
The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law

Jochen von Bernstorff*

Abstract

The article explores the genesis of the Universal Declaration of Human Rights and the turn to rights in international law. To this end, it focuses on how international lawyers have received the Declaration in their contemporary doctrinal and political contexts. The fact that the political and moral importance of the Declaration from the very beginning outweighed its concrete legal significance invited intriguing scholarly reflections on the symbolic dimension of the document. Despite early sceptical voices about its legal and moral value, international lawyers welcomed and reaffirmed its significance during the 1960s and 1970s. While attention turned to human rights treaty law in the 1980s, the Declaration embodied the hope for a new era of human rights protection after the end of the Cold War. Throughout the 1990s a new scholarly defence of the universal character of the Declaration could be observed, later being accompanied by new insecurity and soul-searching in the face of institutional limitations. In general, the Declaration became synonymous with the turn to individual rights in international law, and whenever there was a sense of crisis because of institutional blockades or challenged foundations, the Declaration received new and increased attention. It symbolized unity in an increasingly fragmented and contentious institutional and political environment for international human rights protection. The story of its scholarly reception is therefore also a story of the failed and perhaps unattainable attempt fully to institutionalize international human rights in a cosmopolitan legal order.

* Senior Research Fellow, Max-Planck Institute for Comparative Public Law and International Law in Heidelberg. Former member of a governmental delegation to the UN Commission on Human Rights in 2003, 2004, and 2005 and the UN Human Rights Council in 2006 and 2007. I wish to thank Armin von Bogdandy, Marc Jacob, Alexandra Kemmerer, Jo E.K. Murkens, Eibe H. Riedel and Joseph H.H. Weiler for inspiration, comments and criticism regarding an earlier version of this article.

International lawyers gave the Universal Declaration of Human Rights (the Declaration) a chilly welcome. It was not that they were not supportive of the post-war turn to rights in general; but rather, for many, the legal impact of the Declaration seemed negligible at best and detrimental at worst. In a 1949 *AJIL* editorial comment on the freshly adopted Universal Declaration of Human Rights Joseph L. Kunz, an Austrian émigré and former student of Hans Kelsen, strikes a sobering and realistic tone when depicting the political environment in which it was adopted: '[n]o talk about natural law has saved the Jews from Hitler. ... There are, apart from National Socialist cruelties and sufferings brought about by the war, international and national developments even since the end of actual fighting, which are in no way compatible with the concern for human rights.'¹ Kunz points to the discrepancy between the thrust of the Declaration and the situation of millions of individuals around the globe in 1949 by referring to 'the widespread civil wars of today and the terrible conditions of millions, the engulfing of more and more European states by totalitarian régimes, [and] the increasing inhumanity by total war'.² In his view the ambitious political programme set out in the Declaration had not even been realized by democratic states, including the US, which had already committed itself to human rights protection through its constitution.³ Did the 48 governments (out of 56) voting in favour of adoption in the General Assembly on 10 December 1948 only want to conceal their political responsibility for the status quo by adopting a solemn Declaration? Did it merely serve as a smokescreen for continuous violations of human rights?

Scepticism, nurtured by the experience of two world wars, looms large over the first major scholarly contributions on the Declaration. As indicated in its preamble this Declaration claimed to be the political answer to the extermination of the European Jews – a vague list of rights with an extremely broad limitation clause, a document without binding force let alone any enforcement mechanism. For Kunz and Hersch Lauterpacht, both emigrated liberal cosmopolitans with an Austrian-Jewish background, the document was not worthy of carrying the torch of 19th century European enlightened individualism to the universal level. Its expected impact was grossly disproportional to the moral abyss of the Shoah, the atomic manslaughter in Hiroshima and Nagasaki, the rise of repressive Soviet socialism, and ongoing racial discrimination in all parts of the world. Moreover, its lofty non-binding character ridiculed the liberal inter-war belief in an emerging rule of law in international relations. These early scholarly reactions, in particular Hersch Lauterpacht's monograph *International Law and Human Rights*, introduce the main themes of international legal discourse with reference to the Declaration. The problems raised by Lauterpacht are recurring themes in later international law writings on the document. This contribution attempts to illustrate how international lawyers received the Declaration in the

¹ Kunz, 'The Universal Declaration of Human Rights', 43 *AJIL* (1949) 316, at 319–320.

² *Ibid.*

³ 'Even in the democracies not all is perfect. The case of discrimination against the Hindus in the Union of South Africa Even in this free and democratic country (US), severe shortcomings – discrimination against negroes, or against Asiatics or Mexicans, anti semitic prejudices are admitted', *ibid.*

post-World War II context from a historical perspective.⁴ The selection of the limited number of texts on the Declaration portrayed in this contribution is selective and does not claim to create a representative depiction of the discipline's stance on this document. The fact that the political and moral importance of the Declaration from the very beginning outweighed its concrete legal significance invited intriguing scholarly reflections on the symbolic dimension of the document. In general, scholarly reviews and uses of the Declaration over the last 60 years seem to have gone from initial scepticism (see section 1) to affirmation in the late 1950s and 1960s and 1970s, to neglect in the 1980s (see section 2), and from there to a new Western defence in the 1990s (see section 3), followed by an ongoing phase of growing insecurity and soul-searching (see section 4).

1 Scepticism and Critique – the Declaration as Political Symbolism

Lauterpacht's *International Law and Human Rights* (1950) is the first international law monograph on the topic after the adoption of the Declaration. Lauterpacht himself had not only submitted a draft for the negotiations in the UN but also been considered to become the British delegate to the UN drafting body. However, the British Foreign Office found that only a 'very English Englishman imbued throughout his life and hereditary to the real meaning of human rights as we understand them in this country' could represent the UK in this body and therefore could not be persuaded that 'anybody with Professor Lauterpacht's past antecedents could possibly be the right sort of representative for the U.K. in a matter of this kind'.⁵ It is remarkable and perhaps revealing that the Commission on Human Rights eventually embarked on its journey without any trained international lawyer and with only one legal academic.⁶ Its meetings were chaired by Eleanor Roosevelt, the widow of the wartime US president Franklin D. Roosevelt. The depiction of the group of nine – formally independent – representatives in the so-called nuclear commission by the historian Brian Simpson merits quotation in full:

What a remarkable group they were! To mention only some, there was Peng Chun Chang, playwright, musician, educator, diplomat, philosopher; Hansa Metha, former detainee of the British, Indian nationalist, writer of children's stories; the ferocious Stalinist Alexie Pavlov, nephew of 'dogs' Pavlov; the cuddly Alexander Bogomolov, dispenser of caviar; René Cassin, First World War veteran, champion of the disabled, legal adviser to General de Gaulle and the Free French in wartime Britain; the diminutive Carlos Romulo of the Philippines, aide to General MacArthur,

⁴ On the renewed interest in historical perspectives in international law see Kemmerer, 'The Turning Aside: On International Law and Its History', in R. M. Bratspies and R. A. Miller (eds), *Progress in International Law* (2008), at 71–93.

⁵ Foreign Office, Minutes, 10 Aug. 1946. FO 371/39740 (National Archive, London).

⁶ Namely René Cassin who was a professor of private law and tax law at the Sorbonne in Paris.

anti colonialist, novelist and pamphleteer; the peppery Australian Colonel William Hodgson, whisky drinker and survivor of Gallipoli; Vladislav Ribnikar, former editor of *Politika* and war-time partisan.⁷

The rejection of Lauterpacht as a British representative in the Human Rights Commission and the fact that the draft submitted by him did not impact on the drafting process certainly contributed to his critical stance on the Declaration. His negative position, however, was primarily founded on his belief that international human rights protection required proper legal institutionalization. In his view, the Declaration simply was devoid of any legal value or significance: '[n]ot being a legal instrument, the Declaration would appear to be outside international law ... the determination to refrain from captious criticism ought not to interfere with the duty resisting upon the science of international law to abstain from infusing an artificial legal existence in a document which was never intended to have that character'.⁸ The Commission on Human Rights at an early stage had followed Eleanor Roosevelt's proposal to concentrate on a Declaration without an enforcement mechanism instead of a fully fledged treaty instrument.⁹ A legally binding document was not in the interests of the two emerging superpowers. Only the Australian representative in the Commission repeatedly put forward a proposal for an 'International Court of Human Rights' which could hear complaints from individuals. These proposals were rejected by the Russian delegate, who stated that this would be an organism working against governments by regulating relations between them and their citizens, and that that this would violate the provisions of international law.¹⁰ While commenting on the nature of the Declaration Lauterpacht went out of his way to illustrate that states did not want the Declaration to have direct or indirect legal repercussions, let alone an effective enforcement mechanism. He scrupulously referred to the various declarations made by state representatives on its adoption in the General Assembly, which had stressed the absence of legal obligations arising from the proclaimed 'common standard of achievement'.

The tangible disillusionment in Lauterpacht's comments on the Declaration can be explained by his general approach to international law, which is representative of a larger part of the discipline during this time. In the inter-war period, Lauterpacht had belonged to a group of international lawyers with an open reformist agenda. At the centre of their struggle was the attempt to destroy the concept of sovereignty, which in their view had fostered the emergence of European nationalism. Once notions of absolute sovereignty were overcome, cosmopolitan experiments such as a reformed League of Nations or compulsory adjudication on the international level would become possible.¹¹ The first generation British realist E.H. Carr retrospectively termed the protagonists

⁷ Simpson, Book Review of M.A. Glendon, *A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001), 13 *EJIL* (2002) 725, at 726.

⁸ H. Lauterpacht, *International Law and Human Rights* (1950), at 416–417.

⁹ M.A. Glendon, *A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights* (2006), at 38.

¹⁰ J.P. Humphrey, *Human Rights and the United Nations: a Great Adventure* (1984), at 42.

¹¹ J. von Bernstorff, *Der Glaube an das universale Recht. Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (2001), at 170–197 (translated and revised edition, forthcoming, Cambridge University Press, 2009).

of this intellectual movement the 'metaphysicians of Geneva'.¹² The fact that in San Francisco the allegedly discredited notion of national sovereignty had been strongly reaffirmed was a serious blow for Lauterpacht and his generation of international lawyers. Particularly discouraging was the reinsertion of a domestic jurisdiction clause in the UN Charter (Article 2(7)), a provision which in another version had already been enshrined in the League of Nations Covenant (Article 15(8)) and was interpreted by many as a legal obstacle to an active role of the UN in the field of international human rights protection. In San Francisco, the Charter provision on the establishment of the UN human rights commission could be inserted only at the very last minute, and the other references to human rights protection remained without institutional linkages to the legal or political enforcement mechanisms of the Charter architecture.¹³

For Lauterpacht, a binding bill of rights with an international enforcement mechanism would have been not only the adequate political answer to the horrors of the War but the ultimate proof that international legal development had no intrinsic, sovereignty-induced limits. During the 1940s Lauterpacht and his contemporaries had believed that the socio-cultural atmosphere was conducive to a revolutionary development in international law. Politically the human rights project was launched as a concession to civil society groups in the US and the UK and France which demanded that the allies lived up to their wartime human rights rhetoric. The US had taken the lead in formulating the moral cause for the tremendous war efforts in human rights terms.¹⁴ Franklin D. Roosevelt's four freedoms speech (1941) is the first prominent example of a high-ranking Western government representative engaging in the emerging international human rights discourse, promoted by Western civil society associations.¹⁵ Churchill joined in. It may seem paradoxical that an international human rights discourse emerged at a time when the dark side of Western modernity had culminated in an abhorrent and unprecedented negation of the rights of the individual. Rights historically seem to emerge in contexts of extreme and widespread violations. Radical forms of denial of human dignity have created human rights as a discursive pattern.¹⁶

The allied powers, however, never had intended to grant the protection of human rights a central role in the institutional set up of the new world organization.¹⁷ Washington had an unfavourable domestic non-discrimination record, not just

¹² More precisely, '[t]he metaphysicians of Geneva found it difficult to believe that an accumulation of ingenious texts prohibiting war was not a barrier against war itself', E.H. Carr, *The Twenty Years' Crisis 1919–1939. An Introduction to the Study of International Relations* (1940), at 30.

¹³ On domestic jurisdiction see H. Kelsen, *Principles of International Law* (1966), at 294–301.

¹⁴ Glendon, *supra* note 7, at p. xvi preface.

¹⁵ A very influential association in the US was the 'One World Movement', with its close ties to FDR's long-time foreign minister, Cordell Hull, and the progressive wing of the democratic party: see W. Loth, *Die Teilung der Welt. Geschichte des Kalten Krieges 1941–1955* (2000), at 33ff.

¹⁶ N. Luhmann, *Das Recht der Gesellschaft* (1993), at 544; Neves, 'The Symbolic Force of Human Rights', 33 *Philosophy & Social Criticism* (2007) 411, at 425, employing the notion of *colère publique*; A. Fischer-Lescano, *Globalverfassung. Die Geltungsbegründung der Menschenrechte* (2005).

¹⁷ Buergenthal, 'The Normative and Institutional Evolution of International Human Rights', 19 *Human Rights Quarterly* (1997) 703, at 706.

regarding African Americans; Moscow had established a highly repressive régime; and London had no interest in closer international scrutiny of its policies in the colonies. Lauterpacht directly confronted the perceived governmental hypocrisy in his discussion of the ‘moral force’ of the Declaration. Upon adoption many governments had stressed the moral authority of the Declaration. The British Delegate compared the Declaration with the Magna Carta: ‘[t]his is, indeed, an historic occasion because, great as are those documents, never before have so many nations joined together to agree upon what they consider to be the basic and fundamental rights and freedoms of the individual’.¹⁸ For Lauterpacht the combination of the assertion of the fundamental character of the rights proclaimed in the Declaration and the open denial of any legal obligation to respect them in itself raised ‘in a most acute form, a cardinal issue of international morality’.¹⁹ With the adoption of the Declaration states did not commit themselves to an effective recognition of the rights.

The moral influence of ideas – Lauterpacht insisted – flowed from the sincerity of those who proclaim them. This sincerity had to be evidenced by the degree of sacrifice which governments were willing to bear on behalf of human rights. In the absence of any sacrifice of sovereignty ‘on the altar of the inalienable rights of man’, Lauterpacht concludes that the Declaration could have no moral force. The situation was aggravated by the fact that the formulation of the rights and limitations was often vague and in some instances legally flawed, and that the Declaration foresaw an extremely broad general limitation clause.²⁰ For instance, Lauterpacht observed that the wording of Article 14 on the right to seek asylum contained no right to be granted asylum. The Article cynically restated the already existing right to apply for asylum, without adding a clearly formulated obligation of the state to grant it.²¹

In addition, the general limitation clause in Article 29(2) made the application of all rights subject to ‘just requirements of morality, public order and the general welfare in democratic society’, an overly broad formulation in an institutional context, in which every state remained the exclusive judge of these requirements.²² His critique of the limitation clause evokes a central and lasting problem of rights discourse: the questions of limits to limitations of rights and how to deal with collisions of rights. Without the notion of absolute limits to restrictions of rights, the rights discourse can deteriorate into a political act of ‘balancing’, being exclusively steered by utilitarian considerations of those who are in power to decide.²³ Lauterpacht’s intuition seemed right, without compulsory court decisions which decide the ‘undecidable’²⁴ in an act of ‘creative violence’,²⁵ the semantic indeterminacy of rights overburdens the legal system.

¹⁸ A/PV.181, at 516 quoted in Lauterpacht, *supra* note 6, at 418.

¹⁹ *Ibid.*

²⁰ *Ibid.*, at 417.

²¹ *Ibid.*, at 421, and on Art. 15 at 423.

²² *Ibid.*, at 417.

²³ On the problematic notion of ‘balancing’ and its utilitarian foundations see Waldron, ‘Security and Liberty: The Image of Balance’, 11 *J Political Philosophy* (2003) 191, at 194.

²⁴ N. Luhmann, *Das Recht der Gesellschaft* (1993), at 317.

²⁵ J. Derrida, *Gesetzeskraft. Der ‘mystische Grund der Autorität’* (1996), at 49.

Lauterpacht's negative reading certainly had a strategic function, since it prepared the ground for his own institutional proposal, a binding covenant with an individual petition mechanism. The critique thus served the purpose of maintaining the political momentum for the future creation of 'true and enforceable' human rights obligations.²⁶ But there is another aspect which makes Lauterpacht's harsh condemnation of the Declaration particularly intriguing. It points to a central ambivalence of the turn to rights. On the one hand, human rights can serve as an emancipatory vehicle to express fundamental experiences of injustice.²⁷ On the other hand, they can act as a form of political manipulation to disguise a lack of commitment to implement them. The latter phenomenon is well known at the national level. Pure textualization of human rights in political or legal documents without normative concretization and practical realization leads to a 'hypertrophy' of the symbolic dimension of rights.²⁸ After 1948 practically every new national constitution included a human rights catalogue, many inspired by the Declaration. This textual 'façade' can create the illusion of enshrined rights, while obstructing consistent debate about structural impediments for their implementation. In cases where the symbolic dimension of human rights significantly outweighs their practical significance, the normative force of law is put into question.²⁹ It serves as a cloak of legitimacy for those who are in a position of power.³⁰ The symbolic dimension of human rights has to be accompanied by normative-juridical force through realization in an institutional setting based on the rule of law. Without such an equilibrium rights rhetoric stabilizes patterns of discrimination and abuse rather than preventing and remedying them.

This precisely seemed to be the reason for Lauterpacht's revulsion at the way governments had negotiated and adopted the Declaration. The miscarried turn to rights could have a detrimental effect on international law as a legal order. Without the rule of law and a proper legal institutionalization of the rights discourse, the solemn universal Declaration could constitute a counterproductive move for the human rights cause. It could become a smokescreen for further violations. Hence Lauterpacht's denial of any moral force of the document: '[a] Declaration of this nature might possess a moral virtue if it sprang from bodies whose business it is to propagate views and to mould opinion. When coming from such a source the word of enlightenment and exhortation may be as potent as deed. When emanating from Governments it is a substitute for deed'.³¹ Despite, or perhaps because of, Lauterpacht's strong commitment to a conceptual turn to individual rights in international law, he developed the first far-reaching

²⁶ Lauterpacht, *supra* note 8, at 419; on Lauterpacht see M. Koskenniemi, *The Gentle Civilizer of Nations, The Rise and Fall of International Law 1870–1960* (2002), at 398–399, who depicts Lauterpacht's monograph as a move into institutional pragmatism.

²⁷ Günther, 'The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture', in P. Alston (ed.), *The European Union and Human Rights* (1993), at 117–144.

²⁸ Neves, *supra* note 16, at 432.

²⁹ *Ibid.*, at 429.

³⁰ Koskenniemi, 'The Effect of Rights on Political Culture', in P. Alston (ed.), *The European Union and Human Rights* (1993), at 99–116.

³¹ Lauterpacht, *supra* note 8, at 419.

critique of the international human rights discourse. The desired international legal revolution had not taken place. His critique is reminiscent of Hanna Arendt's sceptical stance on universal rights in her *Origins of Totalitarianism*, in which she holds that, rather than international politics engaging in a lofty universalist rhetoric, it should be legally guaranteed that nobody can be stripped of his position as a national citizen endowed with the 'right to have rights' within a particular legal community.³²

Reactions to Lauterpacht's book were positive in general, even though some reviews considered his stance on the Declaration too negative.³³ Kunz and other authors were not enthusiastic about the adoption of the Declaration either, but they had seen the Declaration more pragmatically as 'the easiest first step' to binding obligations. Later publications on the Declaration attempted to play down Lauterpacht's vigorous dismissal.

2 From Affirmation into Oblivion – the Quest for Legal Institutionalization

Two years after the Cuban Missile Crisis, the former Deputy Director of the United Nations Division of Human Rights, Egon Schwelb, published his short monograph *Human Rights and the International Community: The Roots and Growth of the Universal Declaration of Human Rights, 1948–1963*. In the first bibliographical note the wartime Gestapo prisoner and émigré from Prague tried to set the tone for an affirmative reading of the Declaration by discussing Lauterpacht's 'outstanding work on the problems dealt with in this volume'. After referring to Lauterpacht's early scepticism, Schwelb explains why, 15 years later, a more positive assessment could be deemed appropriate: '[f]ortunately, as is shown in this book, the impact and effect of the Universal Declaration was stronger than many of its sponsors and drafters intended'.³⁴ At the time of publication, the drafting process of a binding 'international bill of rights' still had not been completed, even though the General Assembly already in 1948 had decided that the work relating to the draft covenant and the implementation measures should go ahead. Immediately after the adoption of the Declaration the work on the binding bill of rights had got bogged down in verbal Cold War battles. The concretization of international human rights obligations of states had stalled for decades, or more

³² H. Arendt, *The Origins of Totalitarianism* (1951), at 290–310. On H. Arendt see H. Brunkhorst, *Hannah Arendt* (1999).

³³ McDougal, Review, 60 *Yale LJ* (1951) 1051, at 1055, stating: 'he [Lauterpacht] offers a low estimate – perhaps much too low – of the probable influence of the Universal Declaration on future decisions', without taking issue with Lauterpacht's critique of the declaration; Eagleton, Review, 45 *AJIL* (1951) 390; Meyer, Review, 64 *Harvard L Rev* (1951) 419; Green, Review, 4 *Int'l L Quarterly* (1951) 126, at 129, who states that '[i]nalienable rights have been like the policies of the Holy Alliance and Lord Palmerstone: instead of bringing the world the benefit of mutual understanding, they are too weak or less fortunate nations an unrestrained menace', is critical of the whole book and its natural law foundations without commenting on Lauterpacht's stance on the Declaration.

³⁴ E. Schwelb, *Human Rights and the International Community. The Roots and Growth of the Universal Declaration of Human Rights, 1948–1963* (1964), at 75.

precisely until 1976, when the two principal Covenants eventually came into force. In the 1950s the Soviet Union considered international human rights protection as unduly interfering in its domestic matters, and in the US the catalogue of economic, social, and cultural rights and the non-discrimination provision in the Declaration increased scepticism regarding further steps towards a binding bill of rights.³⁵

Schwelb, who, after having retired from his position in the UN human rights division, lectured at Yale law school, saw the main achievements of the Declaration in filling the 'vacuum' created by little progress in the negotiations on a binding bill of rights. In an attempt to downplay the significance of the binding and the non-binding dichotomy he held that 'in the international community, as it exists today, the practical difference between a legally enforceable treaty and a pronouncement which is supposed to operate in the moral and the political rather than in the legal field is not as great as would be in a developed legal system'.³⁶ Methodologically influenced by the New Haven school, Schwelb turned to the role of the Declaration in 'stabilizing expectations' in the international political process. In repeated resolutions the General Assembly (GA) had frequently invoked the Declaration, most vigorously in its endeavour to have South Africa abandon racial discrimination. Moreover, regarding allegations of forced labour, freedom of movement in Eastern Europe, and discrimination issues in Non-Self-Governing and Trust Territories the Declaration had been used in the GA as a general moral yardstick for national policies.³⁷ In the 1950s the human rights discourse began to assert itself within the Cold War-torn world organization. As the lowest common denominator regarding standards for the national treatment of citizens, the Declaration – not least because of its vague and non-binding character – turned out to be a rhetorical success story. Even the Soviet Union eventually realized the political potential of condemning the political adversary of human rights violations. Eleanor Roosevelt, herself an outspoken opponent of continuing racial discrimination at home, responded to discrimination allegations made by the Soviet Union and other socialist countries within the UN in 1952:

I'm interested that these five countries [Byelorussia, Czechoslovakia, Poland, the Ukraine, and the USSR] place so much stress on the unity of the provisions of the Universal Declaration in our debates here. In 1948 those five countries did not vote for the Declaration. At that time they were critical of it. Now they cite it for their own purposes. They seem to praise the Declaration one time and minimize its importance another time, so that I must question the sincerity of their reliance on the Declaration on this point... Now let me turn to the charge made by some of the delegates... that the United States is disregarding the interests of American Negroes in our country. Unfortunately there are instances of American Negroes being victims of unreasoning racial prejudice in my country. However, we do not condone these acts in the United States. We do everything possible to overcome and eliminate such discrimination and racial prejudice as may still exist.³⁸

³⁵ Glendon, *supra* note 9, at 193–196, 206.

³⁶ Schwelb, *supra* note 34, at 55.

³⁷ *Ibid.*, at 38–40.

³⁸ Roosevelt, 'Reply to attacks on U.S. Attitude Towards Human Rights Covenant', Department of State Bulletin, 14 Jan. 1952, at 59–60; quoted and put into the US context in Glendon, *supra* note 7, at 206–214.

Schwelb considered the thriving political force behind the affirmation of the Declaration to be the link between the Declaration and the decolonization movement.³⁹ The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples of the General Assembly had provided in its last paragraph that all states ‘shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non interference in the internal affairs of all states and respect for the sovereign rights of all peoples and their territorial integrity’.⁴⁰

A similar formulation could be found in the UN Declaration on the Elimination of all Forms of Racial Discrimination. Notably, in these references the Universal Declaration was frequently mentioned together with the UN Charter or the principle of non-interference in internal affairs. The resolutions thus carefully preserved the obvious tension between international human rights protection on the one hand and non-interference in internal affairs and national sovereignty on the other without attempting a reconciliation. The text was ambiguous enough to ensure support from a wide majority within the General Assembly. Schwelb and other authors cited these references to bolster the authority of the Declaration without acknowledging the dilatory character of the diplomatic commitment to human rights protection in these documents.⁴¹

Be that as it may, the growing number of newly independent states had successfully merged the vigorous self-determination discourse with the human rights cause. The new Southern majority within the UN advanced the claims to liberation from racial discrimination and colonial rule in human rights terms; a political strategy which ultimately led to the inclusion of a common Article 1 on the right to self-determination in the two 1966 human rights covenants. Schwelb was an early observer of the political momentum of the human rights discourse in the UN. Whenever a political strategy within the UN needed to be bolstered with moral force, recourse to rights proved helpful. In the mid-1960s, initiated through the decolonization movement, non-discrimination issues slowly began to assume a paradigmatic role in the development of new UN human rights standards, foreshadowing the adoption of a range of major non-discrimination conventions in the 1970s, 1980s, and 1990s.⁴² But also outside the UN the Declaration was promoted by Western civil society groups as a foundational UN document. Five years after the publication of Schwelb’s book, René Cassin, law professor at the Sorbonne and head of various humanitarian and educational non-governmental organizations, received the Nobel Peace Prize for his contribution to the drafting of the Declaration and his promotional activities since then. In 1963 Schwelb

³⁹ Schwelb, *supra* note 34, at 66.

⁴⁰ Final para of GA Res 1514 (XV) of 14 Dec. 1960.

⁴¹ See also Humphrey, ‘The Universal Declaration of Human Rights: Its History, Impact and Judicial Character’, in B.G. Ramcharan (ed.), *Human Rights. Thirty Years after the Universal Declaration* (1979), at 21–37.

⁴² On the Convention on the Elimination of all Forms of Racial Discrimination see Wolfrum, ‘The Implementation of International Standards on Prevention and Elimination of Racial Discrimination: Achievements and Challenges’, in J. Symonides (ed.), *The Struggle Against Discrimination – A Collection of International Instruments Adopted by the United Nations System* (1996), at 45–78.

concluded his review of UN practice by stating that the Declaration had acquired an authority which justified removing it from the category of 'non-binding pronouncements'. Nonetheless, Schwelb acknowledged that this positive development had brought only little progress 'on the ground', ending the book on a sobering note:

While the successes achieved since 1919, when the Powers which had been victorious in World War I, said to have been waged 'to make the world safe for democracy', declined to embody in the Covenant of the League of Nations the principle of the equality of races, should not be belittled, these successes should not blind us to the fact that the task of making the protection of human rights general, permanent and effective still lies ahead.⁴³

Despite being one of the very few legal monographs on the Declaration, the book received little attention. Had Schwelb's affirmation of the legal significance of the Declaration just stated the obvious? The Declaration had become embedded in the institutional practice of the UN. Given the little progress which had been made on the binding bill, and with a Security Council largely paralysed by Cold War antagonisms, the focus on the activities of the General Assembly seemed uncontroversial. At that time, the discipline in general still paid much attention to individual resolutions of the GA and their potential legal implications. Schwelb's book was an attempt to reaffirm the legal significance of the Declaration by blurring the binding/non-binding dichotomy. Lauterpacht's formalistic approach to the issue seemed outmoded. The sharp distinction between politics and law had to be replaced by a more differentiated depiction. Legal normativity now came with various shades of grey represented in the complex political process. Remarkably, by merging legal normativity with politics Schwelb completely loses the critical distance to the highly politicized UN human rights discourse, which had by contrast characterized Lauterpacht's formalist approach to the Declaration. It seems futile to ask whether Schwelb had resorted to the New Haven approach in order to make an affirmative reading of political events possible, or whether the choice of the methodology had preceded his stance regarding the legal status of the Declaration. The traditional strategy of international lawyers to deduce normativity from political processes of course would have been mirrored in scholarly recourse to custom, an approach Schwelb does not even consider. Fifteen years later, John Humphrey, Schwelb's former boss in the UN human rights division and representative of the UN Secretariat in the drafting process of the Declaration, argued that abundant references in later UN documents and state practice meant that the Declaration had acquired the status of customary international law.⁴⁴ Since then, the reference to customary law has become a standard argument in discussions of the legal nature of the Declaration and individual provisions thereof.

When in 1966, 18 years after the adoption of the Declaration, the negotiations on a binding bill of rights eventually came to an end, the attention of the discipline began to turn towards the new human rights treaty law. During the negotiations fundamental ideological divergences regarding the nature and scope of individual rights had surfaced, which had obstructed progress in the elaboration of the bill of rights. After the post-war

⁴³ Schwelb, *supra* note 34, at 74.

⁴⁴ Humphrey, *supra* note 41, at 21–37.

economic recovery in the West many Western states had become more sceptical about the promotion of economic, social, and cultural rights. The US as early as in the drafting process of the Declaration had been reluctant to grant economic, social, and cultural rights the same status as civil and political rights. After long and protracted negotiations, the decision had been taken that there should be two covenants, one on civil and political rights, the other on economic, social, and cultural rights, and that each covenant should contain its own measures of implementation.⁴⁵ In terms of implementation only the Covenant on Civil and Political Rights (ICCPR) foresaw a reporting mechanism before an independent committee (The Human Rights Committee). It was not until 2008 that the UN Human Rights Council could adopt a draft optional protocol for a treaty-based implementation mechanism for the Covenant on Economic Social and Cultural Rights (ICESCR).

In the 1979 volume *Human Rights – Thirty Years after the Universal Declaration* the then director of the UN human rights division, Theo van Boven, reaffirmed the importance of the Declaration, arguing that it had served as a human rights yardstick in the petition mechanism for ‘consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms’ under the UN Commission on Human Rights, the so-called 1503 procedure.⁴⁶ Two contributions deal explicitly with the Declaration; the other 10 with new developments in standard-setting and implementation. The editor of the volume, B.G. Ramcharan, in his introduction in a rather pessimistic voice points to the lack of implementation of human rights:

Human rights are still not effectively assured in practice in most of the world’s countries. Clashes of interest, over riding reasons of State, sudden, sharp changes in economy and in social relationships, the vicissitudes of national and international policy, intergroup antagonisms, fluctuations in power relationships, the pressures of egoism, intolerance and obscurantism, the pretexts afforded by circumstances – all these are continually responsible for shameful retreats.⁴⁷

Written three years after the entry into force of the ICESCR and the ICCPR the contributions are concerned with the lack of progress in the realization of the human rights project.

Most of the contributions refer to antagonistic political approaches to human rights and the resulting lack of coherence in UN standard-setting as one of the root causes of the implementation blockade, such as Moses Moskowitz in his paper: ‘[t]he deep divisions among Nations in their perception of human rights, as well as in objectives, brought into such sharp relief in the Third Committee, cast grave doubt on the viability of the very notion of international implementation’.⁴⁸ Discussing controversies

⁴⁵ On this decision see Schwelb, *supra* note 34, at 33.

⁴⁶ Van Boven, ‘United Nations Policies and Strategies: Global Perspectives?’, in Ramcharan (ed.), *supra* note 38, at 83 *et seq.*

⁴⁷ Ramcharan, ‘Introduction’, in *ibid.*, at 4–5.

⁴⁸ Moskowitz, ‘Implementing Human Rights’, in *ibid.*, at 109, 125; see also Ramcharan, ‘Standard-Setting: Future Perspectives’, in *ibid.*, at 93, 107, and 159.

about collective and economic rights within the UN, Moskowitz speaks of an 'intellectual chaos which pervades the international human rights field'. Developing states in the 1970s had started to reformulate political and economic grievances of a collective nature in human rights terms by pushing for a 'right to development' and other so-called third generation rights.⁴⁹ Interestingly, this claim for collective economic human rights was preceded by the failed attempt to change the structural conditions conducive to global economic inequalities and poverty. Developing states had tried to institute the New International Economic Order (NIEO), which consisted of a set of proposals put forward during the 1960s and 1970s by developing countries through UNCTAD to promote their interests by improving their terms of trade, increasing development assistance, developed-country tariff reductions, and other means.⁵⁰ Once the attempt to replace the Bretton Woods System, which had been accused of benefiting the leading states which had created it after the war, had failed, developing states reformulated their claims in human rights terminology.⁵¹ Not surprisingly, this move was criticized by many Western international lawyers.⁵² Notably, the debate on the right to development has been revived in recent years within the UN by the non-aligned movement.⁵³

With the two principal covenants (ICCPR and ICESCR) entering into force in 1970s the quest for legal institutionalization, which had inspired Lauterpacht and his generation of international lawyers, had reached its first principal objective: binding international human rights law. Other major human rights conventions were to follow in the 1980s, 1990s, and the beginning of the new century. Despite the fact that human rights obligations had eventually become binding law for a growing number of states in the 1970s debates on their nature and their foundations continued to play an important part in the literature. Due to various ideological and economic battles between East and West, North and South, and numerous religious and political affiliations represented in the UN, the human rights treaty 'system' from its inception took a fragmented shape. Governments often took a selective approach to which binding commitments they would take on. Consensus on the adoption of a new human rights treaty could often only be achieved at the price of separate issue-related treaty regimes with separate monitoring bodies and wide-ranging reservations by states. The US for instance still has not ratified the ICESCR and became a party to the ICCPR only in 1992

⁴⁹ Only on 4 Dec. 1986 after years of protracted negotiations did the GA in Res 41/128 adopt the Declaration on the Right to Development.

⁵⁰ The term was derived from the Declaration for the Establishment of a New International Economic Order, 1 May 1974, A/RES/S-6/3201 adopted by the UN GA in 1974, and referred to a wide range of trade, financial, commodity, and debt-related issues.

⁵¹ On the role of the GA during this time see Cassese, 'The General Assembly', in P. Alston (ed.), *The United Nations and Human Rights. A Critical Appraisal* (1992), at 25, 40–43.

⁵² Kooijmans, 'Human Rights – Universal Panacea? Some Reflections on the so-called Human Rights of the Third Generation', 37 *Netherlands Int'l L Rev* (1990) 239; more responsive to the collective dimension of human rights are contributions in S.R. Chowdhury et al. (eds), *The Right to Development in International Law* (1992) and the article by E.H. Riedel, 'Menschenrechte der dritten Dimension' [1989] *EuGRZ* 9.

⁵³ 'Report of the working group on the right to development on its ninth session, Geneva, 18–22 Aug. 2008', Chairperson-Rapporteur: Mr. Arjun Sengupta (India), UN-Doc. A/HRC/9/17, 10 Sept. 2008.

with a long list of substantial reservations. The long list of Sharia-related reservations to the Convention against all Forms of Discrimination of Women (CEDAW) can serve as a current example of the politically contentious nature of many of the commonly adopted standards.

While in the 1970s practice and discipline turned to the new treaty instruments, the Declaration somehow seemed to have fallen into oblivion. But whenever the unity of the human rights discourse had to be symbolized politically or scholarly, the Declaration took centre stage again; like the old ornamental bone china a quarrelsome family gets out to set the dinner table on a festive occasion. The Declaration represented unity in fragmentation and fulfilled its function as the lowest common denominator in the dynamically evolving and increasingly antagonistic institutional human rights discourse; a political role the Declaration has continued to assume to date.⁵⁴

3 Defending Universality

In terms of scholarly attention, the fortieth anniversary of the Declaration in 1988 somehow seems to have been celebrated in a subdued fashion, as if appropriate for a slightly vain text of that age. Apart from Glen Johnson and Janusz Symonides' French textbook on the origins and foundational documents of the UN Human Rights system⁵⁵ and B.G. Ramcharan's *Concept and Present Status of the International Protection of Human Rights*,⁵⁶ no major anniversary volume had been published in 1988. The two books compile and comment upon principal UN documents in the field in a textbook-like fashion and include historical perspectives on the evolution of UN human rights promotion. By the end of the 1980s, historization of the declaration sets in, often with an educational purpose and the aspiration to expose 'the' intent of the drafters regarding various aspects of the Declaration.⁵⁷ A more vigorous debate on the Declaration and the future of human rights protection is launched only in the beginning of the 1990s as a reaction to the end of the Cold War.

Notably, in 1992 the first Commentary on the Declaration was published as a Nordic co-operation project by Asbjorn Eide, Gudmundur Alfredsson, Göran Melander, Lars Adam Rehof, and Allan Rosas. Without contending that the Declaration had already acquired the status of binding customary law, the Commentary conceives the Declaration as a serious document with enormous legal repercussions. Most sections include a review of current Nordic practice under the respective right. The individual contributions to the Commentary often begin with the *travaux préparatoires* on the Article of the Declaration in question, followed by a description of subsequent standard-setting

⁵⁴ See the reference to the Universal Declaration in the 2000 UN Millennium Declaration, GA Res 55/2 of 8 Sept. 2000, para. 25: '[we resolve therefore] [t]o respect fully and uphold the Universal Declaration of Human Rights'.

⁵⁵ G. Johnson and J. Symonides, *La déclaration universelle des droits de l'homme. 40e anniversaire – 1948–1988* (1991).

⁵⁶ B. G. Ramcharan, *The Concept and Present Status of the International Protection of Human Rights: Forty Years after the Universal Declaration* (1989).

⁵⁷ See J. Morsink, *The Universal Declaration of Human Rights, Origins, Drafting and Intent* (1999).

and often end on a realistic note regarding the lack of implementation,⁵⁸ thereby building a classic arc of suspense remotely reminiscent of religious narrations. The creation of the language of rights is genesis, binding standards are the commandments, and the lack of implementation is sin. In the various contributions – also because of the ample references to the drafting debates in the Commission on Human Rights in the 1940s – two recurring themes can be identified: the horizon of universality in a contentious cultural environment and the quest for more effective implementation mechanisms after major political blockades between the two superpowers had been removed by the fall of iron curtain.

In his section on the Preamble to the Universal Declaration, Jan Martenson depicts the political environment in 1992 as follows:

We must not lose sight of the relevance of the UDHR call for action. The world has, over the last two or three years, undergone a significant and fundamental change. Sterile ideological tensions have, in large measure, been replaced by renewed commitments to multilateral diplomacy and, although periods of crisis are still a fact of international life, we do stand at the threshold of what might be called a new era of international relations.⁵⁹

In the early 1990s the end of the East–West antagonism gave rise to the hope that the geopolitical situation was conducive to a global consensus on the nature and scope and improved implementation of international human rights protection. However, conflicting approaches to human rights protection continued to loom under the surface and became clearly visible in the preparation phase for the 1993 Vienna World Conference on Human Rights. Asian governments openly questioned the Western insistence on individual rights and their negative stance on the notion of individual duties to the community. Islamic governments voiced concerns regarding various issues on the human rights agenda.⁶⁰ Many Western governments on the other hand continued to oppose granting economic, social, and cultural rights the same status as civil and political rights.

All of this was in the air when the Nordic commentary was published, and in its introduction the question of universality had to be directly addressed. The authors conceded that conflicts on the Declaration and the rights and duties contained therein persisted, and that there was ‘some truth’ in the contention that the Declaration had incorporated a Western approach to rights. Nonetheless, they maintained that challenges to

⁵⁸ Most authors contributing to the commentary come to a rather negative conclusion regarding improvements on the ground. For instance, Hans Danelius in the section on the prohibition of torture (Art. 5) holds that it is ‘a sad fact that torture is still widely used in many parts of the world’, and Nina M. Larsen (Art. 4.) states that ‘millions of people still suffer from slavery and slavery-like practices’, in A. Eide (ed.), *The Universal Declaration of Human Rights. A Commentary* (1992), at 98, 109.

⁵⁹ Martenson, ‘The Preamble of the Universal Declaration of Human Rights and the UN Human Rights Programme’, in *ibid.*, at 28.

⁶⁰ An-Na’im, ‘Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights’, in C. Welch and V. Leary (eds), *Asian Perspectives on Human Rights* (1990), at 36; on Islam and human rights see Bielefeldt, ‘Muslim Voices in the Human Rights Debate’, 17 *Human Rights Quarterly* (1995) 587; for a governmental Asian perspective see Tun Hussein, ‘Human Rights – The Asian Perspective’, in R.G. Patnam (ed.), *Universal Human Rights* (2000), at 75.

the universality of the Declaration were ‘frequently exaggerated’ and that the Declaration, because of its balancing of civil, political, and economic and social rights, together with its references to duties, could serve as a ‘possible bridge’ between different points of view.⁶¹ Although, or precisely because, the universality issue was on the table in 1993 the Vienna Declaration and Programme of Action should become one of the most noted non-binding UN documents on human rights protection since the adoption of the Declaration in 1948. In a brilliant diplomatic compromise the question of universality had been addressed in paragraph 5 of the outcome document:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁶²

Universality here did not come without strings attached. When interpreted through a relativist lens the paragraph stated that human rights were universal, but (conflicting) cultural backgrounds should continue to be respected, and that all states had to protect human rights, but in order to do so they did not have to change their political, economic, and cultural systems (even if they conflicted with human rights). Again, the reaffirmation of universality was sufficiently vague to achieve broad support within the UN. Of course, a harmonized interpretation reconciling the conflicting poles of universality and relativism could also be advanced. Mary Ann Glendon, in her 2001 book on the origins of the Declaration, rejects the depiction of the Declaration as ‘Judeo-Christian imperialism’, making the case for the diversity in universality approach to human rights:

[t]he Declaration’s architects expected that its fertile principles could be brought to life in a legitimate variety of ways. Their idea was that each local tradition would be enriched as it put the Declaration’s principles into practice ... That is evident from the leeway they afforded in the text for different modes of imagining, weighting, and implementing various rights.⁶³

Yet there is the dilemma indicated by Lauterpacht that precisely this leeway, emerging from the vagueness of the entitlements and their broad limitations, takes away the normative force the Declaration could have, virtually inviting governments to exploit the rights discourse politically.

Debates about the philosophical foundations of human rights had already played a vital role in the drafting process of the Declaration. UNESCO in 1947 held a symposium on the Declaration inviting philosophers from all regions of the world to contribute their stance on the nature of human rights. Jacques Maritain, French thomist, professor of philosophy, and ambassador to the Vatican at the end of the war in his introduction to the UNESCO volume dismissed claims to a universal foundation of human rights. The submitted contributions showed that in 1947 no common philosophical

⁶¹ Eide and Alfredsson, ‘Introduction’, in Eide (ed.), *supra* note 58, at 13.

⁶² Vienna Declaration and Programme of Action, UN Doc A/CONF.157/24 (Pt I) (1993).

⁶³ Glendon, *supra* note 9, at 206, 230.

understanding of human rights could be achieved. A list of universal rights in his view could only be the product of pragmatic creativity in the face of fundamentally antagonistic philosophical and theoretical approaches to the notion of individual rights; a bold foundationless step. If such a list was created it would need several subsequent steps of concretization as to its meaning and the internal hierarchy of the proclaimed entitlements.⁶⁴ From a legal perspective, Lauterpacht in 1950 also took a rather pragmatic approach to the question of universality. Human rights were a historical product of Western enlightenment and its natural law traditions; they were a Western invention which, however, would have binding character internationally only once sufficiently concretized and enshrined in a treaty instrument ratified by the state in question.⁶⁵ He did not seem to doubt for a second that this Western invention could potentially bring benign progress to all parts of the world.

4 Soul-searching and the Limits of Institutionalization

Already in the 1990s the literature had begun more critically to take stock of institutional achievements.⁶⁶ A growing insecurity about the value and the impact of the then existing UN human rights institutions can be observed. Two cross-cutting implementation issues figure more prominently in the literature of that time: the question of selectivity and politicization of the Commission on Human Rights⁶⁷ and the problem of fragmentation of the separate issue-related implementation mechanisms of the treaty system.⁶⁸

The UN human rights system in the mid-1990s rights system relied on mechanisms for standard-setting and monitoring which had been around for decades. The Commission on Human Rights, supported by the newly established Office of the UN High Commissioner for Human Rights, acted as a political standard-setting and monitoring body. Controlled by governmental representatives, monitoring efforts by the Commission on Human Rights, however, remained selective and inevitably highly politicized. The outcome of the Commission's petition procedure remained subject to diplomatic compromises reached behind closed doors. The idea of having independent experts instead of national diplomats sitting in the Commission on Human Rights, which had frequently been voiced in the literature, never met with sufficient support from governments. After the turn of the century, a growing sense of institutional crisis became tangible in the debates among scholars, UN officials, and the interested public.

⁶⁴ Maritain, 'Introduction', in UNESCO (ed.), *Um die Erklärung der Menschenrechte. Ein Symposium* (1951), at 12–15; the notion of a foundationless commitment to the universality of human rights was famously advanced by Richard Rorty at the end of the century: Rorty, 'Human Rights, Rationality, and Sentimentality', in S. Shute and S. Hurley (eds), *On Human Rights, Oxford Amnesty Lectures* (1993), at 111; reflecting on Rorty's approach is Hoffmann, 'Human Rights, The Self and the Other', in A. Orford (ed.), *International Law and its Others* (2006), at 221.

⁶⁵ As of Oct. 2008, 162 states have ratified the ICCPR and 159 the ICESCR.

⁶⁶ With various contributions on the UN human rights system see Alston (ed.), *supra* note 51.

⁶⁷ On 'imbalances' see Alston, 'The UN Commission on Human Rights', in *ibid.*, at 126, 159–164.

⁶⁸ T. Meron, *Human Rights Law-making in the United Nations. A Critique of Instruments and Process* (1986); Crawford, 'The UN Human Rights Treaty System, A System in Crisis?', in P. Alston and J. Crawford (eds), *The Future of Human Rights Treaty Monitoring* (1999), at 1.

In 2005 the UN Secretary General Kofi Annan attested that the Commission on Human Rights, which had created not only the Declaration but a wide range of other human rights standards, was in dire need of reform. In the following reform process, the Commission was replaced by the UN Human Rights Council in 2006. The old Commission had been criticized by Western commentators and governments for inaction on a number of country situations in which the political condemnation of human rights abuses by the Commission was felt necessary. This silence of the Commission was due to the fact that in particular African and Asian states were able to mobilize opposition to resolutions criticizing governments of their regions by way of backroom deals between regional groupings. However, states with significant clout, like China, the US, and Russia, also had been able, through political pressure and inducements, to keep other members of the Commission from tabling or supporting resolutions against them or their allies, as in the cases of Chechnya, Uzbekistan, and Guantánamo Bay.

The strongest criticism of the Commission, however, was generated by the membership question. The fact that countries like Sudan, Sierra Leone, and Togo were among the 53 members of the Commission led to severe criticism, primarily in the public debate in the US. The election of the Libyan Ambassador as chairperson of the Commission in 2003 was the beginning of the end of US support for the Commission as an institution. The growing criticism voiced by the US since 2003 and the UN Secretary General eventually led to the replacement of the Commission by the new UN Human Rights Council in 2006.⁶⁹ Already the first sessions of the Council demonstrated that it was an illusion to believe that the regional and strategic solidarity within the UN would cease to exist once the worst perpetrators no longer sat in the body. Political questions like the Palestine conflict and African solidarity against 'human rights lectures' by former colonial powers continued to facilitate political alliances and bloc voting in the Human Rights Council. The assumption that national representatives entering the Palais des Nations in Geneva for a session of the Human Rights Council would forget their strategic political alliances, economic interests, and public opinion at home in order impartially to advance the universal cause of human rights had been unrealistic to start with.

The old Commission on Human Rights also had at its disposal the mechanism of independent UN Special Rapporteurs, a more neutral and arguably more effective form of issue- or country-related expert monitoring, which was adopted by the new UN Human Rights Council. With regard to the treaty-based system of human rights protection, the individual UN human rights conventions mandate separate expert committees⁷⁰ ('treaty bodies') to conduct a reporting procedure, and in most cases also an individual petition mechanism. Despite increased efforts by the office of the UN High Commissioner for Human Rights to ensure doctrinal coordination of the 'jurisprudence'

⁶⁹ On the new body and the reasons for replacing the Commission on Human Rights see Alston, 'Reconceiving the UN Human Rights Regime. Challenges Confronting the New UN Human Rights Council', 7 *Melbourne J Int'l L* (2006) 185.

⁷⁰ On the committee for the ICCPR see Buergenthal, 'The U.N. Human Rights Committee', 5 *Max Planck Yrbk UN L* (2001) 341.

of the various formally independent treaty bodies, the problem of fragmentation of standards became a prominent issue in scholarly debate.⁷¹ An attempt to create a more powerful unified standing treaty body for all conventions found little support among governments.⁷² Despite new convention projects and the production of more issue-related standards, when it came to implementation the existing institutional set up of UN human rights protection seemed to have reached its limits.

The turn to international human rights from its inception had a cosmopolitan *telos*, which clearly went beyond the institutional realities of the UN human rights system as it had developed since 1948. Lauterpacht had proposed creating a UN Human Rights Council consisting of independent experts who, *inter alia*, conducted an individual petition mechanism.⁷³ A World Court of Human Rights was supposed to function as an appeal body for individual decisions. For him regional experiences with human rights adjudication such as the European Court of Human Rights were 'a contributory factor in the consummation of the organized *civitas maxima*, with the individual human being in the very centre of the constitution of the world'.⁷⁴ The idea of a World Court of Human Rights with compulsory jurisdiction, which had already been dismissed in the drafting process of the Declaration, has time and again reappeared in the literature, often together with the proposal to involve the Security Council in the enforcement of binding judicial decisions.⁷⁵ In the absence of its full legal institutionalization the turn to rights took place – as Habermas pointed out – in anticipation of a cosmopolitan state of international relations.⁷⁶ International human rights protection thus has to operate *as if* that absent state of institutionalization of the rights discourse had already been achieved. This 'as if' character of the rights discourse makes it vulnerable to the temptations of unilateral enforcement and political instrumentalization and often obstructs a realistic assessment of its achievements on the ground.

As is well known, without judicial controls the symbolic dimension of rights claims can easily be exploited to justify recourse to violence by hegemonic powers. Historic examples abound. Despite necessary political and legal differentiations between these cases, recent Western interventions in Kosovo (1999), Afghanistan (2001), and Iraq (2003) all had in common that their official justifications made ample references to the negative human rights record of the invaded country.⁷⁷ Carl Schmitt's famous critique of the political recourse to universal values comes to mind. It is epitomized in the

⁷¹ See Tistounet, 'The Problem of Overlapping among Different Treaty Bodies', in Alston and Crawford (eds), *supra* note 68, at 383.

⁷² OHCHR Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, 22 March 2006 (HRI/MC/2006/2).

⁷³ Lauterpacht, *supra* note 8, at 373–393.

⁷⁴ *Ibid.*, at 463.

⁷⁵ Das, 'Some Reflections on Implementing Human Rights', in Ramcharan (ed.), *supra* note 41, at 131, 152–154; Nowak, 'The Need for a World Court of Human Rights', 7 *Human Rights L Rev* (2007) 251.

⁷⁶ J. Habermas, *Der gespaltene Westen. Kleine politische Schriften* (2004), at 171.

⁷⁷ US President Bush justified his 'war on terror' in 2004 before the UN GA by stating: '[o]ur security is not merely found in spheres of influence or some balance of power. The security of our world is found in advancing the rights of mankind': UN Doc. A/59/PV.3, at 7–11; on human rights and the 'war on terror' see Anghie, 'On Critique and the Other', in Orford (ed.), *supra* note 64, at 389.

pointed statement he adapts from Pierre-Joseph Proudhon: ‘whoever says humanity wants to cheat’.⁷⁸ In his *Concept of the Political* Schmitt saw a close connection between political violence and moral claims to universal justice. States attempt to wage wars in the name of humanity in order to justify political violence. By invoking terms such as ‘humanity’ the political opponent is rendered an outlaw, standing outside humanity and outside the law. Claims to universal values can be used to justify violence of a particularly extreme nature by drawing a moral boundary between oneself and the political ‘enemy’.⁷⁹ Recent experiences with Western interventions, including the subsequent treatment of foreign detainees in the so-called ‘war against terrorism’, seem to have confirmed these sceptical insights offered by Carl Schmitt. In the absence of world state-like structures of checks and balances at the international level the question of ‘ulterior motives’ and discursive justification of excessive violence will continue to loom large over military enforcement of human rights claims in foreign countries. Since the turn of the century, David Kennedy has voiced a comprehensive critique of the human rights project. He points to the problem that human rights vocabulary strengthens the tendency of international lawyers to concern themselves with constitutional questions of the regime itself rather than with questions of distribution in the broader society. He highlights that human rights can be and have been abused to legitimate war, religious oppression, and other repressive projects, and demands a ‘pragmatic reassessment of our most sacred humanitarian commitments’.⁸⁰

Perhaps also out of increasing frustration with institutional developments, the literature approached the implementation issue increasingly from a more decentralized perspective, by referring to the power to mobilize and support resistance, dissent, and emancipatory struggles from within a particular country through public intellectuals, national human rights institutions, and civil society groups.⁸¹ By the mid-1990s the role of civil society in the development and implementation of international human rights had become a standard topic in the literature. The activities of Charter 77 and other civil society groups in Eastern Europe before the fall of the Iron Curtain became a prime example of the significance of human rights activism for the implementation of international human rights.⁸² The Declaration from the very beginning had taken

⁷⁸ C. Schmitt, *Der Begriff des Politischen* (1963 [1932]), at 55; his theoretical insights into the ideological nature of international political discourse stopped Carl Schmitt from neither openly endorsing the racially motivated exclusion of German international lawyers of Jewish origin from the German academic landscape in the 1930s nor intensively collaborating with the Nazi government in the first years of Nazi rule in Germany; on Carl Schmitt’s anti-Semitism see R. Gross, *Carl Schmitt and the Jews: ‘The Jewish Question’, the Holocaust and German Legal Theory* (2007).

⁷⁹ See on morality and international law von Bernstorff and Venzke, ‘Ethos, Ethics and Morality in International Relations’, in R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law* (forthcoming).

⁸⁰ D. Kennedy, *The Dark Sides of Virtue. Reassessing International Humanitarianism* (2004), at 35.

⁸¹ Wieseberg, ‘Human Rights NGOs’, in A. G. Caterman *et al.* (eds), *The Role of NGOs in the Promotion and Protection of Human Rights* (1989), at 23; Christenson, ‘World Civil Society and the International Rule of Law’, 19 *Human Rights Quarterly* (1997) 724; C. Tomuschat, *Human Rights: Between Idealism and Realism* (2003), at 231–240.

⁸² Havel, ‘A Spiritual Covenant for Mankind’, in B. van der Heijden and B. Tahzib-Lie (eds), *Reflections on the Universal Declaration of Human Rights, a Fiftieth Anniversary Anthology* (1998), at 147.

on a life of its own outside diplomatic circles and formal legal documents. Due to its historical significance it had been widely used for educational purposes, and arguably is still much more familiar to the general public than any other international human rights document. The Declaration has been translated into more languages than any other existing text. It is used by individuals and civil society groups in order to protest against forced evictions of slum dwellers from an informal settlement in Nairobi, by Chinese workers protesting against repressive exploitation of their workforce as well as by Western civil society groups protesting against torture in Guantanamo. The question of its (non-)binding character does not seem to play a decisive role in these political struggles. In these contexts, the Declaration does not serve as an 'inspiration', but often as a last desperate attempt to formulate experiences of pain, deprivation, and distress in politically more powerful language. Given its ubiquitous nature, recourse to rights language is an advocacy strategy potentially helping to give those a voice who are otherwise silenced by dominant societal and economic structures; a voice which would also be heard outside one's own country.

A particular dynamic field of cooperation between civil society, legal academia, and UN institutions has since the second half of the 1990s evolved in the area of economic, social, and cultural rights. A number of General Comments of the UN Committee on Economic, Social and Culture Rights have helped to clarify the doctrinal structures of the rights set out in the ICESCR.⁸³ At the same time, the anti-globalization movement discovered the rights discourse by framing distributional questions in human rights language. A particularly striking example is the claim for a human right to water,⁸⁴ which had not been mentioned explicitly in the Declaration but could arguably be derived from the right to an adequate standard of living set out in both in the Declaration (Article 25) and the ICESCR (Article 11). The right emerged out of protests against World Bank-financed water privatization projects in South America, which in the late 1990s in some cities had left poor suburbs and informal settlements without access to safe water facilities. With polluted water killing 4,000 children per day at a global scale the new right has been created out of a situation of extreme distress in many parts of the world.⁸⁵ The responsive stance of the Committee on Economic, Social, and Cultural Rights in its General Comment No. 15 on the 'right to water' and affirmative voices in the literature are about to create a new human right without an explicit textual basis in the Declaration. As to the right to water the symbolic dimension of the rights discourse, facilitated by its semantic openness and normative ambiguity, has proved conducive to employing the rights language as a dynamic counter-hegemonic strategy. A somewhat disturbing question, however, must for now remain unanswered: in 10 years' time will the literature again draw its ritualistic

⁸³ See for instance CESCR General Comment No. 3, UN Doc E/1991/23 for an overview of doctrinal developments: M.C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Development* (1995); A. Eide (ed.), *Economic, Social and Cultural Rights. A Textbook* (2001).

⁸⁴ E. Riedel (ed.), *The Human Right to Water* (2006).

⁸⁵ For an official UNICEF overview of the water crisis see www.unicef.org/wes/index_23606.html.

conclusion that all that has not yet led to any significant improvements in living conditions of the most vulnerable?

5 Conclusion

International lawyers have received the Declaration in the light of their contemporary political and doctrinal contexts. Despite early sceptical voices about its legal and moral value, international lawyers welcomed and reaffirmed its significance during the 1960s and 1970s. While attention turned to human rights treaty law in the 1980s, the Declaration embodied the hope for a new era of human rights protection after the end of the Cold War. Throughout the 1990s a new scholarly defence of the universal character of the Declaration could be observed, later being accompanied by new insecurity and soul-searching in the face of institutional limitations. In general, the Declaration became synonymous with the turn to individual rights in international law, and whenever there was a sense of crisis because of institutional blockades or challenged foundations, the Declaration received new and increased attention. It symbolized unity in an increasingly fragmented and contentious institutional and political environment. The story of its scholarly reception is therefore also a story of the failed and perhaps unattainable attempt fully to institutionalize international human rights in a cosmopolitan legal order. This unattained political *telos* is constitutive of the positive and the negative dimension of the symbolic force of the international human rights discourse: its potential to address individual pain and suffering through the language of international law on the one hand, and its potential for the politico-legal justification of excessive violence and political domination on the other. The Declaration stands for this ambivalence of the turn to rights and will continue to do so.