction of any state”.<sup>41</sup> The understanding of the ‘old doctrine’ was that the relationship between a state and its citizens was part of this *domaine réservé*, hence this interpretation was used to block any attempt by UN political organs to deal with human rights issues occurring in domestic context.<sup>42</sup>

With time, the validity of the objection arguing the domestic jurisdiction of states in relation to human rights diminished to the point of vanishing.<sup>43</sup> Against this development, the Division of Human Rights was reorganized in 1982 into the Centre for Human Rights while the head of the Centre received greater standing by being reclassified as Assistant Secretary-General.<sup>44</sup>

As it is well known, with the demise of the Iron Curtain, the world witnessed a magnificent change: the assertion of one dominant political ideology and of opportunities for the international human rights movement, but also an unprecedented eruption of what seemed to be ethnic violence. In this context, the General Assembly, informed by the recommendation of the Vienna World Conference<sup>45</sup>, took upon itself the mandate to strengthen the United Nations human rights program. Two different interpretations of how the UN General

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<sup>39</sup> Alfred-Maurice de Zayas (2000), “United Nations High Commissioner for Human Rights” in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, (Amsterdam: Elsevier), at 1129.

<sup>40</sup> Alfred de Zayas (2002), “Human Rights, United Nations High Commissioner for”, in Helmut Volger (ed), *A Concise Encyclopedia of the United Nations*, (The Hague: Kluwer Law International), at 219.

<sup>41</sup> UN Charter, Art. 2.7.

<sup>42</sup> See on the ‘old doctrine’ interpretation of Art. 2.7 Christian Tomuschat, *op.cit.*, 114-115.

<sup>43</sup> See for an explanation Bertrand Ramcharan (2005), *A UN High Commissioner in Defence of Human Rights: “No License to Kill or Torture”*, (Leiden: Martinus Nijhoff Publishers), at 40-42.

<sup>44</sup> The following resolutions of the General Assembly were the basis for this change: UN GA Res. 34/47 of 23 November 1979, available at <http://www.un.org/documents/ga/res/34/a34res47.pdf>; UN GA Res. 35/194 of 15 December 1980, available at <http://www.un.org/documents/ga/res/35/a35r194e.pdf> and GA Res. 37/237 of 21 December 1982, available at <http://www.un.org/documents/ga/res/37/a37r237.htm>, (last visited 21 November 2007).

<sup>45</sup> World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 25 June 1993, Section II, Para. 18, available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument), (last visited 20 November 2007).

Assembly understood to fortify the human rights program are eloquent. On one hand, de Zayas emphasizes the creation of a “strong *office* which would be able to *react* effectively to gross human rights violations”<sup>46</sup>; Ramcharan, on the other hand, sustains that “[i]t was mainly with a view to spearheading the *protection* activities of the United Nations that the position of *High Commissioner* was established.”<sup>47</sup>

### **III.2. The mandate of the HCHR: a case for the protection of the universality principle of human rights**

Despite the favorable period in which it was designed, it is clear that the General Assembly Resolution 48/141 of 20 December 1993<sup>48</sup> laying out the functions and responsibilities of the High Commissioner is a compromise solution.<sup>49</sup> The consequences of this compromise will be stressed below, but firstly an analysis of the mandate is in order.

The responsibilities of the UN HCHR are sweeping and an exact enumeration goes beyond the scope (and the limited space) of this paper.<sup>50</sup> Given the essay’s topic, the protection and universality-related tasks will be emphasized. Hence, the HCHR is called upon:

- “To promote and protect the effective enjoyment by all of all civil, cultural, economic, political and social rights” (4(a)). Essential to retain is the focus on universality and indivisibility of rights, reinforced by Paragraph 4(f), which stresses the full realization of “all” human rights and the prevention of violations “throughout the world”. In a Herculean effort, the HCHR is to make human rights reality in every corner of the world or in other words to act as the moral voice of the UN system in human rights issues.
- “To engage in a dialogue with all governments in the implementation of his/her mandate with a view to securing respect for all human rights” (4(g)). Again, in what some might perceive as an obsessive repetition, the word “all” is mentioned in respect to the states the HCHR is to address but also in relation to the rights it is to promote and protect. According to one interpretation, this phrase corroborated with the responsibility of the

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<sup>46</sup> Alfred-Maurice de Zayas (2000), “United Nations High Commissioner for Human Rights” in Rudolf Bernhardt, *Encyclopedia of Public International Law*, (Amsterdam: Elsevier), at 1129 (emphasis added).

<sup>47</sup> Bertrand Ramcharan (2005), *A UN High Commissioner in Defence of Human Rights: “No License to Kill or Torture”*, (Leiden: Martinus Nijhoff Publishers), at 42 (emphasis added).

<sup>48</sup> GA Res. 48/141 of 20 December 1993, available at <http://www.un.org/documents/ga/res/48/a48r141.htm>, (last visited 21 November 2007).

<sup>49</sup> See supra note 47.

<sup>50</sup> The omission of the right to development and the responsibilities of the HCHR in connection to it should by no means be interpreted as an attribution of low importance.

High Commissioner to make recommendations to the UN bodies with a view to improve “the promotion and protection of all human rights”(4(b)) can be translated in a “broad power of initiative”<sup>51</sup>. The HCHR appears to be shaped by these provisions as a political figure.

- “To coordinate the human rights promotion and protection activities throughout the United Nations system” (4(e)) and assure “efficiency and effectiveness” of the UN human rights machinery (4(j)) while supervising the activity of the Office of the High Commissioner (4(k)).<sup>52</sup> A bureaucratic mantle is also given to the HCHR.

Generally, the HCHR is envisaged to be “the United Nations official with principal responsibility for United Nations human rights activities under the direction and authority of the Secretary-General” (4).

Two essential conclusions are to be drawn out of the above presentation. Firstly, an embedded tension as a continuation of the fears and reluctance pinpointed in the previous historic section is evident. On the one hand, it is fair to say that the High Commissioner is entrusted with a wide, almost inhumane mandate for a single human. Hence, it can be argued the HCHR possesses significant powers. However, this hybrid mandate – covering moral, political and bureaucratic functions – particularly through its width, might obstruct the work of the High Commissioner since he/she is expected to perform a balancing act between the different components. Its position subordinated to the Secretary General and acting under the authority and decisions of the General Assembly, the Economic and Social Council and the Human Rights Council<sup>53</sup> restricts his/her independence and space of maneuver and further complicates the balancing act. As explained by Bertrand Ramcharan politics play an important part and serious diplomatic skills are needed even for such issues as assuring finances from the responsible committee of the General Assembly in order to fulfill the mandate attributed to it by the same General Assembly.<sup>54</sup>

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<sup>51</sup> Alfred-Maurice de Zayas (2000), “United Nations High Commissioner for Human Rights” in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, (Amsterdam: Elsevier), at 1130.

<sup>52</sup> The exact phrase of para 4(k) reads: To carry out overall supervision of the Centre for Human Rights, however the Center was renamed Office of the United Nations High Commissioner for Human Rights.

<sup>53</sup> Initially the Commission on Human Rights was mentioned together with the General Assembly and the Economic and Social Council in Para. 4.

<sup>54</sup> Bertrand Ramcharan (2005), *A UN High Commissioner in Defence of Human Rights: "No License to Kill or Torture"*, (Leiden: Martinus Nijhoff Publishers), at 43.

The second aspect to be emphasized from the description of the HCHR's responsibilities and functions, is the universality aura surrounding its mandate. Universality plays a central role to the mandate, with explicit references appearing in the preamble as well as in the operative clauses of the General Assembly's Resolution. In fact, the mandate of the High Commissioner echoes the slogan of the UDHR "all human rights for all". Given these facts, and having in mind the discussion in part I of this paper and its conclusion, i.e. the universality principle as such must benefit from protection; it would thus be legitimate to claim that the High Commissioner is the designated protector of universality.

Critics might argue that the expression, 'protection of the universality principle' does not appear *ad litteram* in the mandate of the HCHR. Nonetheless, inferring it from the mandate would merely mean to interpret the Resolution in accordance with established rules by taking into account object and purpose and the context of adoption, as well as the practice of the High Commissioner.<sup>55</sup>

As just mentioned, it surely does not come as a surprise that different personalities who occupied the post of High Commissioner did in fact act for the protection of universality. Among (new) instances of 'practical' protection of universality one can list the integration process of human rights into all aspects of UN dealings – for example in conflict prevention, peace keeping, peace building, or in the activity of the Counter-Terrorism Committee.<sup>56</sup> Further, the concept of national protection systems reflects the objective stressed by the Secretary General, i.e. "the emplacement or enhancement of a national protection system in each country, reflecting international human rights norms"<sup>57</sup>, as well as the High Commissioner's view that strengthening the rule of law is a key goal, as it would entrench the universality of human rights.<sup>58</sup> Yet another example is the establishment of regional offices<sup>59</sup>, envisaged by some to "spearhead" the activities of the Office of the High Commissioner in

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<sup>55</sup> *Vienna Convention on the Law of Treaties*, entered into force 1980, Art. 31 available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf), (last visited 21 November 2007).

<sup>56</sup> Bertrand Ramcharan (2005), *A UN High Commissioner in Defence of Human Rights: "No License to Kill or Torture"*, (Leiden: Martinus Nijhoff Publishers), at 46 and 49.

<sup>57</sup> Report of the Secretary General, Strengthening of the United Nations: and agenda for further change, 2002, A/57/150, available at <http://portal.unesco.org/es/files/12698/10545492181unc133e.pdf/unc133e.pdf>, (last visited 21 November 2007).

<sup>58</sup> High Commissioner Sergio Vieira de Mello as quoted in Felice D. Gaer, "Review of *The United Nations High Commissioner for Human Rights* by Bertrand Ramcharan", 98 *The American Journal of International Law*, April 2004, at 391.

<sup>59</sup> There are 7 regional offices currently, with 3 more being planned to open. See Regional Offices/Centers available at <http://www.ohchr.org/english/countries/field/field-information.htm#regional>, (last accessed 21 November 2007).

crucial areas such as the role of national courts in protection of human rights or development of human rights education.<sup>60</sup> Hence, these examples serve to prove that the ‘universality talk’ represents the root to action.

#### **IV. The test: universality and the Cairo Declaration on Human Rights in Islam**

Once established that the protection of universality is a crucial element for the further strengthening of the human rights regime and once its protector identified the last step of this paper will be undertaken. The concept of universality will be put to test of the Cairo Declaration on Human Rights in Islam (CDHRI) and the activity of the High Commissioner will be analyzed in order to carve out the protection activity.

Before entering the substance, it needs to be said that other acts or documents – or what was called in the introduction ‘arrangements’ – that can be seen to pose challenges to the universality principle could have been chosen for analysis. To name just a few: reservations and declarations on treaty articles<sup>61</sup>; attempts of reinterpreting the definition and scope of applicability of torture in the context of the ‘war on terror’; the view according to which economic, social and cultural rights are not ‘proper’ rights; or the already mentioned East Asian objections. The decision to tackle the CDHRI rests in the first place on the importance of the organization from which the Declaration emanated and secondly an element of subjectivity comes into play.<sup>62</sup>

##### **IV. I. The provisions of the CDHRI and their interpretation**

In the next paragraphs, an analysis of the CDHRI will be put forward<sup>63</sup>, throughout which the elements of universality or lack thereof will be emphasized. But firstly, in order to correctly seize the importance of the CDHRI it is necessary to mention the fact that the Organization of

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<sup>60</sup> See supra note 59.

<sup>61</sup> See for example on this issue termed in the context of the USA as “American cultural relativism” Johan D. Van Der Vyver, “Universality and relativity of human rights: American relativism”, *Buffalo Human Rights Law Review*, 1998, at 65-78.

<sup>62</sup> In other words, my interest for sociological analysis and the history of religions.

<sup>63</sup> The analysis draws on the Cairo Declaration as primary source, as well as on Eva Brems, op.cit., and Audrey Guichon (2007), “Some Arguments on the Universality of Human Rights in Islam”, in Javaid Rehman & Susan C. Breau (ed), *Religion Human Rights and International Law: A Critical Examination of Islamic State Practice*, (Leiden: Martinus Nijhoff Publishers).

the Islamic Conference (OIC), the institution that put its signature on the Declaration<sup>64</sup> is the second largest organization after the UN, representing 1/5 of the world's population and 24% of its surface.<sup>65</sup> The Islamic Conference of Foreign Ministers adopted on 5 August 1990 the Cairo Declaration to “serve as a general guidance for Member States in the field of human rights”.<sup>66</sup> Later the forum requested that the CDHRI be considered as the contribution of the OIC to the World Conference on Human Rights.<sup>67</sup>

The Cairo Declaration consists of a preamble clause and 25 articles. Eva Brems considers that the CDHRI conforms to the “genre of a human rights declaration” and counts this aspect as one of universality.<sup>68</sup>

Most human rights have a place in the CDHRI. The impartiality of a tribunal and the presumption of innocence principle are referred to in article 19(e). In respect to economic rights, the right to private property (15, 16) and the right to an adequate standard of living (14) are mentioned. Also present is the protection of private life (4, 18) and the right to freedom of movement and to seek asylum (12 – although it is unclear if these extend to women since the bearer of the rights is referred to as ‘he’ and ‘his’).

However, in comparison with the Universal Declaration of Human Rights some rights retain a particular formulation. For example, article 1(a) proclaims that “[a]ll *men* are equal in terms of basic *human dignity and basic obligations and responsibilities*, without any discrimination on the grounds of race, color, language, sex, religious belief, political affiliation, social status

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<sup>64</sup> As a matter of comprehensiveness it needs to be mentioned that the CDHRI is not the first document dealing with the human rights in the Islam. A previous initiative was the Universal Islamic Declaration of Human Rights, coming from a London based private organization sponsored by Saudi Arabia. See Heiner Bielefeld, ““Western” versus “Islamic” Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion on Human Rights”, 28 *1 Political Theory*, Feb. 2000, at 105.

<sup>65</sup> Currently the OIC has 57 members Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Benin, Brunei Darussalam, Burkina Faso, Cameroon, Chad, Comoros, Côte d'Ivoire, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Guyana, Indonesia, Iran (Islamic Rep), Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libyan Arab Jamahiriya, Malaysia, Maldives, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Oman, Pakistan, *Palestine*, Qatar, Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan, Suriname, Syrian Arab Republic, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, Uzbekistan, Yemen.

<sup>66</sup> Organization of the Islamic Conference, *Cairo Declaration on Human Rights in Islam*, 5 August 1990, available at [www.oic-oci.org/english/article/human.htm](http://www.oic-oci.org/english/article/human.htm), (last visited 21 November 2007).

<sup>67</sup> Conference Mondiale Sur Les Droits De L'homme, Comité préparatoire, Quatrième session, Genève, 19 avril - 7 mai 1993, A/CONF.157/PC/62/Add.18, available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/2848af408d01ec0ac1256609004e770b/756c9c37a4f4262d802568fd00524837?OpenDocument>, (last visited 22 November 2007).

<sup>68</sup> Eva Brems (2001) *Human Rights: Universality and Diversity*, (The Hague: Martinus Nijhoff Publishers), at 289.

or other considerations.” Concerning the term ‘men’ any feminist would accuse the CDHRI of taking a paternalistic approach, although it is true that ‘men’ was, and in some circumstances still is, used as a synonym for ‘humans’. As a matter of contrast, the UDHR already in 1948 speaks of human beings in a quasi-equivalent article.<sup>69</sup> Even more peculiar is this choice, given that later in the text of the Declaration itself the term ‘human beings’ is used (8). Beyond this feminist critique, however another point might be of more significance: the equality in ‘human dignity, obligations and responsibility’. A similar formulation appears in article 6, i.e. “woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform”. Some authors note that there is nothing specific discriminatory in the provision, but then go on to highlight that equality in *rights* is omitted.<sup>70</sup> Hence, it certainly is ambiguous what equality in dignity means.

The role of Shari'ah in the interpretation of the Cairo Declaration will be addressed in more detail below; nonetheless it is important to mention here that many provisions of the CDHRI are qualified by the compliance with Islamic law. For example, the right to life is guaranteed, but life can be taken for a Shari'ah-prescribed reason (2(a)), and the prohibition on inflicting physical harm is upheld, except in the case of a Shari'ah-prescribed reason (2(d)). Article 19(d) states that “[t]here shall be no crime or punishment except as provided for in the Shari'ah and article 23(b) provides that “[h]e shall also have the right to assume public office in accordance with the provisions of Shari'ah”. Moreover, freedom of opinion and the right to assume public office are restricted by the principles of Shari'ah (22(a)).

Some rights listed by the UDHR are absent from the CDHRI, among which the freedom of religion and freedom of assembly and association. However, other rights, which are not present in the International Bill of Human Rights, but appear in specific international treaties are present in the Cairo Declaration. Among these are: the prohibition of genocide (2 (b)), some rules of humanitarian law, e.g. the principle of distinction is asserted and the prohibition to mutilate dead bodies (3), the right to live in a clean environment (17) and the prohibition of taking hostages (21). Other rights not listed by universal instruments appear in the CDHRI. One could list: the collective right of the state and society to protect the dead body and the burial place (4); the rights parents have vis-à-vis their children, and relatives against their kin

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<sup>69</sup> Universal Declaration of Human Rights, Art. 1.

<sup>70</sup> Heiner Bielefeld, ““Western” versus “Islamic” Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion on Human Rights”, 28 *1 Political Theory*, Feb. 2000, at 105; Eva Brems, op.cit., 263.

(7(b)); the right to an environment free of vice and moral corruption (17 (a)); the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil (22(b)).

The discussion of the preamble and the two concluding articles were left for the end of this analysis, since these represent the key of the reading of the Declaration. The preamble expresses the goal of the OIC member states in adopting the Cairo Declaration “to contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari'ah” (P2). The forth part of the preamble reads: “rights and universal freedoms in Islam are an integral part of the Islamic religion and [...] no one as a matter of principle has the right to suspend them in whole or in part or violate or ignore them in as much as they are binding divine commandments, which are contained in the Revealed Books of God”. The immediate questions that arise are the following:

1. Is Islamic Shari'ah the measure for freedom and life in dignity or could such rights exist outside it?
2. How should the ‘in as much’ provision be understood? In other words, would universal human rights that are not endorsed by the divine commandments be necessarily dismissed?

Articles 24 and 25 come to authoritatively clarify the dilemma. Indeed, “[a]ll the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah” and the latter is “the only source of reference for the explanation or clarification of any of the articles of this Declaration.” To conclude bluntly, not inherent human dignity is the source of rights, but Islamic Shari'ah. A stringent contradiction with the Universal Declaration of Human Rights. As striking as the difference between the CDHRI and the UDHR may be, a different interpretation, however, need not be valued negatively merely on grounds of being different. Especially in the view of the discussion in the first part of this essay that advocated the need to include legitimate claims of particularity in the concept of universality, the nature and extent of the contradiction with the Universal Declaration of Human Rights need to be carved out. In order to observe the legitimacy of some of the proposals of the Cairo Declaration the interpretation of the Shari'ah will be sought. At this point, it is important to acknowledge that not only one interpretation of Islamic law exists, whereby some are more literal while other are said to be modernist.

Among the most contentious issues in the Cairo Declaration are the ones related to gender equality and freedom of religion. Article 5(a) can be regarded as dealing with both mentioned issues, therefore it will be interpreted as expressly required by article 25, in accordance with Shari'ah law. To start with, article 5(a) states: “The family is the foundation of society, and marriage is the basis of its formation. Men and women have the right to marriage, and no restrictions stemming from race, color or nationality shall prevent them from enjoying this right.” As one surely notices, while race, nationality and ‘color’ are duly stated, no mention in this anti-discrimination clause is made of religion. Guided by article 25, one may wonder what are the provisions of the Islamic law on inter-religious marriage. Shaheen Sardar Ali, talks about two Qur’anic injunctions that “enjoin strict monogamy on women” and “confine her to a Muslim spouse”. In the same time, men may be polygamous by having up to four wives simultaneously from among “kitabia”. As she explains, ‘kitabia’ (kitab is the Arabic term for book) refers to women of the book, meaning professing one of the revealed religions, i.e. Islam, Christianity and Judaism.<sup>71</sup> Put otherwise, inter-religious marriage is permitted for men, but nor for women. Subscribing to Ali’s assessment, these provisions on marriage form a discriminatory category of rights. Can discrimination based on sex and religion be framed as a legitimate challenge to the universality principle while grounding its reasoning on cultural difference? The negative answer is self-evident.

It is a matter of customs that domestic law is interpreted in accordance with international norms and not vice versa. It is Shari'ah norms which must be interpreted, as An-Na'im suggests, in an ‘enlightened’ fashion, so as to conform to the universality principle not the other way around. Shari'ah norms (or interpretations thereof) that work towards the inclusion of rights, supplementing rights bearers with due regard to the respect of other human rights, shall receive their merited influence upon the principle of universality. However, when discriminatory interpretations of Islamic law are presented as expressions of cultural diversity this use is nothing more than an attempt to shield abuse from criticism. These attempts then, not addressed properly, do erode the principle of universality of human rights and open the door to more abuse.

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<sup>71</sup> Shaheen Sardar Ali, (2000), *Gender and Human Rights in Islam: Equal Before Allah, Unequal Before Man?*, (The Hague: Kluwer Law International), at 73-74. See also Majid Khadduri, “Marriage in Islamic Law: The Modernist Viewpoints”, 26 *The American Journal of Comparative Law*, Spring 1978, at 214 and Audrey Guichon (2007), “Some Arguments on the Universality of Human Rights in Islam”, in Javaid Rehman & Susan C. Breau (ed), *Religion Human Rights and International Law: A Critical Examination of Islamic State Practice*, (Leiden: Martinus Nijhoff Publishers), at 191.

## IV.2. The HCHR and the Cairo Declaration

The response of the High Commissioner of Human Rights to the Cairo Declaration will be measured against the concept developed by this paper, meaning the need to protect universality. In other words, this section will analysis if the HCHR stepped up to its role of protector of universality.

The reaction of the HCHR upon the adoption of the Cairo Declaration is obviously inexistent, for the obvious reason that the High Commissioner did not exist in 1990. During this period, civil society organizations, among which also the International Commission of Jurists, sought to signalize the problems the CDHRI posed to the concept of universality and criticized in strong terms the veiled discrimination of women and non-Muslims.<sup>72</sup> Wennergren, a Human Rights Committee member, noted on several occasions during sessions of the ICCPR body in the early 1990s, that the Cairo Declaration on Human Rights in Islam “imposed considerable restrictions vis-à-vis the Covenant” and went on to assert that “it would be materially impossible for a State party which gave priority to the principles set out in the Cairo Declaration to implement the Covenant to the full.” He exemplified with provisions from the CDHRI, which in his view constituted infringements on freedom of expression and safety from bodily harm.<sup>73</sup> In conclusion, once the High Commissioner entered the Geneva scene, there was a fairly amount of criticism of the Cairo Declaration coming from both NGOs and UN bodies; hence, it is important to look at the actions of the High Commissioner against this background.

As protector of universality, two strategies could have been adopted by the High Commissioner. The first one would have consisted in the denunciation of the Cairo Declaration as an instrument that threatens the principle of universality. Such a step would have implied a serious and detailed study by the OHCHR of the encroachments on human rights principles and law of the provisions of the CDHRI and/or a public statement of the

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<sup>72</sup> International Commission of Jurists and International Federation of Human Rights, *Press Release*, Geneva, 5 December 1991.

<sup>73</sup> CCPR, Human Rights Committee, *Summary Record of the 1252<sup>nd</sup> meeting: Iran (Islamic Republic of)*, 27 June 1994, CCPR/C/SR.1252, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.SR.1252.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.SR.1252.En?Opendocument), (last visited 25 November 2007); CCPR, Human Rights Committee, *Summary Record of the 1244<sup>th</sup> meeting: Egypt*, 7 June 1994, CCPR/C/SR.1244, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.SR.1244.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.SR.1244.En?Opendocument), (last visited 25 November 2007).

High Commissioner addressing these issues. A second approach would have been to address the matter in joint events with members of the Organization of the Islamic Conference and carve out together the legal standing of the Cairo Declaration and the interpretation attributed to the document on ‘sensitive’ issues. Summarizing, the first strategy would amount to a ‘naming and shaming’ technique, whereas the second is closer to what one understands under good office or quiet diplomacy. Arguments in favor/against both strategies are abundant and it is realistic to say that either way the choice would have been made, criticism surely was to be expected.

In a written statement submitted to the Commission on Human Rights, the Association for World Education evokes the Iranian Foreign Minister’s call, made during the 50 years commemoration session of the UDHR, for a “revision of the UN’s Universal Declaration of Human Rights.”<sup>74</sup> As a response to this and other similar calls, in 1998 the High Commissioner for Human Rights jointly hosted with the Organization of the Islamic Conference a seminar entitled *Enriching the Universality of Human Rights: Islamic Perspectives on the Universal Declaration of Human Rights*.<sup>75</sup> The “academic seminar” brought together twenty experts in Islamic Law and human rights and 90 governments and 40 non-governmental organizations sent observers.<sup>76</sup> In 2002, the High Commissioner participated at the OIC *Human Rights in Islam and Protection of its Basic Freedoms* Symposium organized as an effort “to protect Man against utilization and persecution; to safeguard his life, body, property and honour; as well as emphasize his freedom and rights in an honourable life in conformity with the Sharia”.<sup>77</sup> The Cairo Declaration was considered “an important documentary reference for the Symposium.”<sup>78</sup>

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<sup>74</sup> ECOSOC, Commission on Human Rights, Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights, *Written statement submitted by the Association for World Education*, 12 February 2003, E/CN.4/2003/NGO/225, available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/4bfebe8da116e9eec1256cf00031ce80/\\$FILE/G0311990.doc](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/4bfebe8da116e9eec1256cf00031ce80/$FILE/G0311990.doc), (last visited 26 November 2007).

<sup>75</sup> OHCHR, *Enriching the Universality of Human Rights: Islamic Perspectives on the Universal Declaration of Human Rights*, available at <http://www.unhcr.ch/html/50th/islamp1.htm>, (last visited 25 November 2007).

<sup>76</sup> See supra note 75.

<sup>77</sup> Organization of the Islamic Conference, “OIC Symposium on Human Rights in Islam at Geneva”, *Press Release*, 10 March 2002, available at <http://www.oic-un.org/pr/2002/108.html>, (last visited 25 November 2007); Organization of the Islamic Conference, “The High Commissioner Addresses the OIC Symposium on Human Rights in Islam”, *Press Release*, 15 March 2002, available at <http://www.oic-un.org/pr/2002/110.html>, (last visited 25 November 2007).

<sup>78</sup> Organization of the Islamic Conference, “OIC Symposium on Human Rights in Islam at Geneva”, *Press Release*, 10 March 2002, available at <http://www.oic-un.org/pr/2002/108.html>, (last visited 25 November 2007).

The above appears to make clear that the variant opted for by the High Commissioner rather corresponds to the second described strategy; in the remainder an analysis will be put forward with a focus on the constraints faced by the HCHR and the advantages, disadvantages respectively of the decision made.

To begin with one must take into consideration the limitation the High Commissioner is facing in the decision-making process regarding the approach to adopt in relation to the Cairo Declaration and the debate sparked by it. It has become a truism that ‘politics matters’. Indeed as was pointed out in an earlier section the High Commissioner is at times under tremendous political pressure and a prioritization of his/her objectives is needed in order to be able to efficiently and effectively improve the human rights condition of individuals. A ‘naming and shaming’ approach, while having the benefit of addressing the problem at hand in a direct and incisive way, could have easily alienated an important group of Muslim states which long felt excluded from the human rights movement. Along these lines, an out-front condemnation might have meant a solidification of the perception of exclusion. Moreover, it is unclear in how far the confrontational policy would have reached its purpose – improvement of the human rights situation on the ground – or rather it would have provoked a boomerang effect, hence a weakening of the adhesion to human rights norms by the states in question. Spillover in other domains where cooperation of individual OIC members or the OIC as an institution was needed could have been another side-effect of a ‘naming and shaping’ strategy. Lastly, possible accusations of Islamophobia coming from some circles could not have been excluded.

One of the major merits of the approach chosen by the High Commissioner is its consistency with the universality principles. Certainly, dialogue and exchange of views answer to the grievance of some Muslims, to the need for inclusion and does promote a better understanding of the positions of the ones involved. One might recall the mentioned criticism regarding the ‘birth defect’ of the Universal Declaration of Human Rights; debates and discussions on the Cairo Declaration, Islamic law and its relation to international human rights standards should preciously avoid excluding a number of states from the human rights movement. That this was the logic behind the 1998 seminar is clear from the words of the then HCHR: “I believe this process will help promote understanding and respect among peoples” and “[i]n

organizing this seminar I wanted to show that the United Nations was open for dialogue and ready to listen to those who seek better protection for human rights.<sup>79</sup>

Some critics of the High Commissioner's choice to open a dialogue stressed that this option transmits a message of endorsement of the Cairo Declaration and casts doubts about the role of the High Commissioner to uphold universality. A Muslim researcher from the European Institute at the University of Geneva, wondered if the 1998 seminar is the beginning of a new Universal Declaration of Human Rights? "To accept this type of manifestation risks opening a breach in the universality of human rights. Worse, this seminar could constitute support for political attitudes totally in contradiction with the fundamental principles of human rights."<sup>80</sup> The seminar and the participation of the HCHR in events organized by the Organization of the Islamic Conference was depicted as opening the way to further questioning of the UDHR based on religious grounds.

In order to have a fairly complete picture of the adopted approach and the management of the situation two more aspects need to be underlined. The High Commissioner stated, including in her final statement concluding the 1998 seminar that her understanding is that no one has denied the universality of international human rights standards.<sup>81</sup> Secondly, a straightforward interpretation of the Cairo Declaration was provided by the legal adviser to the High Commissioner upon request of an NGO – although, as the NGO notes, rather late. According to this: "The Member States which have acceded to and ratified United Nations Human Rights Conventions remain bound, under all circumstances, by the provisions of those texts, as well as the *erga omnes* obligations under customary international law."<sup>82</sup>

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<sup>79</sup> Mary Robinson as quoted in David Littman, "Universal Human Rights and "Human Rights in Islam", *Midstream*, February/March 1999; OHCHR, *Personal impressions of the seminar by Mary Robinson, High Commissioner for Human Rights*, available at [http://www.unhchr.ch/hurricane/hurricane.nsf/\(Symbol\)/OHCHR.981129.A.En?OpenDocument](http://www.unhchr.ch/hurricane/hurricane.nsf/(Symbol)/OHCHR.981129.A.En?OpenDocument), (last visited 25 November 2007).

<sup>80</sup> Hasni Abidi as quoted in ECOSOC, Commission on Human Rights, *Question of the violation of human rights and human freedoms, Written statement submitted by the Association for World Education*, 9 July 2002, available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2002.NGO.19.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2002.NGO.19.En?Opendocument), (last visited 26 November 2007).

<sup>81</sup> OHCHR, *Personal impressions of the seminar by Mary Robinson, High Commissioner for Human Rights*, available at [http://www.unhchr.ch/hurricane/hurricane.nsf/\(Symbol\)/OHCHR.981129.A.En?OpenDocument](http://www.unhchr.ch/hurricane/hurricane.nsf/(Symbol)/OHCHR.981129.A.En?OpenDocument), (last visited 25 November 2007).

<sup>82</sup> ECOSOC, Commission on Human Rights, Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights, *Written statement submitted by the Association for World Education*, 12 February 2003, E/CN.4/2003/NGO/225, available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/4bfebe8da116e9eec1256cf00031ce80/\\$FILE/G0311990.doc](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/4bfebe8da116e9eec1256cf00031ce80/$FILE/G0311990.doc), (last visited 26 November 2007).

Seen from another angle, it became a matter of common knowledge that in some situations much more can be achieved by addressing issues in a discrete manner than in an open way. The advantage of quiet diplomacy is precisely its quietness, whereas its in-built defect is that one cannot trace the results to the source. It is unclear if and/or how the High Commissioner supplemented the openness towards dialogue with requests for betterment of the human rights records of particular OIC member states. Speculation and intuition suggest that good offices were at stake and a more in depth study might reveal some instances of improvement.

As it is obvious the process of balancing objectives and choosing the right strategy cannot be but a thorny one. Bottom-line, not everyone will be pleased with (any) path chosen and (any) result achieved. Be it as it may, in the end this paper will call attention to the one major failure of the HCHR in its mandate of protecting universality. The inclusion by the High Commissioner's Office of the Cairo Declaration on Human Rights in Islam in the 1997 United Nations *Human Rights: Compilation of International Instruments* is beyond problematic.<sup>83</sup> This action amounts to one crucial outcome: the legitimization of the Cairo Declaration as an international instrument, a standard against which state behavior should be measured and judged.<sup>84</sup> How can this action be explained to the women – proven before – to face discrimination under the Cairo Declaration?

## V. Instead of a conclusion

Time has come for the protector of the universality principle of international human rights to move beyond cross-cultural dialogue towards cross-cultural critique. Perhaps then, the United

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<sup>83</sup> OHCHR, *Human Rights: A Compilation of International Instruments*, Volume II, at 474-85; The issue of the inclusion in the UN Compilation has been raised on several occasions by the Association for World Education, see for example ECOSOC, Commission on Human Rights, Report of the United Nations High Commissioner for Human Rights and Follow Up to the World Conference, *Written statement submitted by the Association for World Education*, 20 December 1999, E/CN.4/2000/NGO/3, available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/115dcea7d457004d802568a100410b02/\\$FILE/G0010308.doc](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/115dcea7d457004d802568a100410b02/$FILE/G0010308.doc), (last visited 26 November 2007). However, the arguments on which the inclusion was challenged – the religious character of the Cairo Declaration – are not convincing to the author, in my view it is rather the legitimating effect of a Declaration the provisions of which can be interpreted to discriminate against women (and others) that uphold the critique of the inclusion.

<sup>84</sup> Since its publication in the mentioned Compilation the CDHRI has been used by a UN body in its assessment of state behavior, see OHCHR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Situation of women in Afghanistan, Sub-Commission resolution 1998/17, available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1998.17.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1998.17.En?Opendocument), (last visited 27 November 2007).

Nation High Commissioner for Human Rights can prove that international law is not gendered, and that that gender is not male.<sup>85</sup>

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<sup>85</sup> To paraphrase Shaheen Sardar Ali, (2000), *Gender and Human Rights in Islam: Equal Before Allah, Unequal Before Man?*, (The Hague: Kluwer Law International), at 232.

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