Felipe Gómez Isa and Koen de Feyter (eds.)

International Human Rights Law in a Global Context



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The Universal Declaration of Human Rights

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Summary: 1. Writing the Universal Declaration. 2. The Content of the Universal Declaration. 2.1. The Preamble and Articles 1 and 2: the Ideological Basis of the Declaration. 2.2. Analysis of the main body of the Universal Declaration. 3. The Universality of the Universal Declaration of Human Rights. 4. The Legal Value of the Universal Declaration. 4.1. The Current Legal Value of the Universal Declaration. 4.2. Theories Explaining its Current Legal Value. 4.3. Analysis of the provisions which have acquired the status of peremptory norms of International Law. 5. Conclusions.

Before beginning a detailed analysis of the Universal Declaration of 1948, it should be made clear that the Declaration, together with other human rights instruments, forms part of what is known as the *International Bill of Human Rights*. By using the expression "International Bill of Human Rights", which is not a technical name from an international law point of view, we are recognising three international documents of particular importance: the Universal Declaration of 1948, and the two International Covenants on human rights of 1966, which completed the regulations of the Declaration, making up the basic international code of human rights.

We have already seen[1] how, at the San Francisco Conference, there were more daring proposals regarding human rights than those which were eventually included in the United Nations Charter. However, reference has also been made to the particular importance of Article 68 of the Charter, where the Economic and Social Council of the United Nations was ordered to create a commission for human rights. This commission for human rights was created immediately, in February 1946, and was entrusted with the task of preparing a project of "an international bill of human rights". The Commission very soon recognised that it would be relatively easy to come to an agreement on a declarative and programmatic text but that acceptance of a legally binding inter-

[1] See the introductory paper by Felipe Gómez in this same book.

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national treaty, which would define in detail the obligations of States with regards to each of the rights, would be a much longer process and one which would be much harder to accomplish. Problems regarding the sovereignty of States would again condition the whole process of the internationalisation of human rights which had begun with the United Nations Charter. The Commission therefore very astutely decided to first of all work on a Declaration so that immediately following its approval they could move on to the preparation of a treaty. This decision shaped the work of the Commission in the following years and led to the Universal Declaration in 1948 and, 18 years later, to the International Covenants of human rights of 1966, which were to come into force ten years later, in 1976.

The Universal Declaration of Human Rights is the first general legal and international instrument of human rights proclaimed by an international organisation with a universal character[2]. As Thomas Buergenthal, former President of the Inter-American Court of Human Rights states, "because of its moral status and the legal and political importance it has acquired over the years, the Declaration ranks with the *Magna Carta*, the French Declaration of the Rights of Man and the Citizen (1789), and the American Declaration of Independence (1776), as a milestone in mankind's struggle for freedom and human dignity"[3].

1. **Writing the Universal Declaration**

Right from the beginning of the United Nations, the production of a human rights instrument that could concrete and define the regulations of the Charter was one of its fundamental aims. The most important part of this task was taken on by the Commission on Human Rights, created in 1946 as a subsidiary body to the Economic and Social Council (ECOSOC). However from the beginning the Commission on Human Rights was aware of the problems involved in this venture, given the fact that the positions were, as we shall see below, very opposed.

Initially, the Commission on Human Rights set itself three targets. These were first of all to approve a declaration so as to provide ade-

[2] We should take into account the fact that, a few months prior to the Universal Declaration, the *American Declaration of the Rights and Duties of Man* (2 May 1948) had been approved at the Ninth International Conference of American States, a Declaration which had a certain amount of influence on the Universal Declaration.

[3] BUERGENTHAL, T.: *International Human Rights in a Nutshell*, West Publishing Co., Minnesota, 1988, pp. 25 and 26.

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quate international protection for human rights, secondly a human rights covenant and finally a series of measures for putting into practice the rights recognised in the two aforementioned instruments. These three documents were to form what René Cassin called the "Human Rights Charter"[4]. However, it very soon became clear that these aims were too ambitious; States were not prepared to make commitments of this nature and eventually a much more modest aim was decided on, which was to produce a single document to enshrine the most relevant human rights. However there was still a problem, namely to clarify whether what was going to be produced would be a mere Declaration of the General Assembly of the United Nations, without full legally binding value for States or, conversely, an international human rights covenant which would be a truly international treaty of an obligatory nature[5]. The less stringent option, which was less binding for States, again came to the forefront and it was decided that a human rights declaration would be written; a type of manifesto which was political and programmatic in character, leaving until later, the writing of an instrument which bound States to a greater extent, along with the adoption of concrete measures for putting into practice recognised human rights.

In any case drafting a human rights declaration would not be simple either, but rather the opposite; it was to be a process plagued with obstacles and difficulties[6]. The main problem which faced the Commission on Human Rights in carrying out this task was the huge ideological-political conflict present at that time in international society and, of course, within the United Nations. We are here referring to the East-West conflict and the ideological, political, and economic battles between the United States and its Western allies, on the one hand, and, on the other hand, the Socialist bloc led by the Soviet Union. For the

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[4] CASSIN, R.: «La Déclaration Universelle et la mise en ouvre des droits de l'homme», *op. cit.*, p. 270.

[5] While the United States was in favour of producing a Declaration, other countries, such as Great Britain and Australia, were in favour of approving a document which was binding to a much stronger degree. See VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle des Droits de L'Homme*, Societé d'Etudes Morales, Sociales et Juridiques, Louvain, Editions Nauwelaerts, Louvain-Paris, 1964, pp. 54 ff.

[6] The difficulties which had to be overcome before the eventual approval of the Universal Declaration are related in an autobographical tone by John P. Humphrey who, being as he was at that moment Director of the Division of Human Rights at the United Nations, is able to relay the information first-hand. See HUMPHREY, J.P.: «The Universal Declaration of Human Rights: its History, Impact and Juridical Character», in RAMCHARAN, B.G. (Ed.): *Human Rights. Thirty Years after the Universal Declaration*, Martinus Nijhoff Publishers, Dordrecht, 1979, pp. 21-37.

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Soviet Union and the Socialist bloc countries, the Universal Declaration of Human Rights was not a fundamental objective; rather, they expressed an "uncompromising hostility"[7]. In their opinion, a person is above all a social being and as such the rights which must be guaranteed are those which are economic, social, and cultural in nature, not awarding such importance to those of a civil and political nature. The socialist countries however, gave huge importance to the principle of State sovereignty and as such human rights could not pass over the sovereignty of States; in other words, questions relating to human rights were considered issues that essentially fell under the domestic jurisdiction of States and, as a result, the international community could not intervene and criticise the human rights situation in a given country. Conversely, the stance defended by Western countries, especially France, the United States, and Great Britain was distinguished by its decided defence of rights of a civil and political nature, the classic freedoms of Western democracies. As such, these countries were in favour of human rights becoming issues which went beyond the internal jurisdiction of States; in other words, involving the international community.

As can be seen, the controversy had begun and human rights became yet another tool for the battles between the greater powers which were already very involved in the Cold War, which was to last from the end of the Second World War until the beginning of the 1990s. As John Foster Dulles, former U.S. Secretary of State, stated on this issue (in a speech at the American Bar Association in 1949), "the Universal Declaration, like the French Declaration of the Rights of Man and the Citizen, is an important element in the great ideological fight which is currently being fought in the world, and, in this sense, Mrs. Roosevelt has made a significant contribution to the defence of North American ideals"[8]. As we can see, Mr. Dulles saw the Universal Declaration as yet another element in the ideological battle against the USSR, making a special mention of the work of the United States representative on the committee for the writing of the Declaration, Mrs. Eleanor Roosevelt, which had consisted in a tooth-and-nail defence of American ideals and principles[9].

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[7] CASSIN, R.: «La Déclaration Universelle...», *op. cit.*, p. 267.

[8] Quoted in CASSESE, A.: *Los derechos humanos en el mundo contemporáneo*, Ariel, Barcelona, p. 42.

[9] In any case, it appears that there exists clear evidence that Eleanor Roosevelt's personal opinions were more open than is suggested by the speeches in which she defends the position of the U.S. government. Mrs. Roosevelt expressed herself as hugely critical

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Despite these extreme opinions, it should be said that in the end the Universal Declaration was a balance, a type of consensus, as we shall see when we analyse its content, between the different positions among the international community on the controversial topic of human rights. As Professor Antonio Cassese has correctly stated, the Universal Declaration was, more than a triumph for one side or the other, "a victory (not complete, though) for all of humanity"[10].

As has already been stated, it was to be the Commission on Human Rights of the United Nations that was to take on the complicated task of the project to draw up the Universal Declaration of Human Rights[11]. However, before the Commission on Human Rights could begin its work, the first measure taken by ECOSOC as regards the Universal Declaration was to appoint those on the initial committee (also known as the *nuclear committee*), made up of nine people[12] who would perform their tasks in their personal capacity. Following the first work of this nuclear committee, a drafting committee was named, made up of delegates from eight countries, from which we can begin to form an idea as regards those who were the principal influences on the Universal Declaration. The eight countries involved in this drafting committee were Australia, Chile, China, United States, France, Lebanon, Great Britain, and the Soviet Union. This drafting committee, after its first

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of the racial discrimination of her country which, in her opinion, made her feel ashamed at international conferences she attended. On the enormous influence of Mrs Roosevelt on the Universal Declaration, see JOHNSON, M.G.: «The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights», *Human Rights Quarterly*, Vol. 9, 1987, pp. 27 ff. Also see MOWER, A.G.: *The United States, the United Nations and Human Rights: the Eleanor Roosevelt and Jimmy Carter Eras*, Westport, Greenwood Press, 1979.

[10] CASSESE, A.: *Los derechos humanos...*, *op. cit.*, p. 53.

[11] On the different stages through which the production of the Universal Declaration of Human Rights passed, see the summary produced by MOLLER, J.T.: «The Universal Declaration of Human Rights: How the Process Started», in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights: A Commentary*, Scandinavian University Press, Oslo, 1992, pp. 1-3.

[12] The nine people who were to perform their work were as follows: Paul Berg (Norway); René Cassin (France); Fernand Dehousse (Belgium); Víctor Haya de la Torre (Peru); K.C. Neogy (India); Eleanor Roosevelt (United States); John C.H. Wu (China), later replaced by C.L. Hsia; Jerko Radmilovic (Yugoslavia), replaced by Dusan Brkish; and Nicolai Krioukov (USSR), replaced by Mr. Borisov. It should be noted as regards these nine members of the nuclear commission that René Cassin and Eleanor Roosevelt, two of the main driving forces and significant influences for the Universal Declaration, were already involved. On Cassin's and Roosevelt's roles see EIDE, A. and ALFREDSSON, G.: «Introduction», in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights: A Commentary*, *op. cit.*, p. 11.

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meetings and discussions, entrusted Professor René Cassin with the task of preparing a declaration project. After the drafting committee had approved this project written by René Cassin, it was presented at the second session of the Commission on Human Rights, which took place between November and December of 1947. However the project was still not sufficiently developed and as such had to be discussed again at the third session of the Commission on Human Rights, which took place in May and June of 1948. In the expert opinion of Albert Verdoot, this third session of the Commission was the most decisive for the final project of the Declaration, dealing with very important debates at the very heart of the issue, such as, for example, regarding the inclusion of economic, social, and cultural rights[13].

Once the Universal Declaration project had been approved by the Commission on Human Rights, this same body passed it on to ECOSOC so that ECOSOC could present it to the General Assembly of the United Nations, the body which had to finally approve the project. In September 1948, the General Assembly sent the Declaration project to its Third Committee, the Committee for Social, Humanitarian, and Cultural Affairs for examination. Following 24 work sessions, said Committee completed the Declaration project, recommending its approval by the General Assembly with 29 votes in favour and none against, but with seven abstentions. The countries which abstained in the vote at the Third Committee of the General Assembly were the six countries of socialist Europe and Canada, although, as we shall see, this last country voted in favour at the General Assembly. What is undoubtedly true is that the majority of opposition came from the socialist bloc countries.

Finally, on 10 December 1948 in the Chaillot Palace in Paris the Universal Declaration of Human Rights was approved by the General Assembly of the United Nations[14]. The final voting which took place at the General Assembly gives an interesting insight into where the main problems had been regarding the approval of the Universal Declaration. With this in mind, it should be noted that the Declaration obtained 48 votes in favour, eight abstentions, and not a single vote against[15], which can only be seen as a triumph. However, the definitive text had

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[13] VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle des Droits de L'Homme...*, *op. cit.*, pp. 67 ff.

[14] It should be noted that, from then on, 10 December has become the *International Human Rights Day*.

[15] Honduras and Yemen were not present at the final vote, and as such their votes were not counted.

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eight abstentions. These abstentions came from the following countries: the Soviet Socialist Republic of Belarus; Czechoslovakia; Poland; Yugoslavia; the Soviet Socialist Republic of the Ukraine; the Union of Soviet Socialist Republics; South Africa, and Saudi Arabia. As can be seen, the socialist bloc countries abstained *en masse*, due to the fact that they did not agree with certain parts of the Declaration. For its part, as we shall see below, Saudi Arabia expressed certain doubts based on its religious and family traditions, and South Africa was completely against the inclusion of economic, social, and cultural rights in the Declaration. However, what is far more important from our point of view is the fact that there was not even one vote against the Universal Declaration of Human Rights, and because of this it has become a vital reference point for the human race as regards human rights.

The fact is that the Universal Declaration of Human Rights was written and approved relatively quickly if we compare it with other subsequent human rights instruments. It took advantage of the favourable momentum which could be felt in international society just after the end of the Second World War. Had it not been approved on December 1948, the problems which were beginning to appear on an international scale would have made it very difficult to reach a consensus on an issue as controversial as that of a Human Rights Declaration. Many of the delegations which took part in the preparatory debates for the Universal Declaration were of the opinion that if it was not approved at that precise moment, it would never be approved. Many factors contributed to this, including the following: Firstly, the horrors of war were beginning to be less prominent in people's minds, and no longer had the influence that they had had at the first sessions of the Commission on Human Rights; secondly, the effects of the Cold War were beginning to be felt, intensifying as of 1948, meaning that human rights were beginning to be at the mercy of the great ideological battle; third, the question of self-determination began to rear its head as regards human rights, with its accompanying wildly opposing views; and, finally, the United States was beginning to lose the favourable position it had towards human rights under President Roosevelt[16]. It is as a result of all of these factors that it was so important to approve the Universal Declaration. As Ashild Samnoy has said, "the drafting of the Universal

[16] The radical changes which took place regarding human rights from 1950 with the Eisenhower Administration are significant, with a return to the cyclic "isolation" which the United States falls into on this and other topics. On this, see JOHNSON, M.G.: «The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection of Human Rights»..., *op. cit.*, p. 46.

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Declaration of Human Rights was a struggle against time and the erosion of memory"[17], becoming a more important achievement than anyone had imagined in 1948[18].

2. **The Content of the Universal Declaration**

As regards the content of the Universal Declaration of Human Rights, it is a faithful reflection of the challenges and ideological battles which essentially took place between the Socialist bloc, led by the Soviet Union, and the Western bloc, led by the United States. As Antonio Cassese, the great expert on human rights, has said, "the discussion at the United Nations concerning the Universal Declaration was wholly a fragment of the Cold War"[19], with each side trying to express its own conception of human rights and of the political, social and economic order in the Declaration. We were, at the time of modelling the content of the Universal Declaration, faced with "the confrontation between two human rights messianisms"[20], the capitalist and the socialist. While one of them, the capitalist, placed the emphasis on the 'classic' individual freedoms, or the civil and political rights that came about as a result of the eighteenth century bourgeois revolutions, the other put the emphasis on the economic and social circumstances in which individuals and social groups must exercise their rights, affording greater importance to the economic, social, and cultural rights which were born at the end of the nineteenth century and in the first third of the twentieth. It must not be forgotten that, at this time, the United Nations Organisation was still only made up of a reduced number of States due to the fact that vast colonial empires were still in existence[21]. It was for this reason that most of the group of countries we now know as the *The South* was absent from the debate concerning the Universal Declaration of Human Rights, and the most serious conflict took place between the Western countries and those belonging to the

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[17] SAMNOY, A.: *Human Rights as International Consensus...*, *op. cit.*, p. 108.

[18] HUMPHREY, J.: *Human Rights & United Nations...*, *op. cit.*, p. 74.

[19] CASSESE, A.: *Los derechos humanos en el mundo contemporáneo...*, *op. cit.*, p. 42.

[20] VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle..., op. cit.*, p. 13.

[21] An interesting approach to the historical circumstances in which the United Nations and, consequently, International Law, have evolved can be found in CARRILLO SALCEDO, J.A.: *El Derecho Internacional en perspectiva histórica*, Tecnos, Madrid, 1991.

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Socialist bloc; there were also significant contributions from Latin American countries[22].

In spite of everything already mentioned, and against all expectations, the final content of the Declaration constitutes a delicate and healthy equilibrium between the different ideologies and conceptions of human rights and society which were in existence at the time of its writing. Although we are obliged to recognise the fact that in certain passages of the Declaration the influence of predominantly Western theories can undoubtedly be felt, it cannot be said that the final result was an imposition of one ideology over another. In the insightful words of the eminent Latin American jurist Héctor Gros Espiell:

> "The Universal Declaration aimed to present a universal conception, an ideal common to the whole of humanity, of human rights, rising, in a divided world, above the different ideologies and opposed opinions on their origin and nature..."[23].

Below, we will proceed to a deeper study of the main elements of the content of the Universal Declaration of 1948. For this, we will first of all analyse the preamble and Articles 1 and 2 of the aforementioned text, which is where the underlying ideology is enshrined, so as to later go on to study the different rights proclaimed in the Declaration, both civil and political rights, and economic, social and cultural rights, with this latter group being the main novel element of the Declaration.

2.1. *The Preamble and Articles 1 and 2: the ideological basis of the Declaration*

The preamble of the text under analysis is exceptionally important given that it is where the main themes and guidelines regarding the conception of human rights that the Universal Declaration hopes to express are contained. In other words, it contains the ideological framework of the Declaration. According to the wise words of René Cassin, the French representative in the working group which drew up the Declaration, and one of the principal sources of its ideology:

> "The Universal Declaration has been compared to the vast portico of a temple, where the pediment is built of the preamble which

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[22] For a good summary of the different positions maintained as regards the content of the Universal Declaration by the different groups of countries present, see CASSESE, A.: *Los derechos humanos...*, *op. cit.*, pp. 40 ff.

[23] GROS ESPIELL, H.: *Estudios sobre Derechos Humanos II*, Instituto Interamericano de Derechos Humanos-Civitas, Madrid, 1988, p. 30.

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> affirms the unity of the human family, and where the columns are made up of the general principles of freedom, equality, non-discrimination, and fraternity proclaimed in Articles 1 and 2"[24].

It should also be noted that the preamble was written at the end of the drafting process and as such it reinforces the theory that it is a summary of the ideology of the Universal Declaration of Human Rights. According to Jan Marteson, the preamble "states unequivocally that the foundation of freedom, justice, and peace in the world is the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family"[25]. As we shall see later, the basis for the human rights enshrined in the Declaration is none other than the *dignity of the human being*. In the words of Niceto Blázquez, who has analysed the exact significance of the reference to dignity in the text of the Universal Declaration, "the whole Declaration is based on the philosophical-legal principle of the dignity of the human being. From this come the postulates of liberty, equality, and fraternity"[26]. Such is the sense of the statement which opens the text of the preamble. In it, the General Assembly of the United Nations considers that:

> "... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

Another important pronouncement regarding placing dignity as the basis for recognised human rights in the Declaration can be found in Article 1 of the same document. According to this provision, which goes into detail about what has just been established in the preamble, "all human beings are born free and equal in dignity and rights. They

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[24] CASSIN, R.: «La Déclaration Universelle et la mise en ouvre des droits de l'homme», *op. cit.*, pp. 277 and 278. René Cassin, winner of the Nobel Prize for Peace in 1968, has undoubtedly been one of the great sources of inspiration for the Universal Declaration of Human Rights, and of later United Nations work on the matter. For a personal and academic profile of this great French thinker, see GROS ESPIELL, H.: "René Cassin, los derechos del hombre y la América Latina", in GROS ESPIELL, H.: *Estudios sobre Derechos Humanos I*, Instituto Interamericano de Derechos Humanos-Editorial Jurídica Venezolana, Caracas, 1985, pp. 95-104.

[25] MARTESON, J.: «The Preamble of the Universal Declaration of Human Rights and the United Nations Human Rights Programme», in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights...*, *op. cit.*, p. 19.

[26] BLÁZQUEZ, N.: «El recurso a la *dignidad humana* en la Declaración Universal de Derechos Humanos de las Naciones Unidas», in *Dignidad de la Persona y Derechos Humanos*, Instituto Pontificio de Filosofía, Madrid, 1982, p. 110.

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are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".

Finally, we find a reference to dignity in Article 22 of the Universal Declaration of Human Rights, a provision where the right to social security is recognised, and which serves as a framework for the recognition of economic, social, and cultural rights. The mention of dignity in Article 22 is very important given that it is saying that without the satisfaction of rights which are economical, social, and cultural in nature, then life cannot be dignified[27]. Paraphrasing Article 22, every human being has the right to social security and the satisfaction of the economic, social, and cultural rights, "*indispensable for his dignity* and the free development of his personality"[28] (emphasis added). As we can see, the dignity of the human being depends as much on civil and political rights as it does on economic, social, and cultural rights. We find ourselves, as we will see again in other passages of the Declaration, facing a crystal clear affirmation of the *indivisibility and interdependence* of all human rights.

However, the Declaration offers us no definition of what it means by dignity, expressly rejecting any allusion of a metaphysical character as a foundation for dignity[29]. According to some, "it is implied that dignity is the quality of being recognised as a person"[30], from which the notions of freedom and equality necessarily derive.

These difficulties regarding the definition of the term 'dignity', used in the Universal Declaration as the basis of human rights, lead us to a problem of much greater magnitude which consists in trying to find the inspiring philosophy, if such a thing could be said to exist, of the Declaration. Right from the start of the process of the writing of the Universal Declaration it was clear that an attempt to base human

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[27] OLINGA, A.D.: «Le droit à des conditions matérielles d'existance minimales en tant qu'élément de la dignité humaine (Articles 2 et 3 de la CEDH)», in MORIN, J-Y. (sous la direction de): *Les Droits Fondamentaux*, Bruylant, Bruxelles, 1997, pp. 91-104.

[28] Equally, in Article 23 of the Declaration, which is dedicated o the right to work, a reference to dignity also appears. According to what is set out in Article 23.3, "everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of *human dignity*…".

[29] An attempt at defining the concept of dignity can be found in MAURER, B.: «Essai de définition théologique et philosophique de la dignité humaine», in MORIN, J-Y. (sous la direction de): *Les Droits Fondamentaux*, *op. cit.*, pp. 223-252. See also ZAJADLO, J.: «Human Dignity and Human Rights», in HANSKI, R. and SUKSI, M. (Eds.): *An Introduction to the International Protection of Human Rights...*, *op. cit.*, pp. 15-24; DONELLY, J.: "Human Rights and Human Dignity: An Analytic Critique of Non Western Conceptions of Human Rights", *The American Political Science Review*, Vol. 76, 1982, pp. 303-316.

[30] BLÁZQUEZ, N.: «El recurso a la *dignidad humana* en la Declaración...», *op. cit.*, p. 111.

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rights on a single philosophical foundation was to be an incredibly arduous task. At this time there were many different, and on occasion irreconcilable, cultural, religious, and philosophical traditions represented at the United Nations. It is certain that "the unilateral philosophical or political impositions would, without doubt, have generated irresolvable discussions within the pluralist framework of the United Nations"[31]. The Declaration is, in many regards, the result of a compromise, and the question of its philosophical basis was one of the aspects where agreements had to be reached between those holding differing points of view; points of view which fundamentally were either in favour of a naturalist view regarding human rights, or in favour of a purely positivist way of looking at them. As Joaquín Ruiz-Giménez, a respected expert on human rights, stated, the drafters of the Declaration "came to be convinced that it was useless to continue arguing all the way to the final foundation of human rights, and that what was important was realising the need for a consensus on a number of basic rights"[32]. It is for this reason that any overly explicit reference to the foundation of the Declaration was omitted from it. It is certainly true, however, that the philosophy of the Universal Declaration is basically inspired by the philosophy of human rights in the eighteenth century, but with some very important qualifications[33], as we shall see below.

To begin with, there is no explicit mention in the Declaration of "nature" as the ultimate basis for human rights, a difference compared with the Declarations of Rights of the eighteenth century[34] or the American Declaration of the Rights and Duties of Man[35]. Following an

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[31] RABOSSI, E.: *La Carta Internacional de Derechos Humanos*, *op. cit.*, p. 14.

[32] RUIZ-GIMÉNEZ, J.: «Intervención de D. Joaquín Ruiz-Giménez», in *Alocuciones sobre Derechos Humanos. Cuarenta Aniversario de la Declaración Universal de Derechos Humanos*, Ministerio de Asuntos Exteriores, Madrid, 1989, p. 177.

[33] MORSINK, J.: «The Philosophy of the Universal Declaration», *Human Rights Quarterly*, Vol. 6, 1984, p. 333.

[34] With this in mind it is important to discuss Article 2 of the *French Declaration of the Rights of Man and the Citizen* (26 August 1789). According to this provision, "the aim of all political association is the preservation of the *natural* and imprescriptible *rights* of man…" (emphasis added). In the same vein is Article 1 of the *Declaration of Rights of the Good People of Virginia* (12 June 1776), where it is set out that "all men are *by nature* equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity…".

[35] As is shown in the first paragraph of its preamble, "all men are born free and equal, in dignity and in rights, and, being endowed *by nature* with reason and conscience, they should conduct themselves as brothers one to another" (emphasis add-

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intense debate and seeing that it was very difficult to reach a consensus on this point, the idea in favour of leaving a reference to nature out of the Declaration prevailed. In the words of the Chinese delegation, "this measure would obviate any theological question, which could not and should not be raised in a declaration designed to be universally applicable"[36].

Secondly, this same statement from the Chinese government was applied to the attempt by some delegations to include a reference to the divine origin of human rights, such as appears in the eighteenth century Declarations[37]. The most insistent proposal for this came from Brazil with strong support on the matter coming from Argentina and from Charles Malik, the Lebanese representative. The Brazilian government proposed in Article 1 of the Declaration the expression "created in the image and likeness of God". Eventually, faced with the certainty that the proposal had little chance of prospering, Brazil chose to withdraw it[38]. The Soviet Union, justifying its negative stance against the inclusion of any mention of divinity in the Declaration, stated that it was a fact that "many people do not believe in God, and the Declaration should be aimed at humankind as a whole"[39]. Many delegations criticised this secularisation of the Universal Declaration, but it must be admitted, as René Cassin has done, that "the Declaration could not have been universal if there had been a desire to impose a single official doctrine"[40].

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ed). This statement is practically identical to Article 1 of the Universal Declaration of Human Rights, except that in the American Declaration there is an explicit mention of nature, and aspect which is lacking in the Universal Declaration. As Gros Espiell has said on the matter, "the American Declaration of the Rights and Duties of Man is in keeping with an American historical process in which the human being is the holder of rights which are essential as to his nature, inalienable and imprescriptible…", in Gros Espiell, H.: "La Declaración Americana: raíces conceptuales y políticas en la Historia, la Filosofía y el Derecho Americano", *Revista del Instituto Interamericano de Derechos Humanos*, N.º Especial, 1989, p. 42.

[36] Quoted in Samnoy, A.: *Human Rights as International Consensus...*, *op. cit.*, p. 100.

[37] In the *French Declaration of the Rights of Man and the Citizen* the National Assembly recognises and proclaims human rights "in the presence and under the auspices of the Supreme Being". In turn, the *Declaration of Rights of the Good People of Virginia* in its sixteenth Article refers to "the duty which we owe to our Creator".

[38] The details of these discussions, with different opinions, can be found in de la Chapelle, P.: *La Déclaration Universelle des Droits de l'Homme et le Catholicisme*, Librairie Générale de Droit et de Jurisprudence, Paris, 1967, p. 88.

[39] For the opinions of the USSR on this topic, see Verdoot, A.: *Naissance et Signification de la Déclaration Universelle des Droits de l'Homme...*, *op. cit.*, p. 276.

[40] Cassin, R.: «La Déclaration Universelle...», *op. cit.*, p. 284.

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We must therefore conclude that there is no single philosophical foundation to the Universal Declaration, with the horrors which took place during the Second World War being used as "the epistemic foundation of the Declaration"[41]. And so, as Sonia Picado has rightly said, "the text of the Declaration reveals a resurgence of the theory that there are fundamental principles, higher than ideological discrepancies, which the positive legal developments of each State should look to"[42].

Another significant aspect of the Preamble is the clear and undeniable support for *all members of the human family*, a unit which has as its base the fundamental rights of the human being; it could not be any other way. With this in mind, it is the first paragraph of the preamble which considers that "recognition of the inherent dignity and of the equal and inalienable rights of *all members of the human family* is the foundation of freedom, justice and peace in the world," (emphasis added). In this provision the desire for universality is clear. The Declaration attempts to recognise the human rights of "all members of the human family", regardless of their race, religion, gender, nationality etc. This desire for universality which can be found in the Declaration, which calls itself "Universal", is confirmed in Articles 1 and 2 of the Declaration itself. Article 1 states that "all human beings are born free and equal in dignity and rights", and Article 2.1 tells us that "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".

This same second Article extends the enjoyment or the rights proclaimed in the Declaration to all countries, whether these be independent States or those under colonial rule, thus contributing to the clear support for universality which the Declaration provides. This section is very important given that at the time when the Declaration was first proclaimed vast colonial empires were still in existence, which has been referred to as an enormous "contradiction in terms"[43] because on the one hand universal human rights were being proclaimed, and on the

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[41] Morsink, J.: «World War Two and the Universal Declaration», *Human Rights Quarterly*, Vol. 15, 1993, p. 358.

[42] Picado Sotelo de Oreamuno, S.: «Artículo 2», in Asociación Costarricense Pro-Naciones Unidas: *La Declaración Universal...*, *op. cit.*, p. 27.

[43] Clavero, B.: «De los ecos a las voces, de las leyes indigenistas a los derechos indígenas», in *Derechos de los Pueblos Indígenas*, Servicio Central de Publicaciones del Gobierno Vasco, Vitoria-Gasteiz, 1998, p. 37.

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other, some States continued to maintain colonial empires[44]. It is the second paragraph of Article 2 which states that "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".

In relation to the *principle of non-discrimination* which is proclaimed both in the preamble and in Articles 1 and 2 of the Universal Declaration, the role played by the Commission on the Status of Women should be made clear; it was, like the Commission on Human Rights, created in 1946[45], and defended the inclusion of the particular and specific perspectives of women in the text of the Declaration. On this matter, Mrs. Begtrup, the President of this Commission, played an undeniably praiseworthy role, achieving significant improvements in the final text of the Declaration, as we shall see below.

An important achievement was that the Preamble of the Universal Declaration of Human Rights reaffirmed its faith in "the equal rights of men and women", exactly as had been set out in the Preamble of the United Nations Charter. Article 1 of the Declaration, for its part, was exceptionally important from the point of view of women's rights, as it states that:

> "*All human beings* are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (emphasis added).

The expression "all human beings" is highlighted in italics because it was an expression which caused great controversy in the negotiations which led to the approval of the Universal Declaration. One of the initial proposals for this Article 1 used the expression "all *men*", which would have been disastrous from a women's point of view, and a very bad start for the Universal Declaration of Human Rights, enshrining sexist language in the very provision which was to head the Universal

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[44] This contradiction was solved, in part, in 1960, with the General Assembly of the United Nations' approval of the Declaration on the Granting of Independence to Colonial Countries and Peoples, resolution 1514 (XV), of 14 December 1960. In this Declaration, as well as for the first time proclaiming the right of self-determination for all peoples, the General Assembly states that "the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights…".

[45] John P. Humphrey has discussed the lobbying in favour of the rights of women performed by this Commission. In his opinion, "there was no more independent body in the United Nations" in HUMPHREY, J.P.: *Human Rights & United Nations: A Great Adventure*, *op. cit.*, p. 30.

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Declaration. Finally, faced with pressure from the Commission on the Status of Women and from some of the States more supportive to women's demands, such as some of the socialist countries, the expression was achieved[46].

For its part, Article 2 of the Universal Declaration is dedicated to enshrining the principle of non-discrimination. This second Article in its first paragraph states that:

> "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."

As we can see, it contains an extension of the circumstances in which discrimination is prohibited in relation to Article 1.3 of the United Nations Charter, which referred to non-discrimination "as to race, sex, language or religion".

Another triumph for the women's movement was the inclusion in all the provisions of the Universal Declaration of expressions such as "everyone" and "no one", thus expressing that the principle of non-discrimination should play a role in all the human rights recognised in the Universal Declaration.

There are, however, some references in the Universal Declaration that are fairly negative as regards the rights of women. Article 23.3, which recognises the right to work, states that "everyone who works has the right to just and favourable remuneration ensuring for himself *and his family* an existence worthy of human dignity…" (emphasis added). This sentence supposes that there exists only one working income in the family and that this income is, obviously, earned by the man[47].

Despite these points in the Declaration that are negative for women, Johannes Morsink has come to the conclusion that "the internal history of the drafting process and the struggles involved in reaching the final product, show that from the point of view of the rights of women the Declaration is a remarkably progressive document"[48]. This optimistic view of the document is not, however, shared by others. In

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[46] The details of all these discussions and negotiations can be consulted in MORSINK, J.: «Women's Rights in the Universal Declaration», *Human Rights Quarterly*, Vol. 13, 1991, pp. 233 ff.

[47] This same logic is present in Article 25 of the Declaration, which proclaims the right to an adequate standard of living.

[48] MORSINK, J.: «Women's Rights...», *op. cit.*, p. 255.

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the opinions of certain feminist writers, the evolution of human rights, both on an internal and on an international level, has been presided over by a *male-dominated* view of human rights, a view based on the experiences and the needs of men, which has marginalised the female view of the world. In the words of Carmen Magallón, "male-dominance is a defining characteristic of the tradition of Western thought and of human rights"[49]. In addition, the very structure of human rights, as it has been designed historically, is a structure which does not take into account the needs of women as regards human rights. International Human Rights Law itself "has developed to reflect the experiences of men and largely to exclude those of women"[50]. One of the reasons for this marginalisation of the expectations of women is that in the environments in which international norms are created, in States and international organisations, "the invisibility of women is striking…, very few States have women in significant positions of power"[51], which contributes to the fact that it is the masculine perspective that ends up in the dominant position[52]. In the process of drafting the Universal Declaration for Human Rights the absence of women in the governmental delegations is enormously significant, despite the role played by Eleanor Roosevelt.

Similarly, in the preamble of the Universal Declaration there is a special mention drawing attention to the terrible crimes against human rights committed throughout the Second World War, which are some of the most important factors which led the winners of the war to take on a serious and decided commitment to human rights[53]. This commitment was such that, as we have already seen previously, several statements appear in the Charter of the United Nations Organisation which reaffirm the faith of the peoples of the United Nations in fundamental

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[49] MAGALLÓN, C.: «Los derechos humanos desde el género», in CENTRO PIGNATELLI (Ed.): *Los derechos humanos, camino hacia la paz*, Diputación General de Aragón-Seminario de Investigación para la Paz, Zaragoza, 1997, p. 259.

[50] CHARLESWORTH, H.: «Human Rights, Men's Rights», in PETERS, J. and WOLPER, A. (Eds.): *Women's Rights, Human Rights: International Feminist Perspectives*, Routledge, New York, 1995, p. 103.

[51] CHARLESWORTH, H.: «Human Rights as Men's Rights»..., *op. cit.*, p. 104. This female author offers figures which detail female representation in different human rights bodies, figures which are quite revealing as regards the discrimination which takes place.

[52] FREEMAN, M.A. and FRASER, A.S.: «Women's Human Rights: Making the Theory a Reality», in HENKIN, L. and HARGROVE, J.L. (Eds.): *Human Rights: An Agenda for the Next Century*, The American Society of International Law, Washington, D.C., 1994, p. 104.

[53] On how the events of the Second World War influenced the development of a clear conscience regarding the respect of human rights, see BUERGENTHAL, T.: *International Human Rights in a Nutshell*, West Publishing Co., Minnesota, 1988, pp. 17 ff.

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rights. It is the second paragraph of the preamble of the Declaration that tells us that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of humankind". It is certainly true that from then on the international community has been fully conscious of the fact that if it wants to avoid such events from reoccurring then it should immerse itself in the promotion, encouragement, and effective protection of the human rights of all people[54]. On the other hand, it should be mentioned that, in this second paragraph of the preamble, can be found, in one form or another, the four freedoms proclaimed by Franklin D. Roosevelt in his famous speech to the U.S. Congress in January of 1941. For the President of the New Deal, the fundamental freedoms which all human beings should enjoy are four: freedom of speech and thought; freedom of religion; freedom from want[55], and freedom from fear. And so the philosophy behind Roosevelt's thoughts is now expressed in the Universal Declaration of Human Rights[56], when it states that what it means by the international recognition of human rights is "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want". As we can see, at the beginning of the Declaration we find a faithful representation of the four freedoms proposed by the U.S. President.

Another of the aspects present in the preamble is the connection between *the rule of law* and the effective protection of human rights. In other words, the Declaration considers "essential… that human rights should be protected by the rule of law"[57]. At no point in the preamble is what they consider the rule of law defined, but if we carefully read the different provisions of the Universal Declaration we can come to some conclusions as to what the drafters of the Declaration meant by this. Many of the human rights recognised by the Universal

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[54] Sadly, the events which have taken place in the former Yugoslavia, in Rwanda, in Liberia, and in Kosovo, have again brought to our eyes images which we had considered consigned to the history books.

[55] In saying "freedom from want", Roosevelt was referring to what we know as economic, social, and cultural rights, of which he was a significant instigator, thus contributing to the widening of the traditional concept of human rights in the United States. On this topic, see JOHNSON, M.G.: «The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights», *op. cit.*, pp. 20 ff.

[56] On this subject, see EIDE, A.: «The Universal Declaration in Space ant Time», in *Human Rights in a Pluralist World. Individuals and Collectivities*, UNESCO-Roosevelt Study Center, Meckler, Westport, 1990, p. 16.

[57] Paragraph three of the preamble of the Universal Declaration of Human Rights.

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Declaration help to configure this "rule of law", among which can be highlighted equality before the law (Article 7), the right to an effective remedy by national tribunals (Article 8), the right to be presumed innocent until proven guilty (Article 11), the right to freedom of thought, conscience and religion (Article 18), the right to freedom of opinion and expression (Article 19) etc. All of these are at the foundation of what is now known as the rule of law, an indispensable requirement for the effective protection of human rights. This is such that, as paragraph three of the preamble recognises, the protection of human rights within a rule of law is necessary "if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression". As we can see the preamble is, due to the influence of the socialist countries, suggesting the right to rebellion against regimes which do not respect human rights. Nevertheless, in the substantive part of the Declaration we do not find any other reference to this controversial right; as such this right is to some extent minimised just as the Western countries wanted it to be[58]. This is another of the contrasts between the Universal Declaration and the classic Declarations of rights which included important pronouncements in favour of the right to resistance[59]. Despite these undeniable recognitions of the right to resistance in the first human rights Declarations, the fact is that this right has lost importance and has become diluted as the theory of human rights has evolved. Proof of this is the debate that arose regarding this right at the time when the Universal Declaration of Human Rights was being discussed in 1948. Many delegations, the most significant being those from Cuba, Chile, and France, proposed the inclusion of the right to resist oppression as a separate right in the main body of the Universal Declaration; in other words, they wanted a specific provision in favour of this right. This view met with strong support from the Soviet Union for whom it was essential to recognise a right which was already a part of the Declaration of the Rights of the People of the Soviet Union and which would be able to prevent regimes totally against human rights, such as the Nazi regime in Germany or Franco's regime in Spain (the USSR delegate, Mr. Demchenko, referred

[58] On the details and different points of view and discussions regarding this right to rebellion, see CASSESE, A.: *Los derechos humanos...*, *op. cit.*, pp. 44 ff.

[59] One example among many, the *French Declaration of the Rights of Man and the Citizen*, on listing the basic rights, expressly mentions "resistance to oppression". It is the Article 2 the one which states that "the aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are: liberty, property, security, and resistance to oppression."

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expressly to Franco's regime as one of the examples where the right to resistance could be legitimately invoked). The opposite view as regards this controversial right was defended by countries like Great Britain, the United States, Belgium, and Australia, all of whom were very critical of an eventual inclusion of the right to resistance as an autonomous right in the Universal Declaration of Human Rights. For Great Britain the existence of this right in the Universal Declaration was a step that would be "inopportune and dangerous" and could entail "the risk of inciting anarchy" when, in its opinion, "non-revolutionary democratic methods should be sufficient to do away with tyranny and oppression". A similar view was held by Eleanor Roosevelt, the U.S. delegate, for whom "it would not be clever to legalise the right to rebellion given that it could be invoked by subversive groups who wanted to attack or undermine genuinely democratic governments" (the recognition in the Declaration of human rights of the right to resist acts of tyranny and oppression would be tantamount to encouraging sedition, for such a provision could be interpreted as conferring a legal character to uprisings against a government which was in no way tyrannical). However, for the American delegation, "an honest rebellion against a tyranny should be permitted by the Universal Declaration". We can see therefore that the United States and Great Britain objected to the inclusion of the right to resistance as an autonomous right, but did come to admit it as a general principle. For Ernest Davies, the British representative at the Commission negotiating the text for the Universal Declaration of Human Rights, resistance when faced with oppression could not be considered to be an authentic right, but it could be seen as a "last resort" when faced with a tyrannical or oppressive government. Eventually, given the evident lack of consensus concerning a problematic issue which had inevitable political ramifications, it was decided that this right would be included in the preamble of the Declaration, and not in the main body of it, which meant a clear diminishment of the legal and programmatic content of the right to resistance. In addition, a direct recognition of the right to resistance does not appear in paragraph three of the preamble; rather, this recognition is indirect. The preamble considers it "essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law". As we can see, the right to resistance is not shown as an authentic human right which all human beings enjoy, but rather it expresses it, just as the British delegation wanted, as a type of "last resort" when faced with a tyrannical and oppressive regime. What is made quite clear is that the majority of States present at the discus-

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sions regarding the Universal Declaration in 1948 were not particularly in favour of a clear recognition of the right to resistance, and it is for this reason that those who wanted to see this right diminished triumphed in the end.

A crucial section of the preamble is its fifth paragraph which underlines the fact that "… the peoples of the United Nations… have determined to promote social progress and better standards of life in larger freedom"[60]. As we can see, social progress was undeniably linked with human rights. In other words, for people to truly and effectively be able to enjoy human rights, progress and development are absolutely necessary. It is for this reason that the preamble argues for a *larger concept of freedom*, that is to say that freedom is not to be understood in its simplest sense of formal freedom, but that it should include improvement in people's quality of life. In order to defend human dignity it will be vital to defend both civil and political rights, as well as those which are economic, social and cultural; these latter rights were recognised in the international sphere for the first time by the Universal Declaration of Human Rights. It is this fact that led Philip Alston to refer to the "revolutionary content"[61] of the Universal Declaration. And the fact is that we cannot forget that "all reflection on the success of a legal system for the promotion and protection of human rights should start with the idea that the reality of these rights is determined by economic, social and cultural conditions. In a world characterised by misery, illness, exploitation, and injustice, human rights will not be a reality without the existence of specific economic and social conditions"[62]. So, right from the start of the preamble, the innovative concept of the *indivisibility and interdependence* of the two categories of human rights, civil and political, and economic, social and cultural, is advancing; this is a concept that will be discussed further below.

Finally, the preamble of the Universal Declaration of Human Rights states in its final section that "a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge" (it is referring to the commitment, taken on in the sixth paragraph of the preamble, to "pledge… to achieve, in co-operation with the United Nations, the promotion of universal respect for and ob-

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[60] As we have seen, an identical pronouncement appears in the preamble to the United Nations Charter.

[61] ALSTON, P.: «The Fortieth Anniversary of the Universal Declaration of Human Rights: A Time More for Reflection than for Celebration», in *Human Rights in a Pluralist World. Individuals and Collectivities...*, *op. cit.*, p. 1.

[62] GROS ESPIELL, H.: *Estudios sobre Derechos Humanos II...*, *op. cit.*, p. 254.

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servance of human rights and fundamental freedoms", which clearly reminds us of Articles 55 and 56 of the United Nations Charter). This final paragraph reiterates yet again the call for the universality of human rights, namely the vital importance of achieving a concept of human rights and freedoms that can be shared by all the different peoples and cultures that inhabit the planet. Regarding this, the General Assembly of the United Nations, on proclaiming the Universal Declaration of Human Rights, defines it as "a common standard of achievement for all peoples and all nations", thus signalling the importance of "teaching and education" for the promotion and stimulation of a true culture of human rights. With this final statement, attention is being drawn to the huge relevance of *Human Rights Education* to the achievement of this "common standard of achievement" which the General Assembly speaks of[63]. It is the responsibility of all, public and private institutions, universities, human rights institutes, the media, individuals, etc. that this culture of human rights should definitively be installed among us.

2.2. *Analysis of the main body of the Universal Declaration*

Now that we have analysed the preamble and the first two provisions of the Declaration, we will spend some time studying the different rights which have been recognised and enshrined in the Universal Declaration, which will give us a better idea of the exact concept of human rights that this text of capital importance for the history of human rights is fighting for. To this end we are going to consider the analysis carried out by one of the main inspiring figures behind the Declaration, the aforementioned René Cassin. For him, four columns of equal importance support the portico of the Universal Declaration of Human Rights: the first column is made up of personal rights and freedoms (Articles 3 to 11 of the Declaration); the second comprises the rights of the individual in relation to the groups of which he or she is a part (Articles 12 to 17); the third is made up of political rights (Articles 18 to 21), while the final column consists of economic, social and cultural rights (Articles 22 to 27). Above these four columns, says Professor

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[63] VERDOOT, A.: «Genèse et Expansion de la Déclaration Universelle des Droits de l'Homme. Role de René Cassin», in *Recueil des Cours*, Institut International des Droits de l'Homme, Strasbourg, 1998, p. 95. As the General Assembly stated when it proclaimed the *United Nations Decade for Human Rights Education*, this education "should constitute a comprehensive life-long process by which people at all levels in development and in all strata of society learn respect for the dignity of others and the means and methods of ensuring that respect in all societies", Resolution 49/184, 23 December 1994.

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Cassin, is placed the frontispiece, Articles 28 to 30 of the Declaration, the final provisions which establish the links between the individual and the society of which he or she is a part[64]. Below we will proceed to look more closely at the different divisions made by Professor Cassin.

2.2.1. Personal Rights and Freedoms (Articles 3 to 11)

The rights which refer to the most intimate and personal environment of the human being are found in this first part of the human rights contained in the Universal Declaration. When discussing this part, it is essential to highlight the *right to life* recognised in Article 3 of the Declaration; this is one of the most important rights in the current list of human rights. As this third Article states, "everyone has the right to life, liberty and security of person".

However, the recognition of a right as important as the right to life inevitably brought about significant discussions concerning its extent and scope. In the end a fairly restrictive recognition of the right to life prevailed, with the emphasis placed on its merely formal aspects. This deals with a right to the integrity of the individual when faced with any kind of interference on the part of the State. There were three more aspects which were discussed in relation to the right to life: the death penalty, abortion, and the inclusion of material elements in the definition of the right to life.

As regards the death penalty, the Soviet Union put forward a proposal for the prohibition of capital punishment in times of peace as a logical extension of the recognition of the right to life[65]. However, this

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[64] Cassin, R.: «La Déclaration Universelle et la mise en ouvre des droits de l'homme»..., *op. cit.*, pp. 278 ff. This is not the only way the Declaration can be divided. For example, in Spain, the respected expert on human rights, Professor Carillo Salcedo, former magistrate at the European Court of Human Rights, has distinguished five groups of the human rights recognised by the Universal Declaration: 1) inherent personal rights (Articles 3, 4, 5, 6, and 7); 2) rights guaranteeing personal security (Articles 8, 9, 10, 11, 12, and 14); 3) rights relating to the political life of the individual (Articles 18, 19, 20, and 21); 4) economic and social rights (Articles 17, 22, 23, 24, 25, 26, and 27) and 5) rights concerning to the social and juridical life of individuals (Articles 13, 15, and 26), Carrillo Salcedo, J.A.: «Human Rights, Universal Declaration», in *Encyclopedia of Public International Law*, Max Planck Institute, vol. 8, 1985, pp. 305 and 306.

[65] This proposal, in the opinion of Lars Adam Rehof, was partly as a result of "tactical reasons" derived from the Cold War, given that the USSR widely used the death penalty during that time, and continued to do so in later years; see Rehof, L.A.: «Article 3», in Eide, A.; Alfredsson, G.; Melander, G.; Rehof, L.A. and Rosas, A. (Eds.): *The Universal Declaration of Human Rights: A Commentary*, *op. cit.*, p. 77.

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proposal was rejected, and it remained the exclusive responsibility of national legislations whether to have the death penalty[66]. According to some[67], this was one of the principal gaps in the Universal Declaration, a gap which there have been attempts to fill with the passing of years[68], but which today is still one of the principal obstacles to achieving an authentic human rights culture.

Regarding the thorny issue of abortion, which mixes ethical, religious, and legal aspects, the Universal Declaration decided in the end to again remain completely silent. Once more, due to the lack of consensus, the delegations in favour of the inclusion of an explicit prohibition on abortion in the third Article of the Declaration had to back down. The most serious proposals came from the representatives of Chile and Lebanon, defending the view that the right to life should be guaranteed "from the moment of conception"[69]. However, delegations as important as those from Great Britain, the Soviet Union, the United States, China, Australia, and France were opposed to an express mention of the prohibition on abortion given that this could not be reconciled with some provisions of their internal legislation, which foresaw the possibility of abortion[70].

Finally, the last issue which was debated during the discussion on the right to life was the extent to which this right should be awarded, or whether the right to life should exclusively deal with formal aspects, or whether it should be complemented by elements of a material character. Following this debate, there was a proposal from Uruguay, Cuba,

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[66] LLANO, A.E.: *La protección de la persona humana en el Derecho Internacional...*, *op. cit.*, p. 51.

[67] TOMUSCHAT, C.: «The Universal Declaration of Human Rights of 1948: Does It Need any Updating?», in *The Universal Declaration of Human Rights: Its Significance in 1988*, *op. cit.*, p. 78.

[68] The International Covenant on Civil and Political Rights, approved in 1966, establishes certain limitations to the imposition of the death penalty in its Article 6, which is the one devoted to recognition of the right to life. It states that it can only be imposed "for the most serious of crimes"…; "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women". An analysis of this Article appears in RAMCHARAN, B.G.: "The Drafting History of Article 6 of the International Covenant on Civil and Political Rights", in RAMCHARAN, B.G. (Ed.): *The Right to Life in International Law*, Martinus Nijhoff Publishers, Dordrecht, 1985, pp. 42-56.

[69] On the different elements of this proposal, see BLÁZQUEZ, N.: «El recurso a la *dignidad humana* en la Declaración Universal...", *op. cit.*, p. 124.

[70] SAMNOY, A.: *Human Rights as International Consensus...*, *op. cit.*, p. 90. The opposition to any reference to abortion which came from Mrs. Begtrup, the President of the Commission on the Status of Women, is also significant; see VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle...*, *op. cit.*, p. 98.

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Lebanon, and Mexico to include a reference to economic, social and cultural rights within the right to life; in other words, that the right to life should be complemented by all the conditions which make it possible for this life to be dignified. The amendment proposed by these four States said that "everyone has the right to life, honour, liberty, physical integrity, and to the legal, economic, and social security which is necessary for the full development of human personality"[71]. As we can see, there is a clear link between the right to life and those economic and social conditions which are needed for the full development of the personality of individuals.

This proposal to link the right to life with economic and social rights did not enjoy the support of the majority and was not therefore in the end included in Article 3 of the Universal Declaration. This is an aspect which has also been criticised from some doctrinal standpoints. An example of such criticism comes from Cecilia Medina, for whom Article 3 of the Declaration must necessarily be linked with Articles 25 and 28 of the same document[72]. In other words the right to life cannot be seen as a merely formal right, but must be complemented with "the right to a standard of living adequate" for himself and his family (Article 25), and with the right "to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized" (Article 28). In the same vein are the views of Rubén Hernández Valle, for whom the right to life should include, in addition to the basic right of all human beings that nobody should attack their lives or their integrity, "the right of all human beings that social solidarity, whose maximum expression can at present be found in the State, although not exclusively, should provide them with the means necessary for subsistence…"[73]. And the fact is that, as René Cassin has stated, "there exists an indivisibility, in the right to life, between formal elements on the one hand, and material and economic elements, on the other"[74].

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[71] This quotation, as well as a full analysis of the circumstances surrounding this proposal, can be found in Morsink, J.: «The Philosophy of the Universal Declaration», *op. cit.*, pp. 327 ff.

[72] Medina, C.: «A 1988 Universal Declaration of Human Rights», in *The Universal Declaration of Human Rights...*, *op. cit.*, pp. 64 ff.

[73] Hernández Valle, R.: «Artículo 3», in Asociación Costarricense Pro-Naciones Unidas: *La Declaración Universal de Derechos Humanos...*, *op. cit.*, p. 32.

[74] In the same vein, René Cassin asks himself the following question: "Is it not well founded to say that the right to life is made up not only of the right not to be murdered or not to be arbitrarily condemned to death, but also the right to, through work, contribute to production, and receive food, accommodation, clothes etc. which correlate?", in Cassin, R.: «La Déclaration Universelle...», *op. cit.*, pp. 285 and 286.

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Advancing with this wide concept of the right to life[75], we have come to the point where third generation human rights (that is, the right to development, to peace, to the environment, or to humanitarian aid) are the corollary of the right to life and to security[76]. The right to life would therefore become a true *synthesis-right*, a right which is situated at the foundation of all human rights, reinforcing their indivisibility and interdependence.

Article 4, for its part, prohibits slavery and the slave trade in all its forms thus culminating a process which had been initiated with the General Act of the Brussels Conference in 1890, the Convention of Saint-Germain-en-Laye of 1919, and the Geneva Convention of 1926. This was a provision which did not pose many problems as regards its drafting and inclusion in the Universal Declaration of Human Rights given that there existed a fairly generalised consensus as regards slavery *in all its forms* as an attack on basic human rights[77]. Nevertheless, despite the fact that many notable advances have been made in the field,

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[75] On this topic, see B.G. Ramcharan's interesting comments concerning the different dimensions which should be applied to the right to life, in RAMCHARAN, B.G.: «The Concept and Dimensions of the Right to Life», in RAMCHARAN, B.G. (Ed.): *The Right to Life...*, *op. cit.*, pp. 1-32. In the same vein, the Uruguayan Gross Espiell has defended the value of making the distinction between the "right to life" and the "right to live", in GROS ESPIELL, H.: "The Right to Life and the Right to Live", in *Essais sur le concept de "droit de vivre". En mémoire de Yougindra Khushalani*, Bruylant, Bruxelles, 1988, pp. 43-53.

[76] As Gros Espiell has stated regarding respect of the right to development, this right "results form or is a consequence of the recognition… of economic, social, and cultural rights, and in particular the right to life, which necessarily implies the right to live in a full and integrated manner"; see GROS ESPIELL, H.: «El derecho al desarrollo como un derecho de la persona humana», in *Seminario sobre protección y promoción internacional de los derechos humanos. Universalismo y Regionalismo*, Caracas, 31 de July a 4 de August de 1978, p. 11; TIKHONOV, A.A.: "The Inter-Relationship Between the Right to Life and the Right to Peace", in RAMCHARAN, B.G. (Ed.): *The Right to Life...*, *op. cit.*, pp. 97-113; BETTATI, M.: "L'accès aux victimes: droit d'ingérence ou droit d'assistance?", in *Law in Humanitarian Crises. Access to Victims: Right to intervene or Right to receive humanitarian assistance?*, Vol. II, Office for Official Publications of the European Communities, Luxembourg, 1995, p. 14.

[77] Concerning this issue, we cannot forget that the International Court of Justice, in referring in its pronouncement on the *Barcelona Traction* incident of 5 February 1970 to the "obligations of States towards the international community as a whole", or obligations *erga omnes*, mentioned as an example of these obligations "the principles and rules concerning the basic rights of the human person, including protection from slavery", CIJ, *Recueil*, 1970, p. 31. As we can see, the practice of slavery would have acquired the status of a *ius cogens* norm, as a result there could have been no agreement in opposition on the part of States, according to Articles 53 and 54 of the Vienna Convention on the Law of Treaties.

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"many parts of the world are still experiencing diverse forms of slavery or servility, and a trade in human beings continues to exist not only in Africa, but also in Asia and some parts of Latin America"[78]. Therefore slavery and practices analogous to it, remain problems which both States and the international community have to face up to. This meant that, in the sphere of the United Nations, the Commission on Human Rights created the *Working Group on Contemporary Forms of Slavery* in the mid-1980s. This group has analysed different situations, which are still widespread, and which can be classed as new forms of slavery. Among them, the working group has highlighted the sale of children, child prostitution, the use of minors in pornographic publications, the exploitation of child labour etc.[79], which are all situations which demand urgent attention.

Article 5 is dedicated to establishing that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Clear proof of the fact that the international community considers the right not to have to experience any kind of torture or cruel, inhuman, or degrading treatment to be one of the fundamental rights comes from the huge legal development which Article 5 of the Universal Declaration has undergone both on regional and international levels[80]. However, despite legal and institutional developments, we should underline the fact that unfortunately torture continues to be a widespread practice used in many parts of the world[81].

The right of all human beings "to recognition everywhere as a person before the law" is consecrated in Article 6 of the Declaration, thus prohibiting the formerly common practice of the *civil death* of a per-

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[78] MORA ROJAS, F.: «Artículo 4», in ASOCIACIÓN COSTARRICENSE PRO-NACIONES UNIDAS: *La Declaración Universal de Derechos Humanos...*, *op. cit.*, p. 42.

[79] On the work done by this work group, see ASSEN, N.M.: «Article 4», in EIDE, A.; ALFREDSSON, G; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights: A Commentary*, *op. cit.*, pp. 98 ff.

[80] Within the universal sphere we have the Declaration of the General Assembly of the United Nations of 9 December 1975, concerning the protection of all persons from being subjected to torture and other cruel, inhuman, or degrading treatment or punishment; the International Convention of 10 December 1984 against torture and other cruel, inhuman, or degrading treatment or punishment. Additionally, on a regional level we have the European Convention of 26 November 1987 for the prevention of torture and of inhuman or degrading treatment or punishment, as well as the Inter-American Convention of 9 December 1985 to prevent and punish torture.

[81] Given the seriousness of the situation as regards torture, in 1985 the Commission on Human Rights of the United Nations, by virtue of its resolution 1985/33, appointed a *Special Rapporteur on Torture.*

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son, or the degradation of a person to a mere object, by depriving them of their status as a person before the law[82].

Article 7, for its part, is the one dedicated to establishing the principle of equality before the law and of non-discrimination[83]. Under this provision:

> "all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination".

Article 8 of the Declaration recognises that "everyone has the right to an effective remedy by the competent national tribunals…" for the defence of their fundamental rights, recognised "by the constitution or by law." Another significant provision is Article 9, which states that "no one shall be subjected to arbitrary arrest, detention or exile"[84]. In relation to the two previous provisions is Article 10, which states that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal…"; in other words, this provision recognises the famous *right to due process*. Obviously, the independence and impartiality of the judiciary is a fundamental element concerning the effective enjoyment of the fundamental rights and freedoms enshrined in the provisions under discussion. On this subject it has been said that these Articles "could never have full significance and validity without a truly independent and impartial judiciary"[85]. Finally, and along exactly the same lines as Articles 8, 9, and 10, Article 11 enshrines the

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[82] On this issue, see BOGDAN, M.: «Article 6», in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration...*, *op. cit.*, pp. 112 ff.

[83] This general principle of non discrimination has been extensively developed and made more specific by the normative work undertaken under the auspices of the United Nations. Among the most significant achievements the following can be highlighted: the Convention of 14 December 1960 regarding the fight against discrimination in education; the International Convention of 21 December 1965 concerning the elimination of all forms of racial discrimination; and the Convention of 18 December 1979 concerning the elimination of all forms of discrimination against women.

[84] Nevertheless, arbitrary detention continues to be a fairly widespread practice throughout the international community, as can be seen from the fact that through the 1991/42 Resolution of 5 March 1991, the Commission on Human Rights proceeded to create a *Working Group on Arbitrary Detention*. According to its mandate, this group can "investigate cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments…".

[85] MONTERO CASTRO, J.A.: «Artículos 9, 10 y 11», in ASOCIACIÓN COSTARRICENSE PRO-NACIONES UNIDAS: *La Declaración Universal...*, *op. cit.*, p. 75.

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principle of presumption of innocence[86], as well as the principle of *non-retroactivity of criminal law*[87].

As can be seen, all of these provisions which deal with rights directly related to the personal and civil sphere of the individual seek to establish and perpetuate the "rule of law" which is mentioned in the Preamble to the Universal Declaration. To conclude, democracy and respect for the basic rules of the rule of law are indispensable for the construction of an environment of rights and freedoms[88].

2.2.2. Rights of the Individual in relation to the groups of which he or she is a part (Articles 12 to 17)

This second of the columns which form the principal foundations of the Universal Declaration of Human Rights is made up of those rights and freedoms which refer to the relationships of the individual with the different social groups of which he or she is necessarily a member. Hence Article 12 protects people's private and family life, stating that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation…". In order to protect this right, Article 12 states that "everyone has the right to the protection of the law against such interference or attacks".

Article 13 sets out the right to freedom of movement and that of residence as well as the right to freely leave the country one is in. According to the first section of this provision, "everyone has the right to freedom of movement and residence within the borders of each State", and the second states that "everyone has the right to leave any country, including his own, and to return to his country". As we can see, this provision sets out the right of all people to move and freely set up residence within a State, regardless of whether they are a national of that State. In other words, once a person has legally entered a State, that person has the same rights as a national as regards residence and free movement. Similarly, the same Article recognises the right of all people to leave the

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[86] In its first paragraph, Article 11 states that "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

[87] For its part, Article 11.2 states that "no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed".

[88] On the interaction between democracy and human rights, see Roldán Barbero, J.: *Democracia y Derecho Internacional*, Civitas, Madrid, 1994, in particular pp. 119 ff.

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country in which they find themselves, even if this happens to be their own country. As Alejandro Etienne Llano has said, "this right to emigration can only be effective as far as facilities for immigration and free movement exist, both within and through other States[89]. But this last right is not mentioned in Article 13 of the Universal Declaration. Therefore, the right to leave one's country exists, but there is not a corresponding obligation on other States to welcome that person.

This provision, as was to be expected, brought about significant discussions between States given that they found themselves facing a delicate problem which affects one of the main issues of sovereignty, namely how to establish rules which permit a person to freely leave a State, and as regards whether a State is under the obligation to accept his or her entry. On this matter the representative of the Soviet Union, supported by the delegates from the Ukraine, Belarus, and Saudi Arabia[90], stated that the adoption of Article 13 put Article 2.7 of the United Nations Charter in danger; this is a provision which establishes the principle of non-intervention in affairs which fall essentially under the domestic jurisdiction of States. In addition, this provision in accordance with the opinions of Mr. Paulov (USSR), deliberately ignored the right of every State to freely regulate the movement of people both within its territory, and at exit points on borders. The huge restrictions which former socialist bloc countries used to place both on free movement within the country and, more significantly, on exiting the country, are well known[91].

Along the same lines, Article 14 is devoted to the recognition of the right to asylum, stating that "everyone has the right to seek and to enjoy in other countries asylum from persecution". As we can see, this Article 14 establishes the right of all people who find themselves facing persecution to *seek* asylum. What it does not establish, unfortunately for those who are asylum seekers, is the obligation on countries to receive those seeking asylum; this, according to some, deprives this right of any real effectiveness[92]. The provision of asylum, therefore, is defined as an "optional act, not a duty whose fulfilment is obligatory for States"[93]. Additionally, this right to asylum has appropriate limitations,

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89 Llano, A.E.: *La protección de la persona humana en el Derecho Internacional...*, *op. cit.*, p. 73.

90 These and other opinions can be found in Verdoot, A.: *Naissance et Signification de la Déclaration...*, *op. cit.*, pp. 147 ff.

91 Grahl-Madsen, A.: «Article 13», in Eide, A...: *op. cit.*, p. 210.

92 Llano, A.E.: *La protección de la persona humana...*, *op. cit.*, p. 75.

93 Tinoco Casado, L.D.: «Artículo 14», in Asociación Costarricense Pro-Naciones Unidas: *op. cit.*, p. 97.

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as is established in Article 14.2. According to this provision, "this right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations".

Article 15 recognises the right of all people to have a nationality of which they cannot be arbitrarily deprived, and also the right to change nationality[94]. This is an important right given that nationality is, in many cases, the condition for the enjoyment of some of the rights recognised in the Universal Declaration of Human Rights. Above all, the objective of this Article 15 is to avoid *statelessness*, or the legal situation in which a person holds no nationality[95].

The following Article, the sixteenth, is a little more controversial, proclaiming as it does the right to marriage without restriction[96], and to found a family, classing this as "the natural and fundamental group unit of society". The Article also states the equality of men and women as regards marriage[97]. This is a controversial provision because some of the delegations from Muslim countries present at the discussions leading to the approval of the Universal Declaration of Human Rights expressed a certain amount of reserve concerning the topic, mainly motivated by cultural and religious factors. This led to the abstention of Saudi Arabia at the final vote on the Universal Declaration because it was not totally satisfied with the final text of Articles 16 and 18, which will be commented on below. This reserve on the part of the Muslim world was basically due to their particular way of seeing the roles of men and of women in society, and because of the role played by religion in their so-

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[94] Article 15: 1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

[95] A United Nations development of this Article 15 was made through the Convention on the Reduction of Statelessness, 30 August 1961.

[96] It may seem strange that the right to marriage is recognised in the Declaration; nevertheless, this can be understood through an analysis of its historical significance: the Second World War had demonstrated the risks of State planning of family life, with discriminatory criteria on the basis of race, nationality, or religion (a ban on marriages between Germans and those who had ancestry which was a quarter or more Jewish…), in PÉREZ VARGAS, V.: «Artículo 16», in ASOCIACIÓN COSTARRICENSE...: *op. cit.*, p. 108.

[97] Article 16: 1. "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State".

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cieties. As an Islamic commentator on the Universal Declaration has stated, Article 16 contains many parts "which directly contradict Islamic teaching and which, therefore, are totally unacceptable for Muslims"[98]. The fact is that Islam forbids marriage between a Muslim and someone of another religion, which contradicts the first paragraph of Article 16, which states that men and women have the right to marry "without any limitation due to race, nationality or religion". Similarly, natural equality between men and women does not exist in Islam which believes that nature made them differently and therefore their roles in society will also be different. Finally, Islam only accepts divorce when it is requested by the man, and not by the woman, and so it cannot accept that, as Article 16.1 states, men and women should have the same rights "at [the] dissolution [of the marriage]"[99]. As we can see, Islam questions one of the basic foundations of the Universal Declaration, namely the principle of non-discrimination.

Following on from this analysis, we should remember that some of the provisions of the Declaration, especially Article 16 which is discussed above, can pose certain problems as regards their universal acceptance. On this subject, Philip Alston has mentioned "the importance of being culturally sensitive in our interpretation and application of some of the norms [contained in the Declaration]", particularly referring to Article 16 and its statement that the family is "the natural and fundamental group unit of society"[100]. It is possible that this is true in the Western world, but, as we leave behind this world, both culturally and anthropologically, it is very possible that the truth of this statement diffuses, and begins bit by bit to lose its clarity. For example, the way of understanding the family in certain parts of Africa is nothing like the Western concept of the family, which is based on the nuclear family[101].

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[98] TABANDEH, S.: *A Muslim Commentary of the Universal Declaration of Human Rights*, F.T. Goulding&Company Limited, London, 1970, p. 35.

[99] A detailed analysis of Islamic reservations as regards Article 16 of the Universal Declaration can be found in TABANDEH, S.: *A Muslim Commentary...*, *op. cit.*, pp. 36 ff.

[100] ALSTON, P.: «The Fortieth Anniversary of the Universal Declaration of Human Rights: A Time More for Reflection than for Celebration», in *Human Rights in a Pluralist World...*, *op. cit.*, pp. 7 and 8. Similarly, there have been feminist opinions expressed against this strong declaration in favour of the family. Such declarations in favour of the family tend to go against the rights of women, given that through them they are not accorded rights as individuals, but only as mothers or housewives; on this issue, see MORSINK, J.: "Women's Rights in the Universal Declaration", *op. cit.*, pp. 239 ff.

[101] Regarding conceptions of human rights in Africa concerning cultural, ideological, and legal issues, see. MOTALA, Z.: "Human Rights in Africa: A Cultural, Ideological and Legal Examination", *Hastings International and Comparative Review*, Vol. 12, no. 2, winter 1989, pp. 373-410.

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We must conclude that this issue is one which brings up the controversial and thorny issue of the universality of the human rights enshrined in the Declaration.

Another incredibly conflictive issue regarding Article 16 of the Universal Declaration was the question of divorce, given that some delegations from Catholic countries could not accept an express mention of the possibility of divorce[102]. In the end, due to pressure from those countries which included divorce in their legislation, the Catholic countries had to accept an indirect mention of divorce in Article 16 which establishes that "men and women… are entitled to equal rights as to marriage, during marriage and *at its dissolution*" (emphasis added).

Completing this section, Article 17 is devoted to recognition of the right to property. Following bitter arguments and intense discussion between the many delegations from the socialist bloc and from the capitalist nations, a form of consensus was reached regarding the formulation of this right. The right to property was established as follows: the first paragraph of Article 17 states that "everyone has the right to own property alone as well as in association with others", with the second paragraph stating that "no one shall be arbitrarily deprived of his property"; in other words, the right to property is not seen as an absolute right –under certain circumstances it is possible to legitimately deprive a person of his or her property[103]. As we can see, the consensus was that *individual and collective* property are recognised, which was an attempt to include both Western and Eastern views on the matter. However, true consensus was still far from being reached as can be seen from the fact that, when the two International Covenants on human rights were approved in 1966, the right to property was not explicitly mentioned in either of them.

2.2.3. Political Rights and Freedoms (Articles 18 to 21)

The first section, as we have seen, was made up of civil rights and freedoms, indispensable for the "rule of law"; this concept should also, undoubtedly, be able to count on rights and freedoms of a political nature. Along these lines, Article 18 enshrines the recognition of the

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[102] Mr. Vanistendael's opinions on the matter are significant; he stated that "if the Declaration proclaimed the right to dissolve marriage, it would be unacceptable for hundreds of millions of Christians in countries that were members of the United Nations", quoted in Morsink, J.: "Women's Rights...", *op. cit.*, p. 246.

[103] Alfredsson, G.: "Article 17", in Eide, A...: *op. cit.*, p. 256.

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"right to freedom of thought, conscience and religion"[104]. As before, there were problems for some of the delegations from Islamic countries, this time regarding recognition of freedom of religion and freedom to change religion. This reservation from Islamic countries led to Saudi Arabia's abstention[105]. As René Cassin has stated regarding the position of the Islamic countries, especially that of Saudi Arabia, "it is difficult to demand that theocratic regimes based on a particular religion proclaim the possibility of the individual to elude it"[106].

Another basic right needed for the establishment of a democratic regime of law is the "right to freedom of opinion and expression" mentioned in Article 19 of the Declaration[107]. And for its part, Article 20 recognises the right of all people "to freedom of peaceful assembly and association", continuing in its second paragraph by stating that "no one may be compelled to belong to an organisation".

The last of the provisions in this section is the one aimed at establishing the right to participation in politics. Due to its importance for the establishment of a democratic society, Article 21 of the Universal Declaration is reproduced in full below:

> 1. "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
> 2. Everyone has the right of equal access to public service in his country.
> 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

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[104] As Article 18 of the Declaration states, "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance".

[105] Similarly, Egypt demanded that its reservations figure as a *sine qua non* condition for its affirmative vote concerning the whole of the Universal Declaration, for the same reasons. On the reservations of certain Islamic countries regarding Articles 16 and 18, see VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle des Droits de l'Homme...*, *op. cit.*, p. 77. The theological theories underlying this refusal of the possibility to change religion can be found in TABANDEH, S.: *A Muslim Commentary of the Universal Declaration...*, *op. cit.*, pp. 70 ff.

[106] CASSIN, R.: "La Déclaration Universelle et la mise en ouvre des droits de l'homme"..., *op. cit.*, p. 287.

[107] This Article states that "everyone has the right to freedom of opinion and expression; this *right* includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

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As we can see, this provision clearly expresses the liberal and democratic credo favoured by Western countries which is based on the principles of popular sovereignty and political participation[108]. However, this democratic credo posed problems regarding the acceptance of all its consequences for delegations from the Socialist bloc, and for certain Third World countries. Again, this right must be flexibly interpreted in order for it to be able to contain concepts of democracy present in cultural environments different to that of the West[109].

2.2.4. Economic, Social and Cultural Rights (Articles 22 to 27)

We will now deal with the group of rights that was a true innovation as regards the international protection of human rights. Until the time of the drafting of the Declaration, no international text had collected together what we call *second generation* human rights. As the Belgian representative at the discussions leading to the approval of the Universal Declaration said, "… it is only after Article 22 that we really made innovations concerning human rights"[110]. The Universal Declaration of Human Rights thus became "the first international legal text to create a fully comprehensive catalogue of human rights"[111]. However, this should be looked at in conjunction with the American Declaration of the Rights and Duties of Man, approved a few months before the Universal Declaration in May 1948; this was a document which took in economic, social, and cultural rights. Also, this recognition of second generation rights was a more vigorous recognition than the one which appears in the Universal Declaration; this has been highlighted as one of the principal differences between the two texts[112].

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[108] Volio Jiménez, F.: "Artículo 21", in Asociación Costarricense...: *op. cit.*, p. 149.

[109] An interesting analysis of the concept of political power in African societies can be found in Matala Kabangu, T.: *El poder por el poder en Africa*, Servicio Central de Publicaciones del Gobierno Vasco, Vitoria-Gasteiz, 1996. See also Kumado, K.: "Africa and the Universal Declaration of Human Rights", in *The Universal Declaration of Human Rights: Its Significance in 1988*, Report of the Maastricht/Utrecht Workshop..., *op. cit.*, pp. 55-60.

[110] See the text reproduced in González, N.: "¿Hacia una nueva Declaración de Derechos Humanos?", in *El derecho al desarrollo o el desarrollo de los derechos*, Editorial Complutense, Madrid, 1991, p. 378.

[111] Sommermann, K-P.: "El desarrollo de los derechos humanos desde la Declaración Universal de 1948", in Pérez Luño, A-E. (Coord.): *Derechos Humanos y Constitucionalismo ante el Tercer Milenio*, Marcial Pons, Madrid, 1996, p. 98.

[112] For Gros Espiell, the American Declaration "enumerates with more precision the economic, social and cultural rights, which the Universal Declaration summarizes" (Arts. 22 to 27)», in Gros Espiell, H.: "La Declaración Americana...", *op. cit.*, p. 51.

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However, the inclusion of these economic, social, and cultural rights in the text of the Universal Declaration of Human Rights was far from peaceful. As we have already shown, these rights were mainly supported by Latin American and Socialist countries, while Western countries were less enthusiastic about their inclusion. In the end, after some significant hurdles, equilibrium was reached in the Universal Declaration between civil and political rights, and economic, social and cultural rights, which could be said to be one of the greatest achievements of the Declaration. René Cassin's input was fundamental to this process; it can be stated without doubt that it was thanks to his intellectual talents and negotiation skills that the huge problems and reservations on the topic were overcome. As Albert Verdoot has said with regards to Professor Cassin's significant input,

> "this latter person is taking advantage of his past as an eminent jurist, and of his special abilities to conciliate the liberal tendencies of the French Declaration of 1789 and the socialist tendencies of modern constitutions, especially those of the USSR. He managed to keep both traditional rights and the new economic and social rights in the Universal Declaration"[113].

Even so, and despite all the efforts carried out to strike a balance between the two categories of human rights satisfactory for all, the delegation from South Africa abstained in the final vote on the Universal Declaration of Human Rights due to the inclusion of economic and social rights. For them, economic, social and cultural rights, which cannot (in their opinion) be seen as fundamental rights, should never have appeared in the text of the Declaration.

The most important provision in the list of economic, social and cultural rights is, without doubt, Article 22, a type of *chapeau*[114] article, to use René Cassin's term; in other words, it is a provision which serves as a basis and a framework which marks out the guidelines for all the articles discussed in this chapter. This Article is the one that recognises the right of all people to social security. As it states,

> "everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and internation-

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[113] VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle...*, *op. cit.*, p. 49. Along the same lines, Eide and Alfredsson called René Cassin "an eminent draftsman with a deep social commitment…" in EIDE, A. and ALFREDSSON, G.: "Introduction", in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights...*, *op. cit.*, p. 11.

[114] On this topic, see René Cassin's preface to VERDOOT, A.: *op. cit.*, p. IX.

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> al co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

Firstly, it is important to recognise the fact that this Article acknowledges the right that every person has to social security. However, it is equally significant that it considers economic, social, and cultural rights to be "indispensable" for the dignity of the human being and for the "free development of his personality". These statements are of crucial importance, and serve, once and for all, to support the "larger freedom" of the preamble that was discussed above[115]. Article 22 clearly and unequivocally sets out the *indivisibility and interdependence* of the two categories of human rights, namely those which are civil and political, and those which are economic, social and cultural[116]. Both categories of human rights must be adequately treated if there is truly a desire to guarantee the full dignity of the human being. However in practice the divergences between the different conceptions of human rights have continued, thus making a fully comprehensive definition of them very difficult. As Professor Cassese has, somewhat sceptically, stated,

> "the divergences are significant, and the diplomatic formulae with which, as documentation shows, attempts have been made at overcoming the differences between the opposing sides, have little value. One of these formulae speaks of *indivisibility and interdependence*. This is a comfortable phrase which serves to calm the discussion, leaving things exactly as they were. In reality, the problems continue, and the political and ideological confrontations are only postponed, to reappear more fiercely at the first available opportunity"[117].

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[115] On this topic we have already discussed the enormous contribution of President Roosevelt and his *Speech on the Four Freedoms*, in which he stated the need for economic and social rights for an adequate concept of freedom. See JOHNSON, M.G.: "The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights", *op. cit.*, pp. 20 ff.

[116] The indivisibility and interdependence of human rights as a whole has been strongly reaffirmed by many resolutions made by the General Assembly of the United Nations; both the International Conference on Human Rights which was held in Teheran in 1968, and that which took place in Vienna in 1993 have proclaimed this indivisibility and interdependence, with the Vienna Declaration stating that all human rights "are indivisible and interdependent and interrelated", *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna, 14 to 25 June 1993, A/CONF.157/23, of 12 of July 1993, paragraph 5.

[117] CASSESE, A.: *Los derechos humanos en el mundo contemporáneo...*, *op. cit.*, p. 72.

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An example of these deep divisions, and of how difficult it is to successfully overcome them in practice, comes from the negotiations in the lead-up to the approval of an International Covenant on Human Rights to complement the regulations of the Universal Declaration of Human Rights. These discussions were begun as soon as the Universal Declaration was adopted in 1948. However, the job could not be completed until 1966, eighteen years later, and the Covenants could not come into force until 1976, a further ten years later. In addition, the approval of one single Covenant which brought together all fundamental human rights was not possible. However now that the Cold War has ended it is to be hoped that conflicts regarding the concept of human rights will begin to dissipate[118]. Nevertheless, Philip Alston has warned against "the clear endeavour to exclude economic and social rights" from a clearer definition of human rights, a project which is mainly being undertaken by the United States[119]. As Martha H. Good has said, in reference to President Roosevelt's Four Freedoms and his vigorous defence of economic and social rights, "more than forty years later, however, there is not freedom from want throughout the world or in the United States"[120].

Another element of Article 22 that it is important to highlight, and which contributes to the general characterisation of economic, social and cultural rights, is that these rights are dependent on "national effort" and "international co-operation". If however State resources are not sufficient, reinforcement through international co-operation should be provided. When we are faced with second generation rights we realise that they are rights which depend on all the resources which States have, both economic and otherwise. These rights are not

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[118] The situation is such that many countries from the former socialist bloc are joining the Council of Europe, and are ratifying the European Convention of Human Rights (1950). On the subject, see SAENZ DE SANTA MARIA, M.P.: "Consejo de Europa y derechos humanos: desarrollos recientes", in *Andorra en el ámbito jurídico europeo*, XVI Jornadas de la Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales, Principado de Andorra, 21-23 September 1995, Marcial Pons, Madrid, 1996, especially pp. 215 ff.

[119] ALSTON, P.: «The Fortieth Anniversary of the Universal Declaration of Human Rights...», *op. cit.*, p. 6. Proof of this intent of exclusion can be found in the fact that the United States has still not ratified the International Covenant on economic, social, and cultural rights, and, even more worryingly, there do not appear to be any reliable sources that indicate that it will do so at any point in the near future.

[120] As the same author says, "American courts have never recognized any governmental duty to provide welfare or subsistence benefits to citizens", GOOD, M.H.: «Freedom from Want: the Failure of United States Courts to Protect Subsistence Rights», *Human Rights Quarterly*, Vol. 6, 1984, p. 335.

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absolute but rather are characterised by *progressivism*; they depend on available resources. Article 22 itself recognises that these rights depend on "the organization and resources of each state". The conclusion we can reach is that, for enjoyment of economic, social and cultural rights, there must be complementary national effort and international co-operation, especially if we take into account the difficulties faced by many Third World countries. In many of these, given the scarcity of resources, the fulfilment of second generation rights requires closer co-operation from industrialised countries. With this in mind, we are currently witnessing the 'divorce' of developed countries from under-developed countries as regards the concept of human rights and the emphasis which should be placed on different rights. In the wise words of Eide and Alfredsson, "there are indications that previous tensions between East and West are being replaced by increasing differences between North and South"[121]. The debate concerning the so-called *third generation rights*, or *solidarity rights*, which first appeared in the 1970s, is proof of this growing tension[122].

The next provision in this section devoted to second generation human rights is Article 23, which enshrines the right to work, to equal pay and to just remuneration, as well as the right to freely join a trade union. This right to work is complemented by Article 24, which deals with the right to rest, leisure, a reasonable limitation of working hours, and periodic holidays with pay. However, it should be taken into account that Articles 23 and 24 of the Universal Declaration "do nothing more than enshrine, at the highest international level, principles which were already being incorporated into the Conventions and Recommendations of the ILO"[123].

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[121] EIDE, A. and ALFREDSSON, G.: «Introduction», in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights...*, *op. cit.*, p. 12.

[122] Third generation rights are a new variety of rights which have come about at the hands of developing countries, and which emphasise their principle demands and needs. As was foreseeable, these new rights have met fierce opposition from developed countries. Among these new rights, we can mention the right to development, the right to environment, the right to humanitarian aid, the right to peace etc. There exists extensive literature on the issue of third generation rights. Among others, see URIBE VARGAS, D.: *La tercera generación de derechos humanos y la paz*, Plaza&Janes, Bogotá, 1986; ALSTON, P.: "Conjuring up new human rights: a proposal for quality control", *American Journal of International Law*, Vol. 78, 1984, pp. 607-621; MARKS, S.: "Emerging Human Rights: a new generation for the 1980s?", *Rutgers Law Review*, Vol. 33, 1981, pp. 435-452.

[123] ARAUZ AGUILAR, A.: «Artículos 23 y 24», in ASOCIACIÓN COSTARRICENSE...: *op. cit.*, p. 174.

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Another important provision is Article 25 which is devoted to the recognition of an adequate standard of living for all human beings. As we have seen previously, this provision should be examined in the light of Article 3 of the Declaration. The fact is that, as Gonzalo J. Facio rightly says, "in poor countries, the right to life is linked above all with the possibility of attaining the necessary minimum for subsistence, such as food, accommodation, health, education etc…"[124]. As Article 25.1 tells us:

> "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control"[125].

Article 26 is devoted to recognition of the *right to education*, and sets out some of the principles applicable to this right. First, states the Declaration, education should be free "at least in the elementary and fundamental stages". Secondly, this elementary education will be compulsory. Finally, as regards higher education, access to it "shall be equally accessible to all on the basis of merit".

The second paragraph of Article 26 is of transcendental importance, given that it is where the objectives of education are established. According to this provision:

> "education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace".

As we can see, education, according to the view expressed in the Universal Declaration, must clearly be aimed at the respect and the promotion of human rights, tolerance, and peace[126]. It is here that the rel-

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[124] FACIO. G.J.: "Artículo 22", in ASOCIACIÓN COSTARRICENSE...: *op. cit.*, p. 166.

[125] In addition, and thanks to the influence of the Commission on the Status of Women, presided over by Mrs. Begtrup, a second section was included in Article 25, which is dedicated to special protection for motherhood and childhood, as well as social protection for children whether they are born in or out of wedlock.

[126] FLINTERMAN, C.: "The Universal Declaration of Human Rights and the need for Human Rights Education", in *The Universal Declaration of Human Rights: its Significance in 1988*, *op. cit.*, pp. 41-44.

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evance of *Human Rights Education*[127] comes to the fore, as a fundamental means for the conversion of education systems into instruments for the enjoyment and promotion of human rights, democracy, peace, and development. This is exactly the view expressed in the 1993 Vienna Declaration, which says that

> "the World Conference on Human Rights reiterates that States are duty-bound... to ensure that education is aimed at strengthening the respect of human rights and fundamental freedoms. The World Conference on Human Rights emphasizes the importance of incorporating the subject of human rights education programmes and calls upon States to do so. Education should promote understanding, tolerance, peace and friendly relations between the nations and all racial or religious groups… Therefore, education on human rights and the dissemination of proper information… play an important role in the promotion and respect of human rights…"[128].

With regards to this huge importance afforded to human rights education, it has been argued that this education has become a true human right in itself, namely the right to human rights education[129].

Finally, the last element of the right to education appears in paragraph three of Article 26 of the Universal Declaration, establishing the "prior right" of parents "to choose the kind of education that shall be given to their children"; it proclaims the principle of parental freedom to choose the education system they want their children to be part of[130].

The next provision, Article 27, establishes the right of all people to participate in the cultural life of the community, as well as the right to take advantage of it, while also protecting the copyright. The first paragraph of this Article states that "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share

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[127] As regards Education in Human Rights, many materials have appeared in recent years, and they aim to promote and extend this education. Among others ANDREOPOULOS, G.J. and CLAUDE, R.P. (Eds.): *Human Rights Education for the Twenty-First Century*, University of Pennsylvania Press, Philadelphia, 1997; INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS: *Educación en Derechos Humanos. Texto Autoformativo*, IIDH, San José, 1994; AMNISTÍA INTERNACIONAL: *Educación en Derechos Humanos. Propuestas Didácticas*, Los Libros de la Catarata, Madrid, 1995.

[128] *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna, 14 to 25 June 1993, para. 33.

[129] ALFREDSSON, G.: "The Right to Human Rights Education", en EIDE, A.; KRAUSE, C. and ROSAS, A. (Eds.): *Economic, Social and Cultural Rights*, Martinus Nijhoff Publishers, Dordrecht, 1995, pp. 213-227.

[130] ARAJARVI, P.: "Article 26", en EIDE, A...: *op. cit.*, p. 411.

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in scientific advancement and its benefits". As we can see, this section attempts to introduce cultural rights as a separate and quite different category. However it should be made clear that, as the majority of authors agree, little attention is given to cultural rights in the Universal Declaration, despite the fact that there were serious attempts for them to play a more significant role[131]. One of the more important reasons for this lack of interest in cultural rights seems to have been the choice to reject the inclusion of minority rights in the Declaration[132], in significant contrast to the attention paid to minority rights at the time of the League of Nations. The fact is that whether to include minority rights in the Universal Declaration was one of the most controversial issues discussed during the drafting of the document[133]. The strongest opposition came from the Western countries and particularly Latin America; this latter opposition was due to the fact that the Latin Americans considered that they did not have any minorities, either indigenous or national. This has been criticised by many[134], as it attempted to deny the reality of the existence of minorities and indigenous peoples, the true *absent humanity*[135] in the process of drafting the Universal Declaration of Human Rights; this, in turn, posed problems regarding the supposed universality of the document[136]. The States present assumed "the right to decide not only concerning themselves, but also concerning the totality of peoples in the world… For the time being, they assumed the majority of humanity to be incapable of taking immediate control of their own rights"[137]. In the end, as we know, the absence of minority

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131 Regarding this issue, it is interesting to highlight the contribution of the *American Anthropological Association*, whose Executive Committee made a presentation in 1947 to the Commission in charge of producing the Universal Declaration, using a text which argued for recognition of the importance of the rights of cultural groups. See the text in "Statement on Human Rights submitted to the Commission on Human Rights", *American Anthropologist*, Vol. 49, no. 4, October-December 1947. However, it would appear that this input was not particularly successful, given that it was not reflected in the final text of the Declaration.

132 MELANDER, G.: "Article 27", in EIDE, A...: *op. cit.*, p. 429.

133 SAMNOY, A.: *Human Rights as International Consensus. The Making of the Universal Declaration...*, *op. cit.*, p. 91.

134 VAN BOVEN, T.: "40 Years of the Universal Declaration of Human Rights", in *The Universal Declaration of Human Rights: Its Significance...*, *op. cit.*, p. 17.

135 This expression was coined by Bartolomé Clavero from Seville University, an expert on the rights of indigenous peoples; see CLAVERO, B.: "De los ecos a las voces, de las leyes indigenistas a los derechos indígenas", in *Derechos de los Pueblos Indígenas*, *op. cit.*, p. 37.

136 STAVENHAGEN, R.: "The Universal Declaration: Cultural and Structural Constraints", in *The Universal Declaration...*, *op. cit.*, pp. 71 ff.

137 CLAVERO, B.: «De los ecos...», *op. cit.*, p. 37.

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rights is one of the principal *lacunae* of the Universal Declaration, a gap which there have been attempts to fill as time has passed[138].

For its part, the second paragraph of Article 27 enshrines recognition of copyright, stating that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".

So, as we have seen, the Universal Declaration of Human Rights very significantly recognises the most important economic, social and cultural rights, thus contributing to, or to least attempting to, the indivisibility and interdependence of the two generations of human rights.

2.2.5. Rights that establish the Links between the Individual and Society (Articles 28 to 30)

René Cassin has called these provisions "the frontispiece of the Universal Declaration"[139], noting their tremendous importance. This section sets out that "the full and free development of any person's personality is possible only when he or she forms part of a community and observes his or her duties to it"[140]. However, despite Professor Cassin's special emphasis on these articles, the truth is that they have been given very little attention during the subsequent development of the provisions of the Declaration; to some extent, these sections have been the victims of "forgetfulness"; the fact that they have been forgotten is a fully conscious decision given that people are not willing to accept all the consequences which would come from a full and effective acceptance of these articles[141].

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[138] Regarding the rights of minorities, in 1966 the International Covenant on Civil and Political Rights in its Article 27 established that "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". As regards the rights of indigenous peoples, the most important work has been done by ILO, with many different Conventions on the subject. The most significant and recent are the Convention concerning Indigenous and Tribal Peoples in Independent Countries, ILO Convention No. 169, adopted on 27 June 1989, and the UN Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly of the UN on 13 September 2007, Resolution 61/295.

[139] Cassin, R.: "La Déclaration Universelle et la mise en ouvre...", *op. cit.*, p. 278.

[140] Eide, A.: "The Universal Declaration in Space and Time", in *Human Rights in a Pluralist World...*, *op. cit.*, p. 19.

[141] It is very significant that, in the International Covenants of 1966, there is no mention either to the rights of duties of the individual towards the community, nor to Article 28, the Article which relates the enjoyment of human rights to the establishment of a particular social and international order.

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The first of these provisions is Article 28, a human right which has been described as "exceptional"[142], and which sets out that:

> "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized".

As we can see this Article proclaims the importance of the social and international order for the satisfaction of human rights. In other words, human rights will, on many occasions, depend on the prevailing social order of a particular State as well as on the structure of the international order. For many Article 28 is the germ of what in the 1970s was called the *Structural Approach to Human Rights*[143]. This Structural Approach puts emphasis on the importance of both internal and international structures for the adequate enjoyment of human rights. It is frequently political, social, economic or cultural structures, both internal and international, which hide behind the most serious violations of human rights. And, as Mary Robinson, former United Nations High Commissioner for Human Rights, has recalled:

> "what is unacceptable... is the lack of equality in the world, the evident and unacceptable inequalities which deny people a reasonable level of human rights, and which very often become violations of their rights"[144].

Finally, Article 28 aims, in the opinion of Cassese, to highlight the fact that the human rights recognised in the Universal Declaration "will only be able to come into practice if a social structure that permits the development of countries is set up, and if the international environment as a whole facilitates the economic take-off of the poor countries, and a major redistribution of wealth in developed countries"[145].

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[142] Abellán Honrubia, V.: "Internacionalización del concepto y de los contenidos de los derechos humanos", in Centro Pignatelli (Ed.): *Los Derechos Humanos, camino hacia la Paz*, Seminario de Investigación para la Paz-Diputación General de Aragón, Zaragoza, p. 19.

[143] Concerning the *Structural Approach to Human Rights* and the importance of internal and international order for human rights, see Van Boven, T.: "Human Rights and Development. Rhetorics and Realities", in *Festschrift für Felix Ermacora*, E. Verlag, Strasbourg, 1988, pp. 575-587.

[144] Interview with *EL PAIS*, 16 February 1998, p. 3.

[145] Cassese, A.: *Los derechos humanos en el mundo contemporáneo...*, *op. cit.*, p. 47. Not in vain, this Article 28 of the Universal Declaration of Human Rights is the basis for the emergence of third generation human rights, particularly the right to development, given that this right argues for the legitimacy of individuals and peoples demanding a certain amount of economic, social, and cultural development.

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This right to a particular social order has been criticised by many writers who have classed it as a utopian provision lacking in realism[146]. In response to these criticisms, Professor Gros Espiell has stated that

> "utopian or not, this way of considering the issue is of profound importance, not only theoretically, but also from a practical point of view, because utopia has been, and is, in certain historical conditions, an irreplaceable catalyst for the political, ideological, economic, social, and legal progress and evolution of humanity"[147].

The fact is that the serious problems of under-development, misery, illness, environmental destruction, etc. which three quarters of the human race are suffering, constitute some of the most dangerous and flagrant attacks on fundamental human rights. It is for this reason that, based on Article 28 of the Universal Declaration[148], the General Assembly of the United Nations proclaimed the *right to development* in 1986, declaring that it is "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized"[149].

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[146] Professor Christian Tomuschat has even reached the point of doubting whether, "from a realistic point of view, Article 28 should be kept… Rights of a purely utopian nature probably contribute to discredit human rights; it is as if they are stories which have nothing to do with reality". See TOMUSCHAT, C.: "The Universal Declaration of Human Rights: Does it Need any Updating?", *op. cit.*, p. 79.

[147] GROS ESPIELL, H.: *Estudios sobre Derechos Humanos II...*, *op. cit.*, pp. 349 y 350.

[148] As Clarence J. Dias has said on the topic, "the Universal Declaration of Human Rights provides both the logic and the inspiration for the right to development... The Declaration on the right to development, and subsequent efforts to realise the right to development would be a glorious way of affirming the true universal values of the Universal Declaration", DIAS, C.J.: "From Self-Perpetuation of the Few to Survival with Dignity of the Many: the crucial importance of an Effective Right to Development", in *The Universal Declaration of Human Rights: Its Significance in 1988*, Report of the Maastricht/Utrecht Workshop..., *op. cit.*, p. 24.

[149] *Declaration on the Right to Development*, resolution 41/128, 4 December 1986. We should take into account the fact that in the third paragraph of the Preamble of this Declaration on the Right to Development, there is an express mention of Article 28 of the Universal Declaration. In it, the General Assembly of the United Nations states that it considers that "under the provisions of the Universal Declaration of Human Rights, everybody is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized". A detailed study regarding the right to development and its link to Article 28 can be found in GÓMEZ ISA, F.: *El derecho al desarrollo como derecho humano en el ámbito jurídico internacional*, Universidad de Deusto, Bilbao, 1999.

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The first subsection of Article 29 is also important, fundamentally because it gives us a different way of looking at human rights. This new point of view makes reference to the duties that all people have towards the community of which they are a part. According to this paragraph:

> "everyone has duties to the community in which alone the free and full development of his personality is possible".

This paragraph must be analysed in conjunction with Article 1 of the Declaration which, as has been shown above, sets out that all human beings "should act towards one another in a spirit of brotherhood". As we can see, this means that the individual is not only faced with rights regarding others, but also with certain obligations to the rest of the community[150]. It has been said that there is a complementary relationship between rights and duties; they represent the two sides of the same coin[151]. And the fact is that "it is evident that a legal order which recognises and guarantees the rights of the human being can only exist if those rights are integrated within a system that assures the harmonisation of everyone's rights. Each person's rights cannot be unlimited, given that they can only be rights if they co-exist with and respect the rights of others"[152]. In this regard, it is curious to see how, in the West, the emphasis has been placed on people's individual rights, practically forgetting the existence of correlating duties, while in other cultural environments, such as that of Africa or Latin America, these duties are relatively important. This explains why the Universal Declaration recognises duties fairly discreetly, which is an "almost protocolary"[153] acknowledgment; thus, they only have a very modest role in the text. In order to see what the opinions of the delegations from Western nations were, it is useful to look at what the U.S. delegate, Eleanor Roosevelt, said at one of the first sessions of the working group of the drafting committee. In

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[150] The most rigorous study on people's duties towards the community is perhaps the one written by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Erica-Irene A. Daes: *The individual's duties to the community and the limitations on human rights and freedoms under Article 29 of the Universal Declaration of Human Rights*, E/CN.4/Sub.2/432/Rev.2.

[151] Opshal, T.: "Articles 29 and 30. The Other Side of the Coin", in Eide, A.; Alfredsson, G.; Melander, G.; Rehof. L.A. and Rosas, A. (Eds.): *The Universal Declaration of Human Rights: A Commentary*, Scandinavian University Press, Oslo, 1992, pp. 449-470.

[152] Gros Espiell, H.: *Estudios sobre Derechos Humanos II...*, *op. cit.*, p. 321.

[153] Blázquez, N.: "El recurso a la *dignidad humana* en la Declaración Universal de Derechos Humanos de las Naciones Unidas", in *Dignidad de la Persona y Derechos Humanos*, *op. cit.*, p. 111.

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her qualified opinion, "the task which has been given to us is that of proclaiming the fundamental rights and freedoms of the human being… not that of listing his duties"[154].

Explanations for the fact that the duties of the human being figure so modestly in the Universal Declaration of Human Rights are, firstly, the liberal individualism from which it takes its inspiration, an individualism which fundamentally places the emphasis on the rights of the individual, to the detriment of any consideration of duties; and secondly, the context in which the Declaration came about, one which was marked by the horrors of the human rights violations that took place during the Second World War. These meant that when it came to drafting the Declaration, the main objective was to produce the widest possible catalogue of human rights. Another final reason was the motivation that came about as a result of the excesses committed by fascist States which had placed particular emphasis on the duties of the individual towards the community. These were some of the many reasons why the role of duties was hugely minimised in the text of the Declaration; it was as an antidote to future tyranny and excesses of power[155].

In the end duties were permitted to be included within the Universal Declaration although in a much reduced form, as shown above. This inclusion of the duties people have towards their communities meant a "rejection of eighteenth century individualism, because it asserts the organic connection between the individual and either the State or society", in other words "it constitutes a refinement of the classical natural rights philosophy"[156]. In short, the enshrinement of duties in the Universal Declaration of Human Rights was one of the elements which contributed to the transformation of the "liberal heart of the Declaration"[157]. As we can see, the Declaration was inaugurating a new concept of human rights in which, unlike the classic doctrine of human rights, the human being is not completely isolated, but instead is seen as a member of society. In other words, "in these new concepts man was not an isolated and

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[154] These words, due to the fact that there are not official minutes of the first work group meetings, were recorded by René Cassin in CASSIN, R.: "De la place faite aux devoirs de l'individu dans la Déclaration Universelle des Droits de l'Homme", in *Problèmes des Droits de l'Homme et de l'unification européene. Mélanges offerts à Polys Modinos*, Pedone, Paris, 1968, p. 481.

[155] A thought-provoking consideration of all these explanations for the small role of duties in the Declaration can be found in MADIOT, Y.: *Considérations sur les droits et les devoirs de l'Homme*, Bruylant, Bruxelles, 1998, pp. 111 ff.

[156] MORSINK, J.: "The Philosophy of the Universal Declaration", *op. cit.,* p. 319.

[157] ARGUEDAS, C.M.: "Artículo 30", in ASOCIACIÓN COSTARRICENSE PRO-NACIONES UNIDAS: *La Declaración Universal de Derechos Humanos. Comentarios y Texto*, *op. cit.*, p. 202.

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individualist monad, but rather a member of a collective towards which he has a concrete obligation to maintain and improve it"[158].

Finally, in the spring of 1948, and due to pressure from the Socialist and Latin American countries, an agreement that duties would be included just as they appear in Article 29.1 was reached. However it is interesting to note how in the Preamble of the Universal Declaration, in the ideological portico of this instrument, there is not a single reference to the duties of the human being, either to society or to their peers. In this regard, the contrast with the Preamble of the American Declaration of the Rights and Duties of Man, approved a few months earlier on 2 May 1948, is enormous. The very title of this Declaration is already indicative of the role it wants duties to play, as it is known as the *American Declaration of the Rights and Duties of Man*. From the start, the Preamble of the American Declaration provides a very wide recognition of the duties of the human being, devoting the majority of its paragraphs to it. Due to the huge importance attributed to duties in this Declaration, we shall reproduce here some of the sections of the Preamble which are most explicit in this regard. The first paragraph states that "all men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another" (it should be noted that, apart from the reference to nature, this subsection is identical to Article 1 of the Universal Declaration of Human Rights). The second paragraph, for its part, states that "the fulfilment of duties by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man…". Further on, the following duties are proclaimed: to "serve the spirit" (paragraph four); "to preserve, practice and foster culture" (paragraph five); and, finally, "always to hold it [moral conduct] in high respect" (paragraph 6). As we can see, duties play a primordial role in the Preamble of the American Declaration of Human Rights, completely unlike what can be seen in the Universal Declaration of Human Rights. This has been highlighted as one of the main differences between the Universal Declaration and the American Declaration, as well as the fact that the Universal Declaration does not include a clear list of human duties, whereas there is one in the American Declaration[159].

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[158] Hernández Valle, R.: "Artículo 29", in Asociación Costarricense Pro-Naciones Unidas: *La Declaración Universal...*, *op. cit.*, p. 197.

[159] Gros Espiell, H.: "La Declaración Americana: raíces conceptuales y políticas en la Historia, la Filosofía y el Derecho Americano", *op. cit.*, pp. 42 ff.

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It is significant that this residual role played by duties in the Universal Declaration is not repeated in other international human rights instruments. We have already mentioned the American Declaration of the Rights and Duties of Man, with its Preamble entirely devoted to recognition of the link between rights and duties, and its second chapter containing a list of all the different duties which bind the human being, highlighting among these duties to society, duties between parents and children, the duty to instruct, the duty of suffrage, the duty to serve the community and the nation, the duty to pay taxes etc[160]. Also in America, the American Convention on Human Rights (1969) in its fifth chapter devotes Article 32.1 to stating that "every person has responsibilities to his family, his community, and mankind". But, without doubt, the text which most significantly recognises the duties of the individual is the African Charter on Human and Peoples' Rights (1981). According to Etienne R-Mbaya "the emphasis placed on duties is probably explainable by the very concept of the individual in Africa, as well as by the fact that there is now awareness of the state of under-development in which African countries find themselves"[161]. Faithful to this concept, its Preamble considers that "the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone". Similarly, the entire second chapter is devoted to recognition of duties. Article 27 in its first subsection states that "every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community". However, the most important provision as regards this is Article 29, a provision which produces a true catalogue of human duties[162].

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[160] The duties explicitly recognised in the American Declaration run from Article 29 to Article 38.

[161] MBAYA, E.R.: "Symétrie entre droits et devoirs dans la Charte Africaine des Droits de l'Homme", in MEYER-BISCH, P. (Dir.): *Les devoirs de l'Homme. De la reciprocité dans les droits de l'homme*, Editions Universitaires, Fribourg Suisse-Editions du CERF, Paris, 1989, p. 49.

[162] As shown in Article 29, the individual has the duty to:

Preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;

Serve his national community by placing his physical and intellectual abilities at its service;

Not to compromise the security of the State whose national or resident he is;

Preserve and strengthen social and national solidarity, particularly when the latter is threatened;

Preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;

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In addition to duties, this Article 29 in its second paragraph also deals with the limitations which should be established on fundamental rights and freedoms. In other words rights should not be considered as absolute but rather, according to circumstances, they will be susceptible to some sort of limitation. When it came to setting some kind of limit to those rights set out in the Universal Declaration, it was decided to choose a *general limiting clause*, given that all rights, as long as they meet the established requirements, can be limited. This option is different to that used by the European Convention on Human Rights in 1950, the International Covenant on Civil and Political Rights in 1966, or the American Convention of Human Rights in 1969. In these treaties the technique used was *specific limiting clauses* which means that only articles mentioned as such will be able to be the object of any limitation.

Once the possibility to limit rights had been set out in the Declaration, the problem was to decide what circumstances would allow these limitations to come into force. As regards this, the Universal Declaration set out two general principles in Article 29.2:

1) The *principle of legality*, which holds that all limitations which are to be placed on a right must be set up through law. As Article 29.2 states, "in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law…".
2) The *principle of a legitimate end*, which sets out that all limitations on a right recognised in the Declaration must have a legitimate end. As legitimate ends, the Universal Declaration accepts only the following: "securing due recognition and respect for the rights and freedoms of others", and "meeting the just requirements of morality, public order and the general welfare in a democratic society". This setting out of legitimate ends which might allow for limitations on rights is exhaustive, there is no other reason, however appropriate it may seem, for any kind of limitation of rights.

As regards the possibility of the derogation of human rights in exceptional or emergency situations, the Universal Declaration is com-

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Work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;

Preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;

Contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

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pletely silent and is an aspect which has been criticised by jurists of considerable prestige, such as Cecilia Medina[163]. This silence has received many different doctrinal interpretations. At one extreme we find Albert Verdoot, for whom the silence of the Declaration means that none of the rights contained within it can ever be subject to derogation[164]. On the other hand, the majority are inclined to think that this means that there exists the possibility that at least some of the rights set out in the Declaration can be restricted in emergency situations[165]. However, as Alejandro Etienne Llano states, "some absolute rights, such as the right to life or freedom of conscience cannot ever be legitimately overcome or restricted[166].

Finally, as Article 29.3 sets out, rights and freedoms can never be exercised "contrary to the purposes and principles of the United Nations"; in other words, human rights can never be used as justification for any attempt to diminish the fundamental principles which underpin the work of the United Nations Organisation.

To conclude this commentary, the last provision of the Universal Declaration of Human Rights, Article 30, sets out a clause whose objective is to protect the rights and freedoms enshrined in the Declaration in the case of foreseeable attacks from a State, an individual, or from groups of people. As this subsection sets out, "nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of the rights and freedoms set forth herein". In other words, nobody can seek protection in the rights recognised in the Declaration for any attempt against the Universal Declaration itself.

3. **The Universality of the Universal Declaration of Human Rights**

In the initial stages of the drafting process, the Declaration we are analysing was known as the "International Declaration of Human Rights".

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[163] Medina, C.: "A 1988 Universal Declaration of Human Rights", in *The Universal Declaration of Human Rights: Its Significance in 1988*, Report of the Maastricht/Utrecht Workshop..., *op. cit.*, p. 66.

[164] Verdoot, A.: *Naissance et Signification de la Déclaration Universelle...*, *op. cit.*, p. 271.

[165] See Oraa, J.: *Human Rights in States of Emergency in International Law*, Clarendon Press, Oxford, 1996 (2nd. Edition).

[166] Etienne Llano, A.: *La protección de la persona humana en el Derecho Internacional. Los Derechos Humanos*, Trillas, México, p. 104.

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Only later, and as a result of a French proposal[167], was its title changed, becoming the *Universal* Declaration of Human Rights. René Cassin has explained this change by saying that the Declaration "comes from the legally organised community of all the peoples of the world and expresses the common aspirations of all men"[168]. It is certainly true that the Declaration has a clear vocation for universality; in other words, it aims to award human rights to everybody, without distinction of any kind. On this subject it is worthwhile to remember Article 1. This provision states that "all human beings are born free and equal in… rights". As we can see the Declaration is aimed at the human being, at all human beings, not to any particular type of person. Similarly, the Declaration should be applicable in all territories regardless of whether they have achieved independence or not. As Article 2.2 states on this issue in relation to the enjoyment of human rights:

> "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".

In other words, the human rights mentioned in the Declaration should be in force in those countries which are still under colonial domination; colonial powers could not treat these nations as they had been doing until the time of the drafting of the Declaration. As of this time there were clear and precise standards which were also applicable in these territories.

We have seen how the Declaration is universal due to its content. And the fact is that, in the wise words of Albert Verdoot, "thanks to [the Declaration], universal society sees its rights and freedoms protected which until this point were only set out in national constitutions. The Universal Declaration was innovative in that, on a universal plane, it formulated the rights which no national declaration or law has been able to formulate except with reference to a specific country"[169].

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[167] On this issue it is necessary to return to René Cassin, who was, as we already know, one of the most influential persons concerning the final draft and ideological profile of the Declaration; see CASSIN, R.: "La Déclaration Universelle...", *op. cit.*, pp. 279 ff.

[168] CASSIN, R.: *op. cit.*, p. 279.

[169] VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle...*, *op. cit.*, p. 318.

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Nevertheless, we should also be conscious of the fact that, although the Declaration undoubtedly does have some aims towards universality, not all of its provisions achieve this to the same extent[170]. As Alston has asserted, "any suggestion that all of the provisions of the Universal Declaration are universally accepted, either in philosophical or anthropological terms, is simply untenable"[171]. Some more sceptical authors have even said that "universality is, for the time being, a myth. That the observance of human rights is very different in different countries is a fact that nobody can deny… They are understood in a different way…"[172]. The fact is that, at the moment, "the universal character of the idea of human rights… is beginning to show symptoms of crisis"[173]. These criticisms come mainly from the Islamic world and from Third World countries, who consider human rights to be a predominantly Western idea which do not correspond to their current demands and needs. Swords are still drawn as was made clear at the last big international meeting on human rights. This was the World Conference of Human Rights which took place in Vienna in June 1993. At this Conference one of the principal objects under discussion was that of the universality of human rights[174]. The Final Declaration of the Conference came to a conclusion which, in

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[170] Reference has already been made in other parts of this study to the problems which Islamic states had with certain rights such as religious freedom or the consideration that "the family is the natural and fundamental group unit of society" (Article 16.3 of the Declaration).

[171] Alston, P.: "The Fortieth Anniversary of the Universal Declaration...", *op. cit.*, p. 7.

[172] Cassese, A.: *Los derechos humanos...*, *op. cit.*, p. 61.

[173] On the issue of the universality of human rights and its opposing theory of cultural relativism, see the interesting essay by Dundes Renteln, A.: *International Human Rights. Universalism Versus Relativism*, Sage Publications, London, 1990.

[174] Good proof that the positions were far from one another can be found through comparison of the final documents of the Regional Meetings, which were produced in preparation for the Vienna World Conference. The first was the African Regional Meeting, which took place in Tunisia from 2 to 6 November 1992, *Report of the Regional Meeting for Africa of the World Conference on Human Rights*, A/CONF.157/AFRM/14, of 24 November 1992. The second was the Latin American and Caribbean Regional Meeting, *Report of the Regional Meeting for Latin America and the Caribbean of the World Conference on Human Rights*, A/CONF.157/LACRM/15/, 22 January 1993. The third was the Asian Regional Meeting, *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, A/CONF.157/ASRM/8, 7 April 1993. The European Union also held a preparatory meeting for the Conference, *Note verbale dated 23 April 1993 from the Permanent Mission of Denmark to the United Nations Office at Geneva, transmitting a position paper by the European Community and its member States*, A/CONF.157/PC/87, 23 April 1993.

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my opinion, still leaves this thorny issue unresolved. As the Vienna Declaration states:

> "all human rights are universal, indivisible and interdependent, and are interrelated (…). 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 or cultural systems, to promote and protect all human rights and fundamental freedoms"[175].

It can clearly be seen how this ambiguous paragraph does not openly show support either for the universality of human rights, or for the theory of cultural relativism; it aims, as far as is possible, to please the holders of both opinions. And the fact is that, as we have seen, it was clearly demonstrated in the sessions of the World Conference on Human Rights that some views were strongly opposed and that consensus was still very far from being reached[176].

And so, although we are conscious of the problems that come about when creating a universally applicable concept of human rights, we are also equally aware of the fact that, progressively, a restricted core of almost universally accepted rights is being created. Rights such as the right to life, to security, the prohibition of torture etc are the rights that enjoy very wide acceptance across the majority of the international community. In the coming years the issue of the universality of human rights will be the biggest battle we will face. In this battle it is of paramount importance to be open to other cultures and to other world-views on human rights, especially if we are to come closer to the suggestions of the Third World and Islamic countries. As Xabier Etxeberría has said, "there is a dimension of the universality of human rights which is only coming about through intercultural dialogue, in a never-ending process"[177]. This process has begun, and important steps are being taken, while always avoiding any kind of imposition. As regards this, it is interesting to recall the words of Antonio Cassese:

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[175] *Viena Declaration and Programme of Actino,* A/CONF.157/DC/1/Add.1, 24 June 1993, para. 5.

[176] On the issue of the universality of human rights at the Vienna Conference, and in its Final Declaration, see VILLÁN DURÁN, C.: «Significado y alcance de la universalidad de los derechos humanos en la Declaración de Viena», *Revista Española de Derecho Internacional*, Vol. XLVI, no. 2, 1994, pp. 505-532.

[177] ETXEBERRIA, X.: "Derechos Humanos: ¿Universales u Occidentales?", *Gaceta Municipal de Vitoria-Gasteiz*, no. 79, 7 December 1996, p. 4.

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> "fortunately, States and other organisms are making use of the paths towards universality, not to reach an absurd and undesirable uniformity, but to reach a minimum of common rules as a result of which we will be able to ensure respect of at least the essential foundations of human dignity in any place in the world"[178].

4. **The Legal Value of the Universal Declaration**

The problem of the legal nature of the Universal Declaration is a complex issue, and one which has provoked, and continues to provoke controversy among the international community[179]. It is clear that the Universal Declaration is not a treaty, and as such is not, *per se*, a legally binding instrument for those States which are parties to it. These States did not want to give it this format nor take on such international obligations in 1948 although, during the process of the drafting of the Declaration, there were many suggestions that this should be the case.

The Declaration was adopted by the General Assembly of the United Nations as a resolution and therefore in accordance with the UN Charter, it is a "recommendation" which does not *prima facie* have any legal force. In any event, as is well known, 'Declarations' are not simple General Assembly resolutions, but have a special degree of importance. As has been rightly stated, in the general practice of the United Nations system, "in view of the greater solemnity and significance of a "Declaration," it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it"[180]. The truth is that, in direct reference to the Universal Declaration, the Memorandum of the UN Office of Legal Affairs stated that "a "Declaration" is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting significance are being enunciated, *as is the case for the Human Rights Declaration*. A recommendation is less formal" (emphasis added).

Given this solemn character of a 'Declaration', it can be assumed that the body adopting it is manifesting its strong hope that all members of the international community will respect it. As this hope is

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[178] CASSESE, A.: *Los derechos humanos...*, *op. cit.*, p. 80.

[179] See, for example, the work of Professor Díez de Velasco, who speaks of its "controversial obligatory value", DÍEZ DE VELASCO, M.: *Instituciones de Derecho Internacional Público,* Madrid, 1994, vol. 1, p. 648.

[180] *Memorandum of the United Nations Office of Legal Affairs, United Nations Secretariat*, Doc. E/CN.4/ L.610.

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gradually justified by the practice of States, a Declaration can be considered, due to its customary value, to herald obligatory norms for States. The variables which condition the legal value of a Declaration are, fundamentally, these four:

1. The intention to put forward legal principles;
2. The majority by which it was approved;
3. Its content; and
4. the later practice of States[181].

The aim of the Declaration was, as stated in the Preamble, to establish "a common standard of achievement for all peoples and all nations" and its content is considered to be "a common understanding of [the] rights and freedoms" to which the Charter refers. It is thus clear that from the start the huge moral and political value was underlined. As Antonio Cassese has said, in 1948 the Declaration was a "simple and solemn reciprocal promise, only regarding ethical and political commitments, but not constituting legal obligations on States"; this decision of the States (that of 'lowering' its level of obligation) was made so as to safeguard State sovereignty to the maximum[182], an essential fact and basic constitutional principle of the international community. However, the different delegations involved in the production of the Declaration had many different views on the subject when it came to defining its legal status; the positions of two of the principal people involved in writing the Declaration, Eleanor Roosevelt and René Cassin, are very illustrative on this point.

On the same day as the Declaration was adopted, Eleanor Roosevelt, the President of the Commission on Human Rights, and US representative at the General Assembly, stated that:

> "In giving our approval to the Declaration today it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a Declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations"[183].

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[181] Garzón, C., "El Valor Jurídico de las Declaraciones de la Asamblea General", *Revista Jurídica de Cataluña,* 1973, pp. 581-616.

[182] Cassese, A.: *op. cit.*, p. 51.

[183] Quoted in Whiteman, *5th Digest of International Law 243,* Washington DC: Dpt of State Publications 7873, 1965.

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Faced with this stance which minimised the legal value of the Declaration, one of the 'fathers' of the text, René Cassin, upheld the notion that, at the time of its adoption, the Declaration constituted "an authorised interpretation of the United Nations Charter", although it did not have "coercive legal power" and was not "a direct source of legal obligations". This position strengthened the legal character of the Declaration; Cassin therefore maintained that the Declaration constituted the point of reference for appreciating the extent to which States fulfilled their obligations to co-operate with the United Nations as regards human rights, set out in Article 56 of the Charter, to which the Preamble of the Charter alludes directly. Although this obligation is written in general terms, and needs to be further concreted, for example with the addition of a system of sanctions, this does not to any extent affect its direct legal value. Additionally, the Declaration was called to integrate itself into the "general principles of law", using the definition appearing in Article 38 of the Statute of the International Court of Justice , and, through this, to form a part of a "universal public order"[184].

This firm stance of Cassin's in the light of differing opinions is indicative of the fact that the issue of the legal value of the Declaration was not a peaceful one, and that the views of those most active in its writing were very different. This was such that the Belgian delegate, M. Dehousse, put forward the proposal that the opinion of the United Nations Legal Service be sought on the issue; this was, however, a proposal which was unable to gain a sufficient majority at the Third Commission[185]. On the same topic, it is worthy of note that one of the main reasons for South Africa's abstention in the final vote was due to its conviction that the Declaration was of an obligatory nature.

4.1. *The Current Legal Value of the Universal Declaration*

Whatever the opinions regarding the character of the Declaration when it was approved, it can safely be said that in the decades follow-

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[184] UN GAOR 3d Comm., 3d Sess, 1948, p. 61. CASSIN, R., *La Commission des Droits de l'Homme de l'ONU, Miscelanea W.F. Ganshof Van der Meersch, LGDJ,* Paris 1972, t. 1, p. 405. CASSIN, R.: "La Déclaration Universelle et la mise en ouvre des droits de l'homme", *RCADI,* 1951-II, pp. 293 ff.

[185] On this topic, it is interesting to note the distinction made by the Belgian delegate before the Third Commission on 20 October 1948 which, apparently, "as a result of its great authority... very much impressed the commission"; this distinction was made between the "legal value" of the Declaration, and its "obligatory character". This is a distinction whose reach and transcendence is still being seen today. TCHIRKOVITCH, S., "La Declaration Universelle des Droits de l'Homme et sa portée internationale", *Revue Generale de Droit International Public,* vol. 53, 1949, p. 378.

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ing 1948 the document has undergone a significant transformation as regards its legal value. There are now few international lawyers who deny the fact that the Declaration has become a normative instrument which creates legal obligations for member States of the United Nations. The controversy nowadays, however, concerns two issues: firstly, the interpretation of the process by which the Declaration has become legally binding; and secondly, a discussion as to whether all the rights proclaimed in the Declaration are equally binding for all States.

Although this is the majority opinion, there are still many for whom the current value of the Declaration continues to be as it was when it was adopted; in this regard nothing has changed. Due to the importance of this issue, it is relevant to focus for a while on the position which is held by the United Nations and by the Inter-American Court of Human Rights.

In 1989, the Inter-American Court had to produce an Advisory Opinion on the Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention. This Declaration, which came a few months before the Universal Declaration, has a very similar position within the Organisation of American States to that which the Universal Declaration has in the United Nations. This has the result that the observations of the Court regarding the legal value of the American Declaration are very relevant to the issue under discussion, and can be 'imported' *mutatis mutandi* to the Universal Declaration.

In its section of written observations sent by States which are members of the OAS system, the United States clearly stated its position:

> "The American Declaration of the Rights and Duties of Man represents a noble statement of the human rights aspirations of the American States".

Unlike the American Convention, however, it was not drafted as a legal instrument and lacks the precision necessary to resolve complex legal questions. Its normative value lies as a declaration of basic moral principles and broad political commitments and as a basis to review the general human rights performance of member States, but not as a binding set of obligations.

The United States recognizes the good intentions of those who would transform the American Declaration from a statement of principles into a binding legal instrument. But good intentions do not make law. It would seriously undermine the process of international lawmaking - by which sovereign States voluntarily commit to specific legal obli-

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gations - to impose legal obligations on States through a process of "reinterpretation" or "inference" from a non-binding statement of principles[186].

And in order to still further strengthen their point, the United States made a statement to the tune that "the Declaration remains for all member States of the OAS what it was when it was adopted: an agreed statement of non-binding general human rights principles". The United States must state, "with all due respect, that it would seriously undermine the established international law of treaties to say that the Declaration is legally binding"[187].

This United States interpretation was not accepted by the Inter-American Court which, in accordance with the International Court of Justice, considers that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation"[188]. Continuing along this line of reasoning, the Inter-American Court states that:

> "to determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948"[189].

There is no doubt as to the fact that the evolution of American law is a regional expression of the situation experienced by universal and international human rights law, and it is because of this that the advisory opinion is so important. In addition, as was stated above, the position of the American Declaration within the OAS system is very similar to that of the Universal Declaration within the United Nations Organisation. The Charter of the OAS includes some provisions which refer to human rights, but does not contain a list of what exactly they are; this is very similar to the situation as regards the San Francisco Charter. This is such that, as the OAS General Assembly has repeatedly stated, the American Declaration is an "authorised interpretation" of the Charter as regards human rights for OAS member States, and, as such, is a true source of international legal obligations. As the Inter-American Court has said:

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[186] Inter-American Court of Human Rights, Series A, No. 10, Advisory Opinion OC-10/89, 14 July 1989, para. 12.
[187] *Op. cit.*, para. 17.
[188] *ICJ Reports*, 1971, p. 31.
[189] *Op. cit.*, para. 37.

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> "the member States of the Organization have signalled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration"[190].

The practice repeated at the heart of the OAS has been that for member States which are not a part of the American Convention, the essential legal instrument as regards human rights for the determination of their obligations and the evaluation of their fulfilment is, without doubt, the American Declaration; this is how it has consistently been applied by the Inter-American Commission throughout its significant advisory capacity since 1960. But even for States that were part of the Convention in 1969, although there is no doubt as to the fact that the fundamental basis for their obligations as regards this lies in the same Convention (given the superior precision of its provisions), it is not for this reason that they are freed from the environs of the Declaration through being OAS members and, as such, also bound by the Charter of the Organisation. This position leads the Court to the conclusion that the Declaration undoubtedly has "legal value"[191].

4.2. *Theories Explaining its Current Legal Value*

The process through which the Universal Declaration has become a normative instrument is due in part to the fact that the writing, approval and coming into force of the 1966 Covenants took a significant amount of time, and the international community needed a legal document which defined the legal obligations of States as regards human rights. Once the United Nations Commission on Human Rights completed the draft of the UDHR in 1948, it began the huge task of attempting to write an international treaty which would much more specifically set out the international obligations of States on the issue, considering that the UDHR was a Declaration containing only very general principles. Naturally, achieving agreements from States regarding the specific obligations coming from each of the rights was a much harder task. Firstly, the Commission had to separate what was united in

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190 *Op. cit.*, para. 43.
191 *Op. cit.*, para. 47.

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the UDHR: civil and political rights, and those which are economic, social and cultural. The main reason for this was that States considered the obligations they took on as regards each of these groups of rights to be essentially different. Although the Covenant project was very advanced and almost completed in 1955, it was necessary to wait until 16 December 1966 for the Covenants to be adopted by the General Assembly and opened up for signature and ratification. It should also be noted that they did not come into force until the first few months of 1976 when State number 35 deposited the instrument of ratification for each of the Covenants.

The prolonged absence (at least from 1948 until 1976, and from this latter year only for those States which had ratified it) of a specific treaty on the subject meant that the Declaration was used with great frequency. When governments, the United Nations and other international organisations wanted to invoke human rights obligations, or wanted to condemn violations of them by a State, they referred to the Universal Declaration as the basic norm. In this way, the Declaration came to symbolise what the international community understood as "human rights", reinforcing the conviction that governments had the obligation of assuring fulfilment of the rights of the Declaration for all those individuals under their jurisdiction.

It is undeniable that for the whole United Nations system, especially those bodies relating to human rights (Commission, Sub-Commission, special rapporteurs, working groups etc), the UDHR has been the fundamental point of reference, and therefore taking on an almost 'constitutional' role inside the organisation. The importance of this 'obligatory' value of the Declaration for all UN bodies should be highlighted.

There currently exist three fundamental theories, which do not for any reason have to be incompatible or exclusive, which attempt to explain the current legal value of the UDHR. The first of these holds that the UDHR is an "authentic or authorised interpretation" of the obligations contained within the UN Charter as regards human rights. A second theory states that the UDHR has become "customary international law"; finally, another theory prefers to base its normativity on the category of "general principles of law". These theories will be looked at in detail below.

4.2.1. The UDHR as an "authentic interpretation" of the Charter

Some scholars and governments hold that the fact that UN bodies make constant reference to the Declaration when applying clauses of the Charter implies that the Declaration is accepted as an "authorised

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and authentic interpretation" of these clauses. Many United Nations bodies have made frequent references to the Declaration: the General Assembly in innumerable resolutions; the Commission on Human Rights and its Sub-Commission; the country and thematic special rapporteurs, etc. The references of the International Court of Justice, the highest jurisdictional body in the international community, when it has had to provide an advisory opinion of some kind, or judge some case regarding human rights, are of particular importance. Some examples follow:

In the well-known case of the *Barcelona Traction*, the Court, in referring to obligations *erga omnes* (those obligations which States have as regards the international community as a whole), states that one of the sources of these obligations is "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character"[192].

In the case regarding the *Presence of South Africa in Namibia*, the ICJ concluded that racial discrimination, which constitutes a denial of fundamental human rights, is a flagrant violation of the purposes and principles of the United Nations Charter[193]. The prohibition of racial discrimination is to be found not only in the Charter, but also in the UDHR (Articles 2, 7, and 16).

As regards the *case concerning United States diplomatic and consular Staff in Tehran*, kidnapped by fundamentalist Islamic students, the Court held that the act of abusively denying human beings freedom, and of forcing them into physical suffering in pitiful circumstances, is manifestly incompatible with the United Nations Charter, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights[194]. We can see especially clear with this case how the ICJ considers the violation of one of the basic human rights protected by the UDHR not only as a violation of this document, but also as a violation of the obligations derived from the United Nations Charter; this is an unequivocal sign that the Court considers the UDHR to be a legal text which specifies the obligations of the Charter as regards human rights.

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192 *CIJ Recueil*, 1970, p. 32.
193 *CIJ Recueil*, 1971, p. 57.
194 *CIJ Recueil*, 1980, p. 42.

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As a famous internationalist has stated on examination of the Court's case-law, "apparently the unanimous opinion of the Court is that the Universal Declaration is a document with sufficient legal status that its invocation is justifiable as regards the obligations of States in accordance with general international law… the Declaration as a whole sets out fundamental principles recognised by general international law"[195].

4.2.2. The UDHR as "customary international law"

Other scholars are of the opinion that the fact that governments continuously (at international conferences, in presidential declarations, in ministers' statements etc) cite the Universal Declaration, and that States have even incorporated many of its clauses in their legislation, means that this practice has brought about a norm of customary international law, if not as regards all articles in the Declaration, then certainly as regards a considerable part of them.

The famous theory regarding the relationship between 'Declarations' of the UN General Assembly and customary law, formulated by Jiménez de Aréchaga[196], holds that a 'Declaration' can have three effects:

1. a 'codifying' effect: the Declaration is no more than a formal and written expression of pre-existing customary norms;
2. a 'crystallising' effect: the Declaration is the first written formulation of norms in the process of being set up, and, because of the discussion of the Declaration, consensus among States will lead to its 'crystallisation' as a legal rule which is customary in character;
3. a 'generative' effect: the Declaration, at the time of its approval, is a new norm, and has the status of *lege ferenda*, but it constitutes the starting point for the later practice of States, a practice which is 'repeated and uniform', so that the Declaration becomes a legal rule because of its customary character.

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[195] Rodley, N., "Human Rights and Humanitarian Intervention: The Case-Law of the World Court", 38 ICLQ (1989), pp. 321-326.

[196] As is well-known, this main theory refers to the relationship between treaty and custom, with the application of the Declarations of the General Assembly of the United Nations being a perfect adaptation of the same, Jiménez de Aréchaga, E., *El Derecho Internacional Contemporáneo,* Madrid, 1980, pp. 19-42.

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The first question which should be asked is which of these three categories the UDHR should be placed in. It is very interesting, and at the same time surprising, that Professor Jiménez de Aréchaga, in his many classifications of 'Declarations' regarding these three categories, makes no reference to the UDHR, although this is evidently one of the most important Declarations in the history of the General Assembly. We believe the best position is the one that holds that the UDHR should be placed in the third category, that of being 'generative', although there are also many arguments for putting it into one of the other two categories.

This position leads us to the fact that the UDHR, at the time of its adoption, became the first universal and general international document concerning human rights; its novelty here cannot be disputed. The UN Charter, and the inclusion of clauses on human rights, with the consequent 'internationalisation' of a subject which until that time had come under the exclusive domestic jurisdiction of States, meant that there was a revolution, and undeniable novelty, in contemporary international law; but the Charter does not contain any list of rights, as it was decided not to draft it at the San Francisco conference, but to later entrust the task to the Commission on Human Rights created as a result of Article 68 of the UN Charter. Therefore, when, on 10 December 1948, the General Assembly of the United Nations approved the UDHR, it was giving life to a document that was profoundly innovative in the international field (but not in domestic law, given that much national legislation already recognised some of these rights), hence the difficulty to prove that the UDHR in 1948 was a "codification of pre-existing customary laws", or a "crystallisation" of laws which were *in statu nascendi*. As a result, it seems that the idea that the rules in the UDHR are customary laws can only be based on subsequent practice by States, as long as this practice has proven that it involves two essential requirements: the material or objective element (recurring practice, constant and uniform), and the formal or subjective element, the *opinio iuris*.

Evidence of subsequent practice regarding the UDHR by States and bodies of the international community is abundant, and confirms its character as a customary law. As has been said in the *US Restatement*, the following types of practices are relevant to the consolidation of the customary law of human rights:

> "quasi-universal adhesion to the UN Charter and to its human rights clauses, quasi-universal and frequently reiterated acceptance of the Universal Declaration, even if only in principle; quasi-universal partici-

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> pation in all stages of the preparation and adoption of international agreements recognising principles of human rights in general, or concrete rights; the adoption of human rights principles by States in regional organisations in Europe, Latin America, Africa etc; general support from States for UN resolutions declaring, recognising, invoking, and applying international principles of human rights as international law; actions of States aimed at harmonising their national law and practices to the standards or principles set out by international bodies, and the incorporation of human rights clauses, either directly or through references to national constitutions and other laws; invocation of human rights principles in national policy, diplomatic practice, international organisations, diplomatic communications and actions expressing the point of view that certain practices violate international human rights law, including condemnation and other adverse reactions from the State to violations by other States"[197].

It is clear that all this evidence regarding the value of the UDHR cannot be exhaustively analysed, although it is true that there is an enormous amount of material on the subject. Nevertheless, we shall highlight a few points of interest.

Firstly, the UDHR has been correctly classed as "a legal milestone in the process of progressive codification of international law"; references to the UDHR in all subsequent international instruments which have specified the international obligations of States are an example of the importance given to the document.

As regards allusions made by governments in final documents of particularly important international conferences, we have to mention the Proclamation of Tehran at the First World Conference on Human Rights in 1968, held in the year of the 20th anniversary of the Declaration; the Helsinki Final Act 1975, and the Vienna Declaration and Programme of Action of 1993.

In the *Tehran Proclamation* (13 May 1968), States asserted that the Declaration constitutes an *obligation* for the international community, and that they considered serious violations of human rights to be violations of the Charter[198].

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[197] *US Restatement: US Rest, 3rd; Restatement of the Foreign Relations Law of the USA,* American Law Institute (Washington 1987). Vol. II ii & 702, p. 154, n. 2.

[198] "The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and *constitutes an obligation for the members of the international community*" (emphasis added). The importance of this declaration of obligation for all the international community as regards the UDHR cannot be ignored, bearing in mind the seriousness of the context and the unanimous States' support achieved".

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In the *Helsinki Final Act* (1975*)* both Eastern and Western States set out the principles which were to guide their relations, and in doing this specifically devoted chapter VII to the issue of respect for fundamental rights and freedoms; in that respect, they declared that, in the field of human rights, "States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights".

Finally, in the *Vienna Declaration* (1993), the States taking part reaffirmed again "their commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights"[199].

All these manifestations of States in particularly serious contexts, which give the same importance to the Charter and to the Declaration, are evidence of a particular *opinio iuris*; in other words, of a decision of States concerning the legally binding character of the Declaration.

Other important evidence of the normative and customary character which the Declaration has acquired can be found in the very widespread practice across States consisting of its incorporation into constitutions and domestic legal orders. As the International Law Association has correctly stated, "the Universal Declaration has, directly or indirectly, served as a model for many constitutions, laws, rulings and policies which protect human rights. These internal manifestations include direct constitutional references to the Declaration or incorporation of its clauses; fundamental provisions of the Declaration which have been reflected in national legislations; and judicial interpretation of national laws with reference to the Declaration"[200].

No fewer than 90 constitutions written after 1948 contain rules concerning human rights which faithfully reproduce UDHR articles, or

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[199] Regarding the language used by the Vienna Conference in discussing the value of the UDHR, some authors have detected a certain "step backwards" as regards the Tehran Proclamation, given that at no point is the "obligatory nature" of the Declaration mentioned. The UDHR is rather considered "a common standard of achievement for all peoples and all nations, is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments", particularly in the Covenants of 1966 (paragraph eight of the preamble).

[200] INTERNATIONAL LAW ASSOCIATION, "Final Report on the Status of the Universal Declaration of Human Rights in National and International Law", *ILA Report of the Sixty-Sixth Conference,* Buenos Aires (Argentina), London 1994, pp. 527 ff. In this final report there is a fairly complete study of the incorporation of the UDHR into national laws and constitutions, as well as jurisprudential references to it.

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are inspired by the document. Many of the constitutions of countries which gained independence after 1950 make direct reference to the Universal Declaration. To mention only one example, the Spanish Constitution of 1978 establishes in its Article 10.2 that "provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights…". The importance of this reference lies in the call for tribunals to interpret the human rights contained within Title I (whose writing was also influenced by the Declaration), in accordance with the UDHR. Legal references to the Declaration are useless if judges and tribunals are not legitimised to apply them.

Regarding the use of the UDHR by domestic courts, it must first be highlighted that these are generally reluctant to decide a case against a national law by directly applying international law and, in that respect, the UDHR. There are few precedents for such a situation; one of the few is the decision of the High Court of the United Republic of Tanzania which declared a rule of customary Tanzanian law, which permitted discrimination against women, unconstitutional due to the fact that it was in contravention of Article 7 of the UDHR (equality before the law and prohibition of all discrimination) which, according to the Court, "is part of our Constitution"[201]. Secondly, it should be noted that the normal situation is for domestic courts to refer to the UDHR when they seek support for any right already recognised by their constitutions or national laws, or help in interpreting them. That is the case, for example, in the practice of Spanish courts; more specifically, the Supreme Court refers to the UDHR to materially reinforce the right under discussion.

4.2.3. The UDHR as an expression of general principles of law

A third way in which a part of the doctrine has formed a basis for the legal status of the UDHR is that "general principles of law" have been found in it and, as such, because it is one of the sources of international law in accordance with Article 38 of the ICJ Statute, its legal value is without doubt. We have already seen above how one of the fathers of the Declaration, the great jurist from Bayonne, René Cassin, put forward this theory at its adoption. There have later been many authors who have also shared this opinion; an illustrious representative of

[201] Ephrahim v Pastory & Kaizilige, High Court, 22 Feb 1990, Civil App No. 70 of 1989, reprinted in 87 *International Legal Reports* 106, p. 110.

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this school of thought would be J.A. Carrillo Salcedo. For this international lawyer from Seville, "the theory of the general principles contained in the United Nations Charter and developed by the Universal Declaration", and which are generally accepted, is the most appropriate, and can find its basis in ICJ jurisprudence[202]. An Italian Court appears to uphold this same theory of general principles in its statement in the sense that the Universal Declaration reflects "general principles of international law" which are part of Italian law according to Article 10 of the Italian Constitution[203].

Many years ago, Theodor Meron was surprised by the little attention that the category of "general principles of law recognized by civilized nations" had received as a method for obtaining greater legal recognition for the principles of the Universal Declaration and other human rights instruments. He also added that, as regards the extent to which the norms of human rights contained within international instruments are reflected in national laws, Article 38 of the ICJ Statute becomes one of the principal methods for the maturation of such standards in the field of international law[204]. Through this it becomes clear that the barrier between the two sources, international customs and general principles, becomes blurred if not erased.

Whatever the interpretation might be concerning the foundation of the current legal character of the Declaration, and therefore the extent to which it is obligatory ("authorised interpretation of the Charter", "international customary law", or even "expression of general principles of law which are generally accepted"), what really matters is the general consensus of States concerning the obligatory character, more than the way in which this consensus has been expressed.

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[202] Carrillo Salcedo, J.A., «Algunas Reflexiones sobre el Valor Jurídico de la Declaración Universal de los Derechos Humanos», in *Hacia un Nuevo Orden Internacional y Europeo. Homenaje al Profesor Manuel Díez de Velasco,* Madrid 1993, pp. 22-3. Professor Carrillo specifically refers to the cases of the *Corfu Channel* (1949), *the Genocide Convention* (1951), *the case concerning United States diplomatic personnel in Tehran* (1980), and of *Nicaragua v. United States* (1986).

[203] Fallimento Ditta Magiv Ministry fo Finance, Tribunal de Roma, 27 July 1959, Foro It LXXXV (1960), I col. 505.

[204] Meron, T., *Human Rights and Humanitarian Norms as Customary Law,* Oxford 1989, pp. 88-89. The US Restatement also considers another of the major sources of obligations regarding human rights to be "the general principles of law common to main legal systems of the world", *op. cit.,* p. 152. Similarly, the great American jurist Oscar Schachter also holds that the principles of internal laws are often adequate for international application regarding human rights. Schachter, O., "General Course in Public International Law: International Law in Theory and Practice"*, Recueil*, 178.5, 1982, p. 79.

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As Professor Carrillo has rightly said, "in the development of international law, the essential part is that it crystallises a consensus between States, as the rules of international law are created, modified, and progressively developed through general consensus between States. The formation, development and modification of this consensus is always a dynamic process: the will of States… is essential in the initial phase…; but… what, above all, is important, is a general acceptance of the fact that these guidelines of behaviour are legally binding."[205]. Therefore, continues J.A. Carrillo, what is vital is the consent and willingness of States to determine legal obligations, whatever the way or technical method through which this consent might be manifested and expressed: multi-lateral treaties, customs, United Nations General Assembly resolutions and Declarations.

4.3. *Analysis of the provisions which have acquired the status of peremptory norms of International Law*

General State consensus concerning affirmations of the legal value of the UDHR, manifested, as discussed above, through multiple "forms" evidenced in the three theories discussed, is indubitable. However, the main problem lies in deciding exactly which provisions in the Declaration are now obligatory for all States of the international community as a result of their general acceptance[206]. It is clear that the right to life (Article 3) or the prohibition of torture (Article 5) cannot be afforded the same importance as the right to periodic paid holiday (Article 24). Because of this, the investigation concerning which provisions in the Declaration have been generally accepted and which ones have

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[205] CARRILLO SALCEDO, J.A.: *op. cit*., para. 4.

[206] Scholars who believe that all articles of the UDHR are equally obligatory for all States in the international community are in the minority; among them, however, is one of the people most involved in the process of drafting that the Declaration, John Humphrey, who says that "the UDHR has been quoted so many times both within and outside the UN that jurists now say that, whatever the intention of the authors might have been, the Declaration is now a part of customary international law and, therefore, is obligatory for all States. The Declaration has become what some nations wanted in 1948: a universally accepted interpretation and definition of human rights, which were left undefined in the Charter". HUMPRHEY, J.: "The International Bill of Rights: Scope and Implementation", *17 WM & Mary Law Review* 527, 529, 1976. The following are some other authors who agree: Alston, Bilder, Kartashkin, Lallah, Sohn, Thornberry, Waldock, Robertson and Merrills. There are still fewer who would defend the view that all the Declaration is *ius cogens* (imperative rules of general international law, according to Article 53 of the Vienna Convention on the Law of Treaties); see Haleem, Mc Dougal, Humprey, Markovit.

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not is a task of undeniable transcendence, and is necessary in order to specifically define the legal status of the Declaration. The human rights Committee of the *International Law Association*, one of the most prestigious international organisations of experts in international law, dedicated itself to performing this task between 1988 and 1994. The results of the Final Report were presented at the 1994 Buenos Aires Conference and are somewhat unsatisfactory if one is looking for an exhaustive analysis and clear conclusions on international practice concerning each article of the UDHR.

This committee recognised that "it would be presumptuous to attempt (in the report) to comprehensively analyse every one of the rights contained within the Declaration"[207]. However in the light of State practice, some tentative conclusions can be drawn and are reproduced below.

The committee sees the following as legally binding, as rules of customary law, for all States in the international community:

1. Those contained in Articles 1, 2, and 7, which express the fundamental right to freedom and non-discrimination in the enjoyment of rights. It would be difficult to deny the general acceptance of this right, although in States' practice there exists a less-than-satisfactory fulfilment of this principle of equality. Thus, women are frequently prevented from exercising their rights in a manner fully equal to men; distinctions based on political and religious beliefs are found in many constitutions; and an effective guarantee of the equal rights of the rich and the poor is often lacking. Discrimination on the grounds of race is accepted by the doctrine as prohibited by general international law, and has even been declared as a *ius cogens* norm.
2. The guarantees of Article 3 (the right to life, freedom, and security) are formulated in such a general manner that they hardly constitute a useful and operative standard; nevertheless, protection of the right to life has always been considered as one of the rules of customary international law, in such a way that practices such as assassinations, disappearances, and arbitrary deprivation of life have been universally condemned as violations of the right to life.
3. The prohibition of slavery (Article 4), the prohibition of torture (Article 5), the prohibition of prolonged arbitrary detention (Article 9), the right of every human being to recognition of legal

[207] *ILA*, *op. cit*., p. 545.

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personality (Article 6), the right to a fair trial (Articles 10 and 11), and the right to marry (Article 16) would also be classed as customary rules[208].

However, due to different reasons, the following have not been awarded the status of customary law: the right to an effective remedy for violations of human rights (Article 8), the prohibition of arbitrary interferences into private life (Article 12), the right to freedom of movement and residence within a territory, as well the freedom to enter and leave a country (Article 13), the right to a nationality (Article 15), the right to property (Article 17), the right to freedom of thought, conscience, and religion (Article 18), the right to freedom of expression and opinion (Article 19), the right to freedom of assembly and association (Article 20), and the right to seek asylum (Article 14). Regarding this last right, it should be said that the returning of a person to a country where there are well-founded fears that he or she might be subjected to torture and persecution would be contrary to a practically crystallised customary rule that is the principle of *non-refoulement*.

Although some argue that a "right to democracy" is emerging as a customary norm, it is clear that many States have not accepted the right, recognised in Article 21, of everyone to take part in the government of the country.

Similarly, the committee states that economic, social and cultural rights, set out in Articles 22 to 27 (the rights to work, to social security, to rest, to an adequate standard of living, to education, and to take part in the cultural life of the community), are rarely qualified by the doctrine or tribunals as customary norms. Among them, perhaps the strongest candidates for soon becoming international customs would be the following: the right to free choice of employment, the right to form and join trade unions, and the right to free and accessible primary education, according to States' available resources.

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[208] The aforementioned *US Restatement (Third) of the Foreign Relations Law*, whose significant authority on the current status of international law is disputed by few, includes a list of rules of international customary law concerning human rights, which includes the prohibition of genocide, slavery and the slave trade, murder and disappearance, torture and cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, and practices which constitute serious violations of internationally recognised human rights (*US Restatement, op. cit.,* & 702, vol. II). A discussion of this list can be found in Oraá, J.: *Human Rights in States of Emergency in International Law,* Oxford 1994 (2nd), pp. 214 ff.

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The provisional conclusion of the ILA study is that even if a large proportion of the civil and political rights in the UDHR have now become customary rules, this is not the case for economic, social and cultural rights, and this poses the difficult problem of defining the legal value of these latter rights. It would appear that the position of the ILA is that more value should be afforded to the first group (which are obligatory customary norms), lessening the value of the second group (only very few of these are candidates for soon becoming customary norms).

This position would appear to be in contrast to the current doctrine on human rights which insists that 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"[209].

Although the provisional conclusions of the International Law Association are of much interest, it would be necessary to conduct a more detailed and exhaustive analysis of State practice as regards every one of the other rights protected in the Declaration before coming to definitive conclusions regarding the character of customary norms, and therefore binding for all States of the international community.

5. **Conclusions**

Following this detailed study of the birth and the main elements of the content and legal value of the Universal Declaration of Human Rights, one of the main conclusions which we have reached is that we are faced with a document which is a child of its time; in other words, it is indissolubly linked to the vicissitudes which occurred during the Second World War; a fact which is reflected in many of its passages both in the preamble and in the main text. The Universal Declaration was only the first step and starting point in a long process of internationalisation of human rights, a process in which the United Nations has played a fundamental role with its approval of a huge variety of instruments aimed at developing the sometimes vague and generic provisions contained in the Declaration. With this in mind, the different provisions of the Declaration must be interpreted in a dynamic manner in light of the international treaties and other instruments which the international community has developed.

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[209] *Vienna Declaration...*, para 5.

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On the other hand, the Declaration was the fruit of consensus; it could not have been otherwise. The final content of its text reflects compromise and a delicate balance between the different ideologies and world-views existing in the United Nations at its time of writing. In this regard, it must be noted that the Universal Declaration became a revolutionary instrument, as it was the first international text which achieved the inclusion of both civil and political rights as well as economic, social and cultural rights, thereby advancing the concept of the indivisibility and interdependence of the whole gamut of human rights.

Finally, we would like to state how, sixty years on, the Declaration continues to be a document that is alive and full of inspirational strength for the fight against new threats to human dignity and the very survival of humankind. The seeds of all the human rights developments which have taken place after the writing of the Declaration are found in the document. It is necessary that, at its sixtieth anniversary, we should continue to reflect on this document which is still vital for every reference to human rights and fundamental freedoms. To use the words of Federico Mayor Zaragoza, the former Director General of UNESCO, the Universal Declaration of Human Rights has become a true "ethic heritage of humankind"[210].

[210] Mayor Zaragoza, F.: «Consolidación de una Cultura de Paz», *XVI Curso Interdisciplinario en Derechos Humanos*, Instituto Interamericano de Derechos Humanos, 15 to 26 June 1998, San José, Costa Rica.

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