

'Framing the project' of international human rights law: reflections on the dysfunctional 'family' of the Universal Declaration

1

Anna Grear

'Frames are principles of selection, emphasis and presentation composed of little tacit theories about what exists, what happens, and what matters.'¹

'To frame is to select some aspects of a perceived reality and make them more salient in a communicating text.'²

The task of 'framing the project' of international human rights law is daunting to say the least. First, there is the sheer enormity and complexity of the international human rights law 'project': adequately mapping the subject and its key related issues is impossible in a whole book, let alone a short chapter.³ Secondly, it is daunting because of the sense of epistemic responsibility involved. Every framing inevitably involves selection – if not pre-selection – through the conscious (and/or unconscious) placing of focus upon features or factors considered to be significant and/or valuable.⁴ As Gitlin puts it, framing is a way of choosing, underlining and presenting 'what exists, what happens and what matters'. In this sense, the founding document (or as Entman might put it, the inaugural 'communicating text') of international human rights law (the Universal Declaration of Human Rights, UDHR)⁵ functions as a particularly potent form of framing, for it selects aspects of perceived reality, making them not just salient but symbolically central to the entire philosophical, moral, juridical order designated by the term 'international human rights law'.

Framings, it should be noted, are inescapable – and are always an exercise of epistemic closure or limitation in the sense that frames tend to

¹ T. Gitlin, *The Whole World Is Watching: Mass Media in the Making and Unmaking of the New Left* (Berkeley, CA and London: University of California Press 1980) 6.

² R. M. Entman, 'Framing: Toward Clarification of a Fractured Paradigm' (1993) 43 (4) *Journal of Communication* 51–8 at 52.

³ Joseph and McBeth point out in their editorial introduction to the *Research Handbook on International Human Rights Law* (Cheltenham: Edward Elgar 2010), for example, that it is 'simply impossible to capture' all the relevant issues 'in a single book' (at xiii).

⁴ Not always for reasons that should count as valuable.

⁵ GA Res. 217(111) of 10 December 1948, UN Doc. A/810 at 71 (1948).

draw attention to selected aspects of a perceived ‘something’ at the expense of a host of other candidates for attention producing, in the process, a set of muted or even invisible ‘others’ – a whole range of unfocused-upon factors, features or (for the primary purpose of the discussion here) subjectivities.

Framing choices in international human rights law are particularly influential. International human rights law can be understood as deploying a power verging on the ‘anthropogenetic’ – that is to say, the power precisely to ‘name’ (and thus discursively to ‘create’) the ‘human’ itself. For some readers, this claim may seem counter-intuitive. After all, the international human rights law edifice is usually understood to rest upon the foundation of a notion of the pre-existing ‘natural’ human being. While, however, there is a certain complex truth in the idea that the UDHR and its normative progeny deploy the ‘human being’ as a foundational category, it is also the case, as we shall see in the course of the reflections that follow, that the ‘human’ of international human rights law is, in fact, a highly complex construction taking the form of a ‘universal’ human subject which has been observed, as we shall see, to (re)produce a range of ‘others’ as marginalised subjects. Thus, much as a family photograph might reveal the unconscious favouritisms or oversights of the parent holding the camera, the framing of international human rights law’s universal subject suggests a degree of dysfunction or fracture attending the ‘human family’ evoked by the aspirational text of the UDHR.

This argument, however, will have to wait awhile. In ‘framing the project’ of international human rights law for the purposes of a *Companion* we must surely first introduce at least a rudimentary outline of the project drawn from mainstream, traditional accounts and so provide an account of the project’s broad textual self-enunciation and institutional structure.

Framing the project: traditional accounts

Traditional accounts of the international human rights law project converge to locate it in a rich amalgam of natural law, positive law and an unprecedented international ‘consensus’ ‘on substantive norms with high moral voltage’⁶ at the end of the Second World War. It is generally agreed that the

⁶ B. De Sousa Santos, *Towards a New Legal Common Sense: Law, Globalization and Emancipation* (London: Butterworths 2000) 260.

1945 UN Charter⁷ effectively brought human rights into the sphere of international law – in the process achieving the simultaneous internationalisation of human rights and the birth of the 'human individual' as a subject, rather than an object, of international law.⁸ This development is generally attributed with authoritatively establishing the idea, in normative terms at least, that ensuring respect for human rights should no longer be entrusted solely to the power of the nation state. Ever since the relatively sparse first enunciation in the UN Charter of an international order of human rights, the UN has been widely seen as being instrumental in an apparently ceaseless and expanding process of international human rights standard-setting through an almost kaleidoscopic proliferation of instruments and treaties.

Of all these instruments and treaties, however, one stands out as the iconic matrix from which all international human rights standards take their symbolic and juridical life: the UDHR. This UDHR is widely understood to be the foundation of international human rights law, possessing immense symbolic and rhetorical power and exerting a virtually ineluctable normative traction. It is of note that no state has ever denounced the UDHR, from the moment of its adoption (in 1948) right up until the present day. The UDHR was affirmed, in fact, along with the universality and indivisibility of human rights, by the Vienna Declaration and Programme of Action⁹ in 1993, and it remains the normative fulcrum for the international human rights law project, a status consistent, arguably, with its own inaugural self-enunciation as a 'common standard of achievement for all peoples and all nations'.¹⁰ Since its formulation, the influence of the UDHR has been impressive. It has been praised for giving life to an entire generation of post-colonial states, for providing the rights-centred template for a host of new constitutional documents, and as though this were not enough, it is also credited with being the normative source of over 200 international human rights instruments.¹¹ The centrality of the UDHR as the frame within which the international human rights project unfolds, therefore, is

⁷ Charter of the UN, 1 UNTS XVI, 24 October 1945.

⁸ See T. Buergenthal, 'The Normative and Institutional Evolution of International Human Rights' (1997) 19 (4) *Human Rights Quarterly* 703–23.

⁹ UN Doc. A/CONF.157/23 (1993) of 25 June 1993, endorsed by GA Res. 48/121 of 14 February 1994, [2].

¹⁰ UDHR, Preamble.

¹¹ G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (London: The New Press 2006) 35.

indisputable, its practical influence undeniable: As Donnelly puts it, '[f]or the purposes of international action, "human rights" means roughly "what is in the Universal Declaration of Human Rights"'.¹²

Traditional accounts of international human rights law also emphasise a series of phases or stages of standard-setting¹³ that reflect (and for the purposes of this discussion at least) pre-figure critiques of the UDHR. The initial vigour of the standard-setting activities reflected by the drafting of the UDHR cooled noticeably in the light of Cold War politics, producing a marked lull in the production of human rights documents, unbroken until the 1965 adoption of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD),¹⁴ a development which quite naturally reflected the concerns of the newly decolonised nations which were then swelling the ranks of UN membership and beginning to influence the preoccupations of the international community.¹⁵

In 1966, there was a fresh phase of general or universal standard-setting through which the rights of the UDHR found further enunciation in two international legal documents, in narrow chronological order, the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁶ and the International Covenant on Civil and Political Rights (ICCPR).¹⁷ The dichotomous separation between these two 'categories' of rights is often traditionally explained as reflecting a Cold War ideological rift, but for many the separation also reflects perceived differences between the categories of rights in terms of their relative justiciability, putative operation as primarily 'negative' or 'positive' rights and relative enforceability.¹⁸ Together, the UDHR, the ICESCR and the ICCPR are referred to as the 'International Bill of Rights', and are supplemented, further expressed (or implicitly criticised – depending on one's chosen frame) by further standard-setting exercises. All of this has resulted in a proliferation of

¹² J. Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, NY: Cornell University Press, 2003) 22.

¹³ See Buergenthal, 'The Normative and Institutional Evolution' 00.

¹⁴ Opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

¹⁵ Joseph and McBeth, editorial introduction.

¹⁶ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

¹⁷ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹⁸ B. Turner, 'Human Vulnerabilities: On Individual and Social Rights', <http://web.gs.emory.edu/vulnerability/zpdfs/turnerpub.pdf> (date of last access 13 July 2011).

international human rights treaties, focusing upon either specific rights (such as the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNCAT¹⁹) or (perhaps more critically for present purposes) on *specific rights-holders* (such as the Convention on the Elimination of all Forms of Discrimination against Women, CEDAW²⁰).

This almost 'carnivalistic'²¹ expansion in the number of international UN human rights treaties has been accompanied, at different times and rates, by the incremental spread and maturation of a set of regional international human rights regimes: the European Convention of Human Rights and Fundamental Freedoms (ECHR²²) (adopted in 1950, which embraces only civil and political rights); the American Convention on Human Rights (ACHR²³) (which excluded economic and social rights but later gave them normative space in the form of a separate protocol); The African Charter on Human and People's Rights (Banjul Charter²⁴) (adopted by the Organisation of African Unity, OAU, in 1981 – embracing all categories of right in one culturally distinctive document). There is also a neonate and culturally distinctive Arab and Muslim regional system (expressed in the Arab Charter on Human Rights,²⁵ adopted by the Council of the League of Arab States in 1994 and which entered into force in 2008).²⁶ No matter to what degree such human rights regimes operate at differing stages of juridical and institutional maturity and reflect radically differing regional and cultural commitments and histories, it is notable that they all, without exception, explicitly affirm their normative continuity with the iconic UDHR.

¹⁹ Opened for signature 10 December 1984, 1465 UNTC 85 (entered into force 26 June 1987).

²⁰ Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

²¹ U. Baxi, *The Future of Human Rights* (Oxford University Press 2006) 46.

²² Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (entered into force 3 September 1953), as amended by Protocols Nos. 3, 5, 8 and 11 (entered into force on 21 September 1970, 20 December 1971, 1 January 1990 and 1 November 1998, respectively).

²³ American Convention on Human Rights, OAS Treaty Series No. 36, 1144 UNTS 123 (entered into force 18 July 1978).

²⁴ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

²⁵ League of Arab States, Arab Charter on Human Rights, 22 May 2004, reprinted in (2005) 12 *International Human Rights Reports* 893 (entered into force 15 March 2008).

²⁶ See M. Amin Al-Midani and M. Cabanettes (trans.) and S. M. Akram, 'The Arab Charter on Human Rights 2004' (2006) 24 (2) *Boston University International Law Journal* 147–64.

Framing the project: critical accounts

The UDHR and the international human rights system, as has already been implied, is also subject to a range of critiques, some of which are now well embedded within mainstream human rights scholarship and debate. The most famous of these reflects cultural relativist arguments deconstructing the 'universalism' of human rights, arguments which emerge from a range of alternative framing positions, including, most notably, 'Asian values', Islam and postmodernism.²⁷ Within such discursive accounts, there is a closely related and oft-repeated accusation that the UDHR is an instrument of 'Western cultural imperialism', a mere Trojan horse for the imposition of 'Western' commitments upon 'non-Western' cultures. This critique is intimately related to the idea that the UDHR is Eurocentric in both origin and formulation.²⁸

Such critiques, in turn, are addressed by defences of international human rights universalism resting on a variety of claims. It is argued, for example, that the UDHR Drafting Committee was more internationally diverse than is often assumed,²⁹ and that the values in the UDHR reflect at least a thin convergence or 'justificatory minimalism'³⁰ centred upon on values viewed as being common to or at least conceptually derivable from many, if not most, great human philosophical and religious traditions.³¹ Donnelly argues, for example, that 'Christians, Muslims, Confucians, and Buddhists;

²⁷ See, for examples of discussions canvassing relevant and related arguments, K. Engle, 'Culture and Human Rights: The Asian Values Debate in Context' (2000) 32 (2) *Journal of International Law and Politics* 291–333; H. Samuels, 'Hong Kong on Women, Asian Values and the Law' (1999) 21 (3) *Human Rights Quarterly* 707–34; A. J. Langlois, *The Politics of Justice and Human Rights: South East Asia and Universalist Theory* (Cambridge University Press 2001); K. Dalacoura, *Islam, Liberalism and Human Rights*, 3rd edn (London: I. B. Tauris 2007); M. Ignatieff, 'The Attack on Human Rights' (2001) 80 *Foreign Affairs* 102–16; Z. Arslan, 'Taking Rights Less Seriously: Postmodernism and Human Rights' (1999) 5 *Res Publica* 195–215.

²⁸ For example, see M. Matua, 'Savages, Victims and Saviours: The Metaphor of Human Rights' (2001) 42 (1) *Harvard International Law Journal* 201–46.

²⁹ J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press 2002) 21.

³⁰ J. Cohen, 'Minimalism About Human Rights: The Most We Can Hope For?' (2004) 12 (2) *The Journal of Political Philosophy* 190–213 at 213.

³¹ A range of perspectives related to this can be found in H. Kung and J. Moltmann, *The Ethics of World Religions and Human Rights* (London and Philadelphia, PA: SCM Press, 1990). See also J. Donnelly, 'Human Dignity and Human Rights' (2009), Swiss Initiative to Commemorate the 60th Anniversary of the Universal Declaration of Human Rights: *Protecting Dignity: An*

Kantians, Utilitarians, Pragmatists, and neo-Aristotelians; liberals, conservatives, traditionalists, and radicals, and many other groups as well, come to human rights from their own particular path'.³² Moreover, the *de facto* universality implied by the almost global-wide international recognition of the UDHR is also cited as evidence of its contemporary legitimacy as a common standard of achievement for all peoples. It is pointed out, furthermore, that the Vienna Declaration and Programme of Action affirms universalism, construing it as a value capable of respecting cultural variation and specificity while at the same time retaining an important primacy in order to defend against culturally derived violations of the minimum standards set forth by international human rights norms.³³ In this sense, as Donnelly has argued, we can understand international human rights norms to be 'relatively universal'.³⁴

There exist, of course, a range of other critiques – some of which are related to those already noted. The criticism, for example, that civil and political rights are incipiently favoured over economic and social rights within the institutional mechanisms of international human rights law,³⁵ a fact taken to reflect a fundamental ideological privileging of liberal constructs of rights descended from the commitments of the 'West', remains painfully apt, particularly in the contemporary globalised context.³⁶ It has been argued, relatedly, that the entire international human rights law project stands discursively colonised by the project of neoliberal capitalism and the hegemonic power of transnational corporations (TNCs) within the international legal order.³⁷ Such arguments can be linked to earlier

Agenda for Human Right, www.udhr60.ch/report/donnelly-HumanDignity_0609.pdf (date of last access 15 June 2011). See also J. Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76 (2) *The American Political Science Review* 303–16.

³² Donnelly, 'Human Dignity and Human Rights' 7.

³³ See Part 1, para. 1 of the Vienna Declaration.

³⁴ J. Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 (4) *Human Rights Quarterly* 400–19 at 419. But see also the critique of this offered by M. Goodhart, 'Neither Relative Nor Universal: A Response to Donnelly' (2008) 30 (1) *Human Rights Quarterly* 183–93.

³⁵ See, for an introduction to the depth of the challenge, D. Beetham, 'What Future for Economic and Social Rights?' (1995) 43 (1) *Political Studies* 41–60.

³⁶ See the excoriating critique of the imperatives of neoliberal globalisation and their deleterious effect upon the realisation of socio-economic rights offered by Baxi, *The Future of Human Rights*.

³⁷ See Baxi, *The Future of Human Rights*; S. Gill, 'Globalisation, Market Civilization and Disciplinary Neoliberalism' (1995) 24 *Millennium Journal of International Studies* 399–423; A. Gear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Basingstoke: Palgrave Macmillan 2010).

criticisms of rights discourse, particularly perhaps to the Marxist claim that human rights are individualistic tools of the capitalist project.³⁸ Such critiques, taken together, strongly imply that the hierarchies and asymmetries observable in international human rights law (and further reflected, in substantive terms, by the differing strengths of enforcement mechanisms available for different categories of rights) reflect agendas far removed from the affirmation of the equal worth and dignity of all members of the 'human family'. This criticism, moreover, remains un-deflected – even in the context of the so-called 'third-generation' (or 'solidarity') rights, such as the human right to a clean environment.³⁹

Other telling discrepancies are also noted, centred upon excoriating denunciations of the selective deployment of international human rights standards by Western states, particularly in the late twentieth and early twenty-first centuries: for example, the use of human rights-based justifications for the 'legitimation' of Western (and NATO) incursions into the sovereignty of certain states, especially those states whose aims and interests are considered inimical to those of the capitalist 'West'. There is a shocking disjunction, for example, between the 'humanitarian' NATO intervention in Kosovo and abject failure of the Western powers to intervene to prevent the highly publicised and appalling genocide in Rwanda. Such discrepant practices are sometimes cited as evidence of a self-serving *Realpolitik* deploying the mantle of human rights.⁴⁰

There are many available critical framings of international human rights law. In fact, there are so many that the only safe conclusion that we can draw, as an intermediate matter, is that international human rights law, in both theory and practice, is riven with contradictions, disputations, rival framings and oppositional accounts. The mainstream frame or account is vociferously disputed – and, just as it is challenging to provide a comprehensive map of the

³⁸ See K. Marx, 'On the Jewish Question', in *Selected Essays by Karl Marx* (H. J. Stenning, trans.) (London and New York: Leonard Parsons 1926).

³⁹ A range of problems reflecting the fundamental fracture between the broadly (neo)liberal ideological commitments so intimately linked to the traditional (and contemporary) primacy of civil and political rights and the general failure to realise the economic and social rights of the economically disempowered peoples and nations of the earth replicate themselves in the context of environmental injustice, including climate change injustice: See, for more the contributions in (2010) 1 (2) *The Journal of Human Rights and the Environment* 131–256.

⁴⁰ See, for more, C. Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Abingdon: Routledge–Cavendish 2007).

main documents and institutional mechanisms of international human rights law, it is even more difficult, arguably, to provide a complete account of all the critiques internal and external to international human rights law's vast and apparently illimitable discursive field.

An interposition: framing 'the frames'

What should be noted, at this stage of our reflection, is the contingency of all the available renderings of international human rights law, mainstream and critical. All the accounts we have introduced (and those we have not) are 'framings'. They all come complete with their own epistemic limitations and closures. However, there is arguably one important general difference observable between 'mainstream' and 'critical' accounts – or, at least, those critical accounts embracing the inescapability of epistemic limitation – and it is this: such critical accounts are based on an explicit reflexivity that attempts to respond to the partiality and contingency of framings themselves. Generalisations are never safe, but it is possible to assert with some degree of plausibility nonetheless that many 'mainstream' accounts of the international human rights law project imply a degree of 'progressiveness' in the international human rights law trajectory. Genuinely critical accounts, by contrast, tend invariably to problematise it – as well as the narratives and framings on offer. This is not to suggest that critical accounts end in a terminus of radical, paralysing relativism. Human rights emerge from critical accounts as 'ideas' (albeit powerful, world-shaping ideas) which are revealed as being semantically elusive 'placeholder[s]' in a global conversation that allows a constant deferral of the central defining moment in which rights themselves will be infused with substance'.⁴¹ Such accounts emphasise the sense in which the very meaning of human rights is always 'up for grabs'. They amply suggest the ambivalence of human rights: their Janus-faced capacity for producing and cloaking privilege and yet, simultaneously, their capacity for the unveiling of oppression. Critical accounts of human rights underline the sense in which human rights are always (to borrow the words of Douzinas) 'floating signifiers':⁴² their promise constantly draws the human

⁴¹ A. Ely-Yamin, 'Empowering Visions: Towards a Dialectical Pedagogy of Human Rights' (1993) 15 (4) *Human Rights Quarterly* 640–85 at 663.

⁴² C. Douzinas, *The End of Human Rights* (Oxford: Hart 2000) 253–61.

imagination forwards, but is ever-deferred, always ‘not yet’. Meanwhile, their meaning, as critical accounts stress, remains contestable, semantically unsettled, radically porous, open to co-option, colonisation and, importantly, never, ever above the interplay of power relations.

One contingent re-framing

We have already noted the centrality of the iconic UDHR to the entire edifice of human rights law and mentioned its production of a universal human rights bearer. As I have earlier suggested, a central paradox of international human rights law rests on the construction of this universal ‘human subject’. Despite the fact that the UDHR clearly enshrines its rights as belonging to all members of the ‘human family’, to ‘everyone’, it is far from clear that all human beings as concrete beings find themselves fully embraced or represented by the universal human rights subject. In fact, there is arguably a dysfunction or fracture at the heart of the ‘human family’ of the UDHR – and it is this observation that forms the inspiration for this particular framing of the international human rights law project.

It is clear on various accounts, including its own, that the UDHR attempts to respond to the need to protect the human being understood *qua* human being. If we combine the emphasis of the UDHR preamble with the language of Article 2, this inclusive aspiration becomes clear: the invocation of terms such as ‘everyone’ and ‘the human family’ are supported by the *explicit de-legitimation* of forms of discrimination based upon any putative distinctions or sub-divisions between human beings:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, *without distinction of any kind*, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty [emphases added].

It is clear from this that no putative basis for distinction, even those centred upon the nation state itself, should form a legitimate basis for the denial of human rights. This emphasis is unsurprising in so far as certain scholarship has revealed the central concern driving the drafters of the Declaration to be

an explicit reaction to the bio-centric, racist and species-segmenting abuse of state power by the Nazi state⁴³ (which was itself conceived of as a species-specific entity: as an 'Aryan' organic body of which Hitler was the head).⁴⁴ This argument, emerging from Morsink's careful analysis of the records of the deliberations of the Drafting Committees,⁴⁵ is lent further plausibility by the preamble's immediate reference to the 'barbarous acts that have outraged the conscience of mankind'. Although, inevitably, this view is contested, it seems relatively clear that the affirmation of the fundamental commonality of the human race was a conscious aim of the drafters and that the UDHR explicitly emphasises the unacceptability of selective segmentations and discriminatory practices and violations, whether those were primarily driven by awareness of Nazi laws and practices or were also responding to wider socio-historical patterns and trajectories.

The UDHR aspiration for human familial inclusion and the explicit rejection of discrimination based on sub-divisions in the human family is accompanied, it will be argued here, by an enduring paradox consisting in the directly contradictory (re-)production, within international human rights law, of an entire range of outsider or marginalised subjectivities. The puzzle of this contradictory state of affairs seems to hinge on a fundamental contradiction inherent in the figuration of the abstract form of human nature deployed as the 'universal' subject of rights.

Linking the abstract human being of the UDHR with the abstract man of the earlier French Declaration, Douzinas argues that '[o]nce the slightest empirical or historical material is introduced into abstract human nature, once we move from the declarations onto the concrete embodied person, with gender, race, class and age, human nature with its equality and dignity retreats rapidly'.⁴⁶ We should pause to note, moreover, the *patterned nature of the specificities* in relation to which equality and dignity retreat. Such *patterned retreat* in the face of embodied empirical and historical particularity is especially troubling for the international human rights law project for, as Otto suggests, such critique 'goes to the heart of the post-World War

⁴³ J. Morsink, 'World War Two and the Declaration' (1993) 15 *Human Rights Quarterly* 357–405 at 357.

⁴⁴ See Morsink on 'Hitler's Organic State and Articles 1 and 2' (1993) 15 *Human Rights Quarterly* 359–66; A. Hitler, *Mein Kampf* (R. Manheim, trans.) (Boston, MA: Houghton Mifflin 1971) 150.

⁴⁵ Morsink, 'World War Two' 357. ⁴⁶ Douzinas, *The End of Human Rights* 96.

II discourse of universal human rights which, *as its most fundamental premise*, purports to apply *equally, without distinction*, to “everyone” [(Article 2 UDHR)]. [Despite this t]he allegedly universal subject of human rights law . . . reproduces hierarchies, including those of [gender], race, culture, nation, socio-economic status and sexuality.⁴⁷

It seems that the universal human rights subject installed at the heart of the international human rights law project appears to (re-)produce the very hierarchies and discriminatory patterns that the UDHR itself explicitly rejects. This presents, clearly, something of a conundrum, and despite the proliferation (as we have already seen) of a range of ‘identity’-inclusive documents, such as CEDAW, patterns of marginalisation remain obdurately real and installed within international human rights law. The evidence for the reality and impact of these marginalised subjectivities emerges from various critical positions and sources, but it is worth noting that even at the origins of the UDHR, marginalisation was a historically real problem. For example, women, in particular, were marginalised (almost explicitly) in the very drafting process: the Commission on the Status of Women (CSW) had to fight hard just to achieve a shift away from the language of the rights of ‘all men’ towards the rights of ‘all human beings’. This limited concession, moreover, entailed the explicit rejection of the explicitly sexuate and inclusive formulation sought by the CSW – that of ‘all people, men and women’.⁴⁸ It is of note that the masculine pronoun remains stubbornly dominant throughout the text of the UDHR, which is also completely silent on the issues of gendered violence and reproductive rights. Critics have noted, moreover, that women’s equal rights are semantically tied to the context of the family (Article 16 UDHR) and that there is a problematic further muting of women’s rights claims through the traditional liberal public/private divide (which famously reserves the public domain for men while relegating women to the ‘private’ domestic sphere) – itself a profound barrier to genuine female rights enjoyment – and uncritically installed at the heart of the international human rights law project.⁴⁹

⁴⁷ D. Otto, ‘Disconcerting “Masculinities”: Reinventing the Gendered Subject(s) of International Human Rights Law’, in D. Buss and A. Manji (eds.), *International Law: Modern Feminist Approaches* (Oxford: Hart 2005) 105–29 at 105–6. (Emphasis added.)

⁴⁸ See J. Morsink, ‘Women’s Rights in the Universal Declaration’ (1991) 13 *Human Rights Quarterly* 229–56.

⁴⁹ For more, see F. Beveridge and S. Mullally, ‘International Human Rights and Body Politics’, in J. Bridgeman and S. Millns (eds.), *Law and Body Politics: Regulating the Female Body* (Aldershot: Dartmouth 1995) 240–72.

In a sense, the *very need* for CEDAW and other treaties directed at particular groups or 'identities' of rights-claimant reflects the existence of marginalised and hierarchically constructed subjectivities within international human rights law. It is precisely the felt/lived sense of exclusion, hierarchical marginalisation or invisibility that has driven women and a range of marginalised 'others' to seek the specific enumeration of their rights. This dynamic strongly suggests the (re)production within international human rights law of what we can with a high degree of accuracy label as '*non-universal* human subjectivities' (those deemed inherently *incapable* of representing all humanity).

The evidence suggests, though, that the existing universal, far from being universal in reality, despite its claim to be inclusively representative, is a radically 'non-universal universal', an abstract construct enacting familiar exclusions historically linked to certain much-criticised conceptual and ideological features of Western thought.⁵⁰ In short, the philosophical foundations of the universal human subject enact a certain kind of 'tilt'. This point is not without its irony. It has been noted by Morsink that the urgent ethical humanitarian sensibility driving the UDHR drafters was such that 'they did not need a philosophical argument in addition to the experience of the Holocaust'⁵¹ in order to justify the UDHR. Yet, despite their ethical humanitarian energy, their moral outrage and high degree of empathy with victims of human violation, the drafters of the UDHR, in attempting to inaugurate a new age of international, ethical and juridical concern predicated upon the important concept of inclusive universality, turned (naturally enough perhaps) to the pre-existing formula of abstract universalism enshrined within Western philosophy, and in particular, to the iconic French Declaration of the Rights of Man and the Citizen.

The universal subject or 'man' of the French Declaration has, of course, its own philosophical foundations and antecedents. Its formulation, for example, is radically continuous with the philosophical, political and rights-based discursivity of John Locke, and with earlier philosophical assumptions concerning the primacy of 'man's nature' as being quintessentially 'rational'. The rational man of the French Declaration, as Douzinas' argument above implies,⁵² is the direct progenitor of the universal 'human

⁵⁰ See Gear, *Redirecting Human Rights* Chapters 3, 4 and 5.

⁵¹ Morsink, 'World War Two' 358.

⁵² Douzinas, *The End of Human Rights* 46 and related text.

being' of the UDHR. In fact, there are extensive continuities between the UHDR and the earlier Declaration. Marks has argued that the proclamation of rights in the French Declaration had a 'major impact on the form and content of the UDHR proclaimed 160 years later, and subsequently, on the current codex of internationally recognized human rights'.⁵³ The assertion that all 'men are born and remain free and equal in rights' (Article 1 of the French Declaration) becomes, in Article 1 UDHR, the statement that all 'human beings are born free and equal in dignity and rights' – an almost identical formulation, as Hunt suggests, but for the exchange of 'human beings' for 'men'.⁵⁴ The drafters of the UDHR, reached out, then, for the pre-existing symbols of a rich human rights imaginary at the heart of which stood an abstract universal.

The abstract universal 'man'/'human being' is conceived of as being essentially 'neutral' – as representative of all humanity. Closer inspection, however, reveals this 'neuter' universal to be a cipher that is never neutral, never empty, because its essential rationality comes laden with philosophical and ideological provenance – most especially a long-standing co-imbrication of rationality and maleness. Inevitably, then, this abstract universal is gendered. (We have already noted the related struggle of the CSW to change the language from 'men' to that of 'human beings' in the UDHR drafting process.) If we pause to reflect once more on the fact that, as Douzinas points out, 'universal' dignity and equality rapidly retreat once the abstract human subject takes on materiality or concrete form, we can begin to grasp the essence and implications of the problem. The universal seems to be constructed as neutral, yet the retreat of dignity and equality is precisely along the well-worn conduits of discriminatory species segmentation so familiar in our long human history of inequalities, diminutions, degradations, marginalisations, oppressions and violences.

The marginalised subjectivities revealed by such realities suggest, just as a photographic negative might, the precise contours of the construct covertly privileged by the neuter-impossibility of the 'universal *one*' of human rights.

⁵³ S. P. Marks, 'From the "Single Confused Page" to the "Decalogue for Six Billion Persons": The Roots of the Universal Declaration of Human Rights in the French Revolution' (1998) 20 *Human Rights Quarterly* 459–514 at 460.

⁵⁴ L. Hunt, *The French Revolution and Human Rights: A Brief Documentary History* (New York: Bedford/St Martin's Press 1996) 3. The text of the American Declaration of Independence (1776) declares 'all men' to be 'created equal, [and] endowed by their Creator with certain unalienable Rights, [and] among these are Life, Liberty and the pursuit of Happiness'.

The marginalisation of 'women, humans of colour, children, humans with disabilities, humans who are older or poor, and those with different sexual orientations'⁵⁵ – those with long histories of exclusion – including indigenous peoples – point ineluctably towards a hidden 'insider' – the 'one' who is most definitely '*not*' any of these. It is as if a great invisible figure inhabits the universal. The figure revealed by the patterned retreat of particularity in international human rights law emerges from the ebb, as 'natural man' or 'natural human being' – in 'his' materialisation, however, bearing a predictable set of particularities. 'He' (for this is a construct not a living man (despite the fact that some groups of men have clearly benefited from their (incomplete) correspondence with its contours)) emerges as the male, the property-owning, the European and the white.⁵⁶ To claim this is simply to insist that international human rights law, in this particular regard, is no real exception to the history of rights struggles before it, although this paradox is all the more troubling in international human rights law, where the issue is both more complex (the UDHR explicitly denounces discrimination) and *more telling (for the same reason)*.

History is where ideology breaks cover.⁵⁷ The paradoxes of the universal are reflected in a long history of rights settlements, history revealing a pattern – not just in the UDHR – of rights being born of visceral, critical reactions against a violently uneven status quo or an immense injustice – followed by their institutional crystallisation, at which point their radical potential is muted or foreclosed,⁵⁸ captured by the power of pre-existing elites (albeit not completely – thankfully the critical energy of rights is never entirely exhausted in the process). Even in revolutionary France, where rights-talk was at its most universalistic and liberationist, the initial institutional settlement strongly reflected the priorities of the powerful: The 'rights of man' were granted, paradigmatically to the male, rational property-owning citizen – notwithstanding vigorous and open debate concerning the rights of slaves, Calvinists, Jews and homosexuals and the attempts by some women to gain rights to active political citizenship.⁵⁹

⁵⁵ D. Nibert, *Animal Rights, Human Rights: Entanglements of Oppression and Liberation* (Oxford: Rowman & Littlefield 2002) 4.

⁵⁶ Douzinas, *The End of Human Rights* 100.

⁵⁷ See M. Horwitz, 'Comment: The Historical Contingency of the Role of History' (1981) 90 *Yale Law Journal* 1057–9.

⁵⁸ N. Stammers, 'Social Movements and the Social Construction of Human Rights' (1999) 21 *Human Rights Quarterly* 980–1008.

⁵⁹ Hunt, *The French Revolution*.

By the time of the UDHR, as the text itself reflects, there was a widely accepted awareness of just such past discriminatory patterns – yet – as we have seen – discriminatory patterns remained installed in the drafting process itself (almost explicitly, concerning gender), and remain problematically installed within the cognitive and ideological architecture of the abstract ‘universal subject’ of international human rights. A key challenge related to these patterns concerns a tendency in abstractionism towards (incomplete) disembodiment. The construct of the universal human being simply does not do justice to the full complexity, the sheer fleshy variability and multiple forms, colours, shapes and sex/genders of the embodied human personality in all its vulnerability. The thin ‘non-universal universal’ cannot do justice to the ‘thick’ humanity of the entire human family. There is, quite simply, no adequate protection in the UDHR for the human being *qua* human being, a fact representing a profound ethical failure lying at the heart of the most putatively humanitarian of rights regimes.

Lest readers think this statement too strong, let us pause to reflect with Arendt in *The Origins of Totalitarianism* on the fact that human rights ‘based on the assumed existence of a human being as such broke down at the very moment when those who professed to believe in [them] were for the first time confronted with people who had lost all other qualities and specific relationships – except that they were still human’.⁶⁰ This breakdown concerns, paradigmatically, ‘the refugee’ – the very figure who should most embody any *international* human rights subjectivity genuinely founded upon the radical presence of the human being *qua* human being *as such*. Yet Article 14 UDHR, examined closely, fails to guarantee the refugee the right to enter another country, producing a lacuna signalling the radical failure of the promise of the universal in the stark light of the very moment when the promise of full inclusion in the ‘human family’ of the UDHR is most necessary: for those otherwise juridically naked, radically dislocated human beings fleeing war, economic privation, environmental devastation or tyranny. Article 14 arguably announces, or *amplifies*, the dysfunction lying at the heart of international human rights law concerning the discrepancy between the avowedly universalist aspirations of the UDHR and the fractured reality of its patterned (re-)production of marginalised subjectivities.

In Arendt’s terms, the fact that the UDHR fails to embrace the embodied vulnerable particularity of the human being *qua* human being, and the fact

⁶⁰ H. Arendt, *The Origins of Totalitarianism* (New York: Harcourt 1971) 299.

that the UDHR 'family' remains haunted by international human rights law's multiple 'others', signals a 'void' at the heart of international human rights law. This 'void' (and its historical and contemporary resonances) amply suggests, moreover, dark intimations of the radically differential distributions of life and death in the well-defended patterns and practices of injustice now characterising our global age of corporate capital predation.⁶¹ Indeed, the spectre of deepening climate injustice and its (as-yet) differential distribution of privation, immiseration, cultural destruction and radical human dislocation⁶² points, if anything, to the continuing salience of Arendt's lament.

What use then, we might ask, are international human rights, if they fail precisely at the point where they are called upon in the very name of the juridically naked, embodied, vulnerable humanness so poignantly exposed? Was achieving this very nakedness not the precise aim of the Nazi programme of stripping away both citizenship and legal personhood – a process which assiduously preceded the procedurally regulated extermination of Jews and other victims in the camps of the Third Reich and which, through the imposition of 'juridical death' opened the way for the practices of Holocaust so foundational, on one reading at least, to the inception of the UDHR as an outraged reaction to it?⁶³

How, then, are we to answer this call for human rights meaning? Arguably, human rights break their promise when they fail to be bearers of outrage and compassion. It is arguably at the very moment of experienced 'nakedness', in the face of the 'void' itself, in the 'felt' gap between the 'now' and the 'not yet', in the savage contradiction between human rights promise and human rights betrayal, which the illimitable energy and paradox of human rights returns. For it is in the very experiential realities of the betrayal of the promise of the universal, in the viscerally felt failures of inclusion, in the embodied, lived senses of marginalisation, exclusion or excision that human energies surge back into the space of human rights failure, articulating new words, breathing (literally) a pain that re-awakens

⁶¹ See Baxi, *the Future of Human Rights*; Gill, 'Globalisation'; Grear, *Redirecting Human Rights*; F. Pearce and S. Tombs, *Toxic Capitalism: Corporate Crime and the Chemical Industry* (Aldershot: Dartmouth 1998).

⁶² See, e.g., L. Westra, *Ecoviolence and the Law* (Ardsey, NY: Transnational Publishers 2004); L. Westra, *Environmental Justice and the Rights of Ecological Refugees* (London: Earthscan 2009); L. Westra and B. E. Lawson (eds.), *Faces of Environmental Racism: Confronting Issues of Global Justice* (Lanham, MD: Rowman & Littlefield 2001).

⁶³ Morsink, 'World War Two' 358.

human rights as an endless contestation concerning the constitution of the 'human family'. Hope lies, perhaps, in the idea that international human rights law has not yet exhausted the critical energy of human rights as an endlessly recursive interaction concerning inclusions and exclusions in which every inclusion necessarily creates new, unforeseen exclusions, and in which every lived exclusion births new claims for inclusion. Perhaps in this sense, we can render legible the 'void' of international human rights law, with Rancière, as being precisely that fragile but persistent space of hope in which international human rights are 'the rights of those who have not the rights that they have and have the rights that they have not'.⁶⁴

Further reading

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⁶⁴ J. Rancière, 'Who is the Subject of the Rights of Man?' (2004) 103 *South Atlantic Quarterly* 297–310 at 302.

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