DRAWING INSPIRATION FROM THE UDHR: LESSONS ABOUT UNDERSTANDING THE ROLE OF LAW IN PROTECTING MINORITY RIGHTS

Joshua Castellino *

The strong edifice of minority protection that existed during the *League of Nations* was unable to stop the mass atrocities against minorities that were a central feature of World War Two. Chastened by this experience, minority rights, which had hitherto been a strong bulwark around which human rights itself evolved, were given less prominence under the United Nations system that began to emerge in the mid-1940s. The *Universal Declaration of Human Rights* (UDHR) has no explicit acknowledgment of minorities, instead implicitly positing that ensuring the rights of *all* trumped the need to recognise the specific needs of particular groups. In the seventy-five years since its passage however minority rights law has emerged, drawing strength from the principles of human rights as articulated in the UDHR to form a strong part of the legal platform protecting rights across the world. While minority rights law draws sustenance from the growth of the human rights movement itself, it also offers insights into the limitations of that regime in overcoming ossified structural discrimination. In this chapter the authors track this issue, presenting a critique concerning the extent to which law was envisaged as a founding platform through which societies could be regulated. The piece is divided into three short parts. The first seeks to draw attention to how minority rights were perceived around the time of the framing of the UDHR; the second aims to highlight the emergence of what could be identified in broad terms as a regime for minority rights protection that draws direct inspiration from the non-discrimination principle contained in the UDHR; while the third emphasizes how such regimes have been unable to guarantee the rights of marginalized communities. The piece ends with a brief commentary on the type of renewal that would be necessary, seventy-five years after the UDHR, of its true essence: the generation of societies where the individual and collective dignities and inherent worth of communities could be recognised.

Minority Rights and the Attempt to Create a Universal Compact for Human Rights

The *Promise of St. Louis of France to the Maronites* in 1250 is among the earliest international documents to seek to protect the few from the tyranny of the many.[1] The Ottoman *millet* system, with rights to autochthonous communities such as Christians, Jews and Armenians is an older, purer form of the earliest acknowledged forms of minority protection.[2] *The Promise*, renewed subsequently by successors, guaranteed safe passage to Maronites traversing the Ottoman Empire to Mount Lebanon to benefit from the *millet* system.

The growth of international norms stem from the principle of non-discrimination and equality conditioned by awareness of how threats to minorities exposed them to significant likelihood of violence, including genocide.[3] While physical protection-oriented regimes are beyond the scope of this paper, the principles of participation and the promotion of rights, including on the basis of identity, form the normative basis to the existing protection of minority rights. This section briefly addresses their evolution and status emerging from the cornerstone principle of non-discrimination as reflected in article 7 of the *Universal Declaration of Human Rights*.

Entrenched in domestic systems, non-discrimination in international legal contexts developed through standards against which all policies can be examined.[4] The standard combines theoretical and legal positivist elements. The quest for equality is its key theoretical component with developments stemming from the bid to eliminate its corollary - inequality. Two types of equality are recognised:

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* Executive Co-Director, *Minority Rights Group International* and Professor of International & Comparative Law, *University of Derby*, UK.

[1] General background on that frames the context for Promise is available at https://www.britannica.com/biography/Louis-IX

[2] KH Karpat, *Studies on Ottoman Social & Political History: Selected Articles & Essays* (Brill 2002).

[3] J Heiskanen, 'In the Shadow of Genocide: Ethnocide, Ethnic Cleansing & International Order' 1(4) *Global Studies Quarterly* (2021) https://doi.org/10.1093/isagsq/ksab030.

[4] For broad reading of discrimination law see S Fredman, *Discrimination Law* (OUP 2011).

formal and material. Formal, *de jure* equality requires explicit recognition of the need for equal treatment in law, while material, *de facto* equality calls for elimination of economic, social and cultural inequalities.[5] The *Permanent Court of International Justice* in *Minority Schools in Albania* reflected this as a 'quest to achieve effective, genuine equality'.[6]

The importance of non-discrimination at the UN was already reflected, prior to the passage of the UDHR in Article 1 of the 1945 UN Charter. The principles of human rights - with equality and non-discrimination at its heart are key to the modern UN human rights machinery. In 1947 the *UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, set up as an advisory body to the *Commission on Human Rights*[7] established boundaries between non-discrimination and minority rights at international level.

The quest against discrimination sought '…prevention of any action which denies to individuals or groups of people equality of treatment which they may wish', while minorities' rights constituted '…protection of non-dominant groups which, while wishing for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population'.[8] International human rights law enshrines non-discrimination in every human rights treaty, generating obligations to ensure that enshrined rights accrue to *every* individual without restrictions.[9]

Despite the historical richness of the minority rights discourse, UN interest in minority rights was politically constricted in the framing of the UDHR, even though the organisation's genesis emerged from the ashes of genocide.[10] A lurking fear persisted about how minority rights could be used. After all 'unification of German minorities' was offered as justification for Nazi advances - resonant with contemporary Russian occupation of Ukraine. The failure of the *League of Nations* minority systems during the inter-war period was also stark.[11] Under UN decolonization many States emerged with significant minority-identity oriented quests that threatened dismemberment.[12] The validating of 'minority rights', especially when linked to self-determination was viewed as threatening the spectre of the dismemberment of the State. The post-colonial State was already built on the precarious myth of full effective control of the territories and full sovereignty over the peoples deemed (usually by colonial powers) to be within their jurisdiction.[13]

The debates around at the time of the framing of the Universal Declaration did not focus heavily on minority rights. Instead ideological battles, South v North[14] and East v West,[15] at the *Commission* over the framing of the *International Bill of Rights*[16] took centre stage. It was in the midst of this that States united to pass the *Universal Declaration.* While *only* a declaration at the time of its passage the attempt to frame this into legally binding standards continued in the background. It is instructive to note however that despite that discussion which featured minority rights only peripherally, the first global

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[5] EW Vierdag, *The Concept of Discrimination in International Law* (Martinus Nijhoff 1973) 7
[6] P.C.I.J. Series A/B, No.64 (1935), p.19.
[7] UN Doc. E/1371 (1949).
[8] UN Doc. E/CN.4/52, s V (6 December 1947) 13-14.
[9] See e.g. Art. 2(1) ICCPR; Art. 2(2) ICESCR; Art. 2 CEDAW and Art 4(1) ICRPD among others.
[10] Z Elkins & T Ginsburg, 'Imagining a World Without the Universal Declaration of Human Rights' 74(3) *World Politics* (2022) 327-366.
[11] J Stone, 'Procedure under the Minority Treaties' 26(3) *American Journal of International Law* (1932) 502-513.
[12] R Sureda, *The Evolution of the Right of Self-Determination* (Sithoff: Martinus Nijhoff, 1973).
[13] Humphrey, 'The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities', 62 *American Journal of International Law* (1968) 872.
[14] RE Edward, 'The "Full Belly" Thesis: Should Economic Rights Take Priority Over Civil & Political Rights? Evidence from Sub-Saharan Africa', 5 *Human Rights Quarterly* (1983) 467-490.
[15] MM Kampelman, *Three Years at the East-West Divide* (Freedom House 1983).
[16] D McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil & Political Rights* (Clarendon 1994).

binding Convention was completely focussed on minorities, namely the *International Convention for the Elimination of All Forms of Racial Discrimination* (1965, henceforth referred to as ICERD or the Race Convention).[17] Its swift passage was driven by a rise of anti-Semitism in Europe; concern from 'sending' migrant States (e.g. Mexico, India) of their nationals abroad; and emerging States' determination to create a binding standard against apartheid in South Africa.[18]

The history of international law is replete with examples of treaties designed to protect minorities[19] including the *League of Nations* mechanism.[20] Yet the failures at protecting minorities from genocide, dominates global history books. It is unclear what value can be placed on this in what may seem a changed approach of the *Universal Declaration* which focussed on the human rights of *all*, rather than the specific rights of those facing intense marginalisation and persecution. Starting with the UDHR, minorities are often referenced, but the focus has shifted to protecting the rights of all instead. Thus while minorities feature in preambles and discussions, few mechanisms were created to tackle their situation. Even the mandate of the Sub-Commission, originally designated the *Sub-Commission for the Prevention of Discrimination and Protection of Minority Rights* was broadened to developing standards for human rights protection with its name changed, further eclipsing the minorities agenda.

This represents an ideological shift towards the erection of general mechanisms, rather than ones specialised on ethnic, linguistic or religious identity. Human rights protection was based on the inherent dignity and worth of *every* individual. In contemporary parlance, the choice was that 'all lives matter' would include 'Black lives matter'. ICERD challenged this rhetoric articulating special regimes to protect classes of individual members of definitive groups. That trend was not new: special regimes protected women and children during war.[21] Such measures aimed to create extra protection to overcome access difficulties that members of such groups faced.[22]

The Re-Emergence of Minority Rights within Human Rights Law

Despite articulating rights as applying *equally* to everyone since the commencement of the United Nations era, it was the Race Convention that re-emphasized *lex specialis* as a specific tool to combat collective inequality experienced by individuals from an identifiable class of people. This proliferated instruments pertaining to indigenous peoples,[23] women,[24] children,[25] migrant workers

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[17] *International Convention for the Elimination of All Forms of Racial Discrimination, 1965* (21 December 1965 UNGAOR 2109 (XX).

[18] T Meron, 'The Meaning & Reach of the International Convention for the Elimination of All Forms of Racial Discrimination' 79(2) *American Journal of International Law* (1985) 283-318.

[19] J Castellino, 'The Protection of Minorities and Indigenous Peoples in International Law: A Comparative Temporal Analysis' in 17 (3) *International Journal of Minority &Group Rights* (2010) 393-402.

[20] M Mazower, 'Minorities and the League of Nations in Interwar Europe', 126 (2) *Daedalus* (1997) 47-63.

[21] There are 42 provisions referring to women in the 1949 *Geneva Conventions on the Laws of Wars* and the 1977 *Additional Protocols* see Gardam & Jarvis (2001). For an articulation of child rights during the League of Nations see *Geneva Declaration of the Rights of the Child of 1924*.

[22] For more on access to justice, see DL Rhode *Access to Justice* (Oxford University Press 2004), 1-19, 103-120.

[23] See *Convention Concerning Indigenous & Tribal Peoples in Independent Countries* (ILO No. 169).

[24] CEDAW (1981); *Op. Protocol to* CEDAW (2000); *Declaration on the Protection of Women and Children in Emergency and Armed Conflict* (1974).

[25] *Convention on the Rights of the Child* (1989); *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (ILO No. 182); *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts* (2000); *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (2000). In addition there are also guidelines concerning juvenile offenders such as *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, (1990); *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)* (1990) and the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*(1985).

(documented and undocumented),[26] refugees[27] and persons with disabilities.[28] Binding international standards have been agreed outlining specific rights distinct to a class of persons; in some cases with additional mechanisms to overcome access to rights issues. Meanwhile at the core of human right law, besides the Race Convention that aimed to 'eliminate all forms' of racial discrimination, a single clause was inserted into the *International Covenant on Civil & Political Rights* (ICCPR) to respect minority rights. Article 27 remains the most widely accepted legally binding provision on minorities and forms the basis for the later *UN Declaration on Minorities*.

In 1998 the Sub-Commission sought research on affirmative action with the final report describing accepted practice in using the term 'discrimination' to designate 'arbitrary', 'unjust' or 'illegitimate distinctions'.[29] Affirmative action remains a lynchpin in compensating intentional or specific past discrimination with contemporary repercussions. Disadvantaged groups subjected to longitudinal discrimination have descendants in underprivileged positions, with educational, social, economic and status distinctions, showing why *de jure equality* will remain insufficient in dismantling entrenched structural discrimination.[30]

Rather than equalization of result i.e., achieving equal distribution of material benefits to all the sister convention to the ICCPR, the *International Covenant on Economic, Social & Cultural Rights* recognized a process where social resources would be redistributed to satisfy rights of basis of equality of opportunity. In its first general comment it identified an initial step towards realization of Covenant rights as identifying disadvantaged populations for positive State action.[31] The *Human Rights Committee,* the monitoring body of the ICCPR, also iterated this in commentary on non-discrimination, highlighting how 'preferential treatment', 'for a time' would be important in eliminating perpetual discrimination.[32]

The monitoring body of the Race Convention, the Committee for the Elimination of Racial Discrimination (CERD) has been particularly active in championing group rights. Its general comment on special measures[33] develops the text in Article 1(4) and Article 2(2) which confers a positive obligation on States to enact special measures, '…when the circumstances so warrant'. Despite significant controversies and reservations towards the principle, special measures are a legal requirement under international human rights law if certain socio-economic disadvantages are identifiable.[34] CERD's General comment 32 clarifies the distinction between special measures and permanent rights,[35] reiterating that special measures are 'integral to its meaning',[36] invalidating need to prove historic discrimination and emphasizing corrective measures for disparities.[37]

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[26] *International Convention on the Protection of the Rights of All Migrant Workers & Members of Their Families* (1990).
[27] *Convention relating to the Status of Refugees* (1954); *Protocol Relating to the Status of Refugees* (1967); *Guiding Principles on Internal Displacement* (1998); and the *Cartagena Declaration on Refugees* (1984).
[28] *Declaration on the Rights of Disabled Persons* (1975); *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* (2006); *First Optional Protocol to the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* (2006).
[29] UN Doc. E/CN.4/Sub.2/2002/21, para.5.
[30] J Castellino, *Equality Matters: Why & So What?* (TEPSA Briefs, 2021) available at: https://www.tepsa.eu/tepsa-brief-2021-castellino-2/
[31] CESCR, General Comment No. 1, para.3, in HRI/GEN/Rev.4 (2000).
[32] HRC, General Comment No. 18, para. 10, in HRI/GEN/1/Rev.4 (2000).
[33] CERD, General Comment No.32, 'The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination' (2009).
[34] *Ibid.*, para.29.
[35] *Ibid.*, para.15.
[36] *Ibid.*, para.20.
[37] *Ibid.*, para.22.

Critical race theorists, alongside many others, stress that racial and ethnic diversity within the public sphere is a necessary component of a just society. They argue 'positive diversity' is a better frame for achieving compensatory justice for racial and ethnic minorities; and that such diversity needs to be distinguished from affirmative action.[38] For such scholars affirmative action is concerned with addressing past wrongs, while diversity in co-governance ensures groups are integrated into contemporary public decision-making. International law supports this view of diversity, encompassing non-discrimination as articulated in article 7 of the UDHR as a starting point, with tailored special measures towards achieving equality of fact. However a point may have been reached where deeper legislative approaches are warranted. While States are afforded leeway designing such measures, the burden of proof remains on States to determine whether such measures are necessary, which is easily defeated by rising majoritarianism.

As indicated above, at least five classes of individual are already recognised in international human rights law through widely accepted special regimes that address identity related structural discrimination. Within the UN system of human rights these include racialized groups (1965), women (1979), children (1989 including a specific provision on minority children), migrant workers (1992) and persons with disabilities (2000). Attempts to create UN backed special regimes for minorities (1992), religious groups (1988) and indigenous peoples (2007) have resulted in declarations not binding treaties.

While ethnic, linguistic and religious minorities from recognised groups face additional intersectional disadvantage within each of the treaty regimes, failures to explicitly protect this category of persons in the form of a binding international treaty is sometimes portrayed as a normative gap. Yet the existing regime does theoretically cater for minorities. As a binding treaty the ICERD was formed around concerns central to minorities. Two further binding international standards also focus on minorities: *The Framework Convention on National Minorities* (FCNM 1995)[39] and the *European Charter on Regional & Minority Languages* (ECRML 1992).[40] Both are accompanied by (relatively) well-functioning monitoring mechanisms and fall under the mandate of the *Council of Europe*. They are however only binding on a small proportion of the world's States with their geographic remit preventing them from being considered 'universal' standards. For indigenous peoples despite the universalist nature of *ILO Convention 169*[41] the small number of ratifying States show limited access to a global instrument and mechanisms headlining specific concerns. While the minorities, and indigenous peoples declarations have set aspirational standards, the growing strength of the latter - UNDRIP - is of noticeably greater significance in its ability to compel the behaviour of States and courts of law.

The *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Racial or linguistic Minorities* (UNDM 1992) is inspired by the spirit of article 27 of the ICCPR. It seeks minority protection that contributes political and social stability through participation within society. Mindful of migrations, cross-border communities and contested boundary lines, it acknowledges that promotion of minority rights '…would strengthen […] friendship and cooperation among peoples and States'. States are urged to protect minority existence of through conditions that promote their identities. Substantial elements highlight importance of political participation with the kin-State issue reflected in calls for freedom from hindrance in cross border links. States and the UN itself are encouraged to plan, implement, cooperate and assist minorities in full rights access.

The UN Network on Racial Discrimination & Protection of Minorities created by the Secretary-General in 2021 as an inter-agency framework with OHCHR as Permanent Chair of the network, also

[38] I Jiminez Marfin, VH Perez, L Parker, M Lynn & J Arrona, 'Hiding the Political Obvious: A Critical Race Theory Preview of Diversity as Racially Neutral in Higher Education' 20(1) *Educational Policy* (2006) 249-270.
[39] *Framework Convention on National Minorities, 1995* (Strasbourg 1.II.1995, CoE ETS 157).
[40] *European Charter for Regional and Minority Languages, 1992* (Strasbourg, 5.XI.1992, CoE ETS No. 148).
[41] *Indigenous & Tribal Peoples Convention, 1989* (No. 169).

seeks to address the goal of protection of minorities.[42] Acknowledged UN failures towards minorities, most recently in Sri Lanka[43] and Myanmar[44] has driven the UN Secretary General to seek better performance,[45] making it imperative that this is prioritized at the marking its 30th anniversary of the Minorities Declaration of 1992.

That the Declaration marked dissipation of earlier fears over minority issues has proven baseless,[46] reflecting instead the narrow perspective in its conception.[47] The world has changed significantly since its passage. Emphasizing human rights in the hope that minority protection would rise appears myopic. Encouragement of outward looks from Europe towards minorities in Africa, Asia and Latin America with exported ready-made prescriptions including nation-building,[48] individually based minority rights,[49] multiculturalism,[50] consociationalism,[51] autonomy regimes,[52] bi-cultural linguistic policies[53] and territorial autonomies[54] has proved deeply restrictive and largely performative. These models did not facilitate the challenging of historical narratives, including in the territorial dimensions of the externally exposed States based on colonial interests, nor did they pay adequate attention to the need to disrupt ossified structural discrimination within post-colonial States.[55]

Instead the overt focus on these issues extracted an opportunity cost, restricting scope for systemic development of intersecting personal autonomies,[56] failed to emphasize access to socio-economic rights that was deepening the descent of minority communities into poverty,[57] did not model resource-sharing between minorities and majorities,[58] nor begin to address the issue of multi-linguality, often stemming from the need for minorities to learn a national language and the former colonial

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[42] See J Castellino, *Conflict, Structural Discrimination & Minorities: Towards a Road-Map for Inter-Agency Cooperation* (London MRG Briefings, 2023) available at https://minorityrights.org/wp-content/uploads/2023/02/MRG_Brief_Conflict_ENG_Jan23.pdf

[43] *Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka* (31 March 2011).

[44] G Rosenthal, *A Brief and independent inquiry into the involvement of the United Nations in Myanmar from 2010 to 2018* (29 May 2019).

[45] See UN Deputy Secretary General's comments on the 20th anniversary of the Rwandan genocide available at: https://news.un.org/en/story/2014/04/466342-rwandan-genocide-security-council-told-failure-political-will-led-cascade-human. Also L Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (Zed Books, 2009).

[46] P Hilpold, 'UN Standard Setting in the Field of Minority Rights', 14 *International Journal of Minority &Group Rights* (2007) pp. 181-205, at p. 182.

[47] J Castellino & E Dominuez Redondo, 'The Declaration and its Guidance: A View from South Asia', *The UN Declaration on Minorities: An Academic Account on the Occasion of its 20th Anniversary (1992-2012)* [Caruso & Hofmann eds.] (Brill 2015) 283-305.

[48] K Deutsch & W Foltz, *Nation Building* (Atherton Press, 1963).

[49] See generally J Pejic, 'Minority Rights in International Law', 19 *Human Rights Quarterly* (1979) 666; PV Ramaga, 'The Group Concept in Minority Protection', 15 *Human Rights Quarterly* (1993) 575.

[50] W Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford University Press, 2001).

[51] A Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (Yale University Press, 1977). Also see CE Ehrlich, 'Democratic Alternatives to Ethnic Conflict: Consociationalism and Neo-Separatism', 26 *Brooklyn Journal of International Law* (2000- 2001) 447-484.

[52] G Gilbert, 'Autonomy and Minority Groups: A Right in International Law?', 35 *Cornell International Law Journal* (2002) 307.

[53] F de Varennes, *Language, Minorities & Human Rights* (Martinus Nijhoff/Brill 1996).

[54] H Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press 1980).

[55] J Castellino, *International Law & Self-Determination: The Interplay of the Politics of Territorial Possessions with Formulations of 'National Identity'* (Martinus Nijhoff 2000).

[56] F Ahmed, 'Personal Autonomy and the Option of Religious Law', 24(2) *International Journal of Law Policy & the Family* (2010) 222-244.

[57] Report of the independent expert on minority issues, Gay McDougall – *Minorities, Poverty and the Millennium Development Goals: Assessing Global Issues*, UN.Doc. A/HRC/4/9 (2007).

[58] S J Anaya & RA Williams, 'The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System', 14 *Harvard Human Rights Journal* (2001) 33.

language alongside their mother tongue to simply prevent their disappearance from labour markets.[69] They did not set the frame for tackling access barriers to rights, relying instead on the *human rights for all* rhetoric; nor were they mindful of how poorly designed affirmative action measures could gestate generational prejudice.[59]

Minority Rights Today: Between Regimes and Realities

Despite the emergence of strong regimes that protect human rights at a global level, the situation of minorities is at the same levels of precarity as throughout global history, where genocides, ethnic cleansings and crimes against humanity have been disproportionately experienced by those in non-dominant positions, faced with an aggressive majority. The articulation of non-binding standards, in the form of the *Sustainable Development Goals* emphasize the 'leave no one behind' principle, but minorities and indigenous peoples continue to be rooted at the bottom of socio-economic and political hierarchies within States. The Covid-19 pandemic exacerbated this marginalization,[60] while scarcity bred by the climate crisis is generating continued backlash as communities closer to sites of power seek to control access to resources.[61] Scapegoating has become a standard political tool, used even in democracies to generate artificial majorities that can dominate elections, with communities often united by common enmity, sometimes even hatred, of minorities.

It is difficult to envisage what role law could have played in disrupting this trend which has dominated episodic and systematic gross human rights violations throughout centuries. The vision of the UDHR, articulated to inspire a world where the inherent dignity and worth of every individual would be respected has, to a certain extent succeeded. Modern laws at domestic, sub-regional, regional and international levels are replete with exhortations towards equality and non-discrimination. As a process that influences the generation of global norms to protect minorities and indigenous peoples, the UDHR can only be deemed a success.

Yet if law is viewed as a process through which behaviours are compelled to change, the serious questions that confronted policy makers, civil societies and intellectuals in the aftermath of World War Two remain unanswered. Is it possible to generate values within society that are built on empathy rather than competition, and that view identities as mere accidents of birth, rather than existential quests determining the survival of the fittest? Minorities today can, at a normative theoretical level, draw on a range of standards enshrined in laws. Even the most repressive of legal systems make allowances for the pursuit of equality irrespective of identities, gender or other. Yet these standards are in general not reflected in policies and not disseminated adequately through education systems. As a consequence the emergence of a muscular masculine nationalism often targeting minorities has swept dubious political movements to power who have then set about seeking to undermine institutions established to uphold and further the values espoused in documents such as the UDHR.

Meanwhile the agenda of minority rights has continued to be used, as in World War Two, to further the ambitions of military occupation. Unlike in that era however the multiple identities that have been submerged under a dominant nationalism in post-colonial States are a further cause for pressure. Lines drawn on maps by colonial powers to maintain peace between themselves as they conquered foreign lands morphed into colonial administrative units of control. Via decolonization processes in the United Nations era these became transformed into sovereign States. The historical intermixing of populations and the stranding of some communities across the new boundary lines where they found themselves a minority are a cause for further tension. Kin minorities, often on the 'wrong' side of the

[59] T Skutnabb-Kangas, R Phillipson, AK Mohanty, M Panda, *Social Justice Through Mutilingual Education* (Multilingual Matters 2009).
[60] See *Minority Rights Group Trends Report: Focus on Covid 19* (London: MRG 2021) available in full text at: https://minorityrights.org/publications/trends2021/
[61] C Ferreira Marinelli, A Montañés Jiménez & S Pipyrou, *Minorities in Times of Scarcity & Conflict* (London: Routledge 2024 forthcoming).

border from where they may be majorities, become a source of contention,[62] especially when nationalisms are built around the legitimacy of who belongs where.[63]

The attempt to erase certain histories, while augmenting and anchoring key moments within shifting historical tides to generate a favourable majoritarian political narrative is well worn tool through which enmity is sowed and sustained as a societal force. It has been central to the success of political movements that have formed into governments that may even have generated short-term growth. Yet such movements based on hatred have fragmented societies leading to a hysteria and polarization in the public square that closely mirrors events in the immediate lead-up to some of the most major human catastrophes recorded. Set against the backdrop of the urgency of the need to engineer systemic step change to combat climate change, these forces merely serve as a politics of distraction, generating wealth and power for the few that sit precariously atop a crumbling infrastructure.

Conclusion: Invoking the Spirit of the UDHR Amidst the Ruins

Despite the success of the UDHR in shaping law over the last few years, the challenges to society as a whole and to minorities in particular remains grave. Minorities and others far from sites of power remain a key litmus test of the extent to which society as a whole is able to create the bulwark for peace and prosperity that underlie the UDHR vision. This paper concludes with a series of 10 actions that draw inspiration from the UDHR but that the authors argue are necessary to ensure that the spirit of that document continues to contribute to its aspiration.[64]

A. Dismantle societal and institutional patriarchies.

The feminist movement highlighted the inherently gendered nature of politics and policy-making, and while law has guaranteed gender-based equality *de jure*, the reality remains that in fundamental areas—notably, in access to key factors of production such as land, finance and even nationality—women face *de facto* challenges. Further cultural nuances, specifically the culture of male dominance, are dressed up as "inherent practices" of communities with little challenge to this assertion. The tendency remains to 'invite' women into systems, rather than to reframe systems on the basis of full, rather than 50-percent, participation. Minority women are doubly marginalized, including by men from their own communities.

B. Challenge and transform the extractive economic model.

By way of statues and monuments, the central plazas of the cities of the Western world pay actual, not metaphorical, homage to individuals who cheated, lied, exploited, and stole resources from communities throughout the world with an absolute conviction in their own racial and moral superiority. While Western colonization was not the first, and perhaps not even the most brutal form of exploitation in many parts of the world, its continuing legacy lies within the creation of an extractive economic model that established global trading systems that were subsequently scaled up by the acquiescence of the postcolonial State, as it stepped into and continued to exploit this system. Seeking a return to modest and sustainable consumption that respects the circular nature of economies and pays due homage to nature requires large-scale systemic change, not minor adjustments.

C. Seek accountability of contemporary economic actors for damage to societies.

Despite extensive scientific evidence highlighting the damage to the environment caused by certain activities for decades, contemporary economic actors have sought to obfuscate, challenge and sew false

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[62] W Kemp, V Popovski & R Thakur, *Blood & Borders: The Responsibility to Protect and the Problem of the Kin State* (Tokyo: UN University Press, 2011).

[63] J Castellino, 'Who Belongs Where in Northeast India, and Who Should Decide?' MRG Blog, available at https://minorityrights.org/2019/07/31/who-belongs-where-in-northeast-india-and-who-should-decide/ (31 July 2019).

[64] These suggestions are extrapolated from a workshop with litigators seeking to articulate a project to support global civil society movements. They were first printed as J Castellino, 'Towards Putting Human Rights Law at the Behest of Global Movements Seeking Structural Change' *ECCHR Annual Report 2021* 28-35 available at https://www.ecchr.eu/fileadmin/Jahresberichte/ECCHR_ANNUAL_REPORT_2021_EN.pdf

narratives about this damage. This has enabled them to generate mechanisms for unjust enrichment,[65] benefit from tax avoidance in the name of wealth distribution and job creation, while siphoning funds from the public sphere. While corporations will remain a fundamental part of the future world, their soul-searching concerning impact of their activities within a tort-based model of compensation remains fundamental to freeing up resources for societies to rejuvenate.

D. Seek accountability through mechanisms addressing historical crimes.

While moving forward requires consensus and collaboration, the need to address historical crimes, as a key structural component of our broken present, remains important. Some schemes, including debt forgiveness, may be a minimal condition for enabling transnational solidarity, but others will need to go deeper. Wealthier societies need to examine the forensics of their wealth accumulation while seeking pecuniary and non-pecuniary modes of reconciliation. This issue takes on an added element in view of the diversity in many parts of the world that is not reflected in the single "male victor" narrative of history, a narrative which discounts all other realities and is often deliberately inaccurate and limited in perspective and fact.

E. *Uphold "leave no one behind" as a key principle for future development*.

The magnitude of the COVID-19 pandemic and its longevity showed the intrinsically interconnected experience of contemporary global reality. Leaving the pandemic to fester in one part of the world meant that the world as a whole would not be free of its impact. The existence of deep inequalities hamper the extent to which social cohesion, progress and collective solidarity can confront greater challenges. Societies remain dominated by wealthy male elites and their beneficiaries. With women deemed as second-class citizens, especially in terms of access to education at the start of their lives and the glass ceilings later in their careers, significant talent is lost to the system. The narrative privileging men from dominant communities at the cost of everyone else drains talent needed for collective efforts. Leaving no one behind is not just a moral aim; its utility is deeply pragmatic.

F. Support historians in writing accurate narratives not linked to power regimes.

The narrowness of education and its tendency towards propaganda impinges global solidarity. Mainstream historians and intellectuals have served as handmaidens to power, framing singular narratives and disseminating them as the only authoritative one. They have othered women, diverse communities, and multiple forms of human expression and activity, while sowing seeds for supremacist and deeply flawed ideologies dressed up as definitive "history." Correcting the historical narrative is key to a sustainable future: as a bulwark against supremacism while harnessing the width of human experience to foster cohesion and collaboration.

G. Take political action that is necessary to fulfil our objectives.

There has been a tendency for those seeking progress to paint themselves as politically neutral. However, as the political arena has become occupied by populists who are anti-political, this trend has been unable to stem the tide towards stigma and hatred. "Scapegoat politics"— a process by which artificial majorities are generated by targeting a specific identity group— has tapped into an angry *zeitgeist*, generating mediocrity in leadership characterized by a lack of qualifications, governing experience and empathy in addressing the deeper, longer-lasting climate crisis and the short- and medium-term needs to contain the pandemic. Acting politically in support of those driven by legitimate political objectives is important, while generating momentum to build a collective bulwark against those who wish to turn democracies into a game of numbers rather than values.

H. Ensure that the language of law is not exclusive and patriarchal.

The legacy of the law is itself a deeply problematic one. Historically laws sought to guarantee order while pursuing justice. The earliest legislators were "free men"—not women or slaves— and property owners, a status used to justify their legitimacy in writing the rules. The earliest laws sought to safeguard

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[65] J Castellino, 'Entrenched Structural Discrimination & the Environment: Recovery Based International Law Response to Colonial Crime' *140 Policy Series Brief* (2022) available at: https://www.toaep.org/pbs-pdf/140-castellino/

assets from other claimants in the belief that this would guarantee order. The justice project was called upon and became central in contemporary history through the universal human rights movement. However, as the legacy of the so-called 'war on terror' showed, when order was threatened, or perceived to have been threatened, the quest for social justice was relegated to side-lines. In addition, with law functioning as an elitist discourse, its realm was shielded from the public imagination. The failure to contest ingrained social injustices—the arms trade, the overt enrichment of the few, the siphoning of public funds to tax havens, corruption at the highest levels, failures to account for mass atrocities, and failures to dismantle (or support those seeking to dismantle) forms of patriarchy—made the legal discourse, and all who work at its behest, appear elite, exclusivist and patriarchal. Hiding behind technical nuances reinforced this notion, for example, by legitimising certain property titles while dismissing ancestral domain; or invoking statutes of limitation to prevent scrutiny of episodic and systemic crimes, not to mention the general failure to ensure accountability. Challenging this is fundamental and includes reforming the process of articulating laws.

I. Promote a transnational approach based on universal solidarity.

The current crises we face are intrinsically transnational, while attempts at policy level to address them are often national. The notion that territories remain the exclusive domain of specific sovereigns is much-contested, which pits governments against each other in competition rather than collaboration. This is born out of deep insecurities—about the extent to which "foreign interests" may dictate issues, as well as the unsavoury and not-so-distant experiences of colonization. Movements gaining traction demonstrate how people can bond in empathy and solidarity, unencumbered by territorial boundaries. Such empathy, if translated into regional approaches, can cement meaningful change, forcing governments to act in a manner that is broader than attempts to maintain their exclusive hegemony.

J. Collaborate and share resources with others committed to these values.

While civil society movements have gained traction in recent decades—often providing a thin sliver of accountability in a world riven with injustices—their lack of sustainable models has put them under constant pressure to fulfil donor agendas. This has made collaboration difficult to forge, and many progressive organizations compete against each other in the world of ideas and actions, hindering emergence of collaborative and cohesive movements. A further divide is visible as Northern civil society organizations succeed in gaining funding and visibility, while those in the South are neglected. For any movement to galvanize change, it is imperative that these issues are addressed in a spirit of solidarity—emphasizing collective action that includes resource sharing.

Volumes such as this often contain unfettered tributes to the legacy of the UDHR. This piece may differ from others in levelling accusations in the decisions made by drafters to adopt a human rights based approach that was not cognisant of the need to protect minorities and indigenous peoples. There is little to contest in terms of the impact of the Declaration in building a strong edifice of human rights law. Yet to realize its vision the test will lie in the extent to which ossified structural discrimination is dismantled. Should that succeed in drawing on the spirit of the UDHR, volumes seventy-five years from now will be celebrating a much greater legacy.