

TRANSFORMING HUMAN RIGHTS THROUGH DECOLONIAL LENS

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Abstract: This article problematizes the Human Rights conceptualization embodied in the International Human Rights Law corpus. It considers human rights as a Western construct rooted in a particular historical context, located in a specific ideological background and grounded in a concrete socio-cognitive system. Thus, in disregard of features of non-dominant cultures, the mainstream human rights grammar became a discourse of empire. Building on TWAIL and decolonial theory, this article challenges that hegemonic human rights discourse while providing a justification for incorporating other conceptualizations of rights through an inter-epistemic conversation with alternative world-views.

Keywords: Human rights, eurocentrism, decoloniality, alternative epistemologies, Indigenous Peoples, development.

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“Rights were no longer universal, because “North” and “South” did not occupy the same universe” (Burke, 2008, p. 296).¹

1. DEBUNKING HUMAN RIGHTS UNIVERSALISM

1.1. Introduction and preliminary clarifications

Since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, much has been written about the Eurocentric origins and western conceptualization of human rights (HR) and International human rights Law (IHRL). Predominantly, the discussion has dealt with three controversial aspects around HR. Firstly, the ultimate foundations of the HR discourse; secondly, the debate about universalism/relativism of HR, and lastly although to a lesser extent, the idea of HR as a strategic tool that retains an imperial ambition due to its inherent universal claim, characteristic of a postcolonial postmodern era.

This article will critically examine the dominant HR discourse that has consolidated in the IHRL corpus as universal. It examines the issue from the premises of critical legal theory focusing on critical approaches to international law (IL). From that perspective, this paper reads the positivisation of HR precepts and claims,² in connection to power

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¹ This position gained strength during the First UN International Conference on Human Rights held in Tehran in 1968. Princess Pahlavi of Iran (member of the royal family who hosted the conference) referred to a “distinctive Third World human rights ideology” (Burke, 2008, p. 285). This view will come back to the forefront in the 90’s with the Asian values’ cultural relativist challenge.

² “The legalization of rights or *politics by other means*” (emphasis added) as put by Wilson, 2007.

and ideology. Thus, it will shed light on to what extent this dominant conceptualization of HR is rooted in Western ideology and can therefore be seen as a hegemonic order. Within this overarching goal, special attention will be paid to the elements behind the theoretical construction of HR, namely: historical context, geo-political factors and particular ideological underpinnings. Thus, the context, the actors and the ideas that led to the HR conceptualization will be examined along the different sections below. In order to do this, the focus will lie in the politics and support of different key actors involved in decision, policy and law-making processes that hold unequal power; the ideas and interests which influenced their choices, and the elements which contribute to shifting discourses, legitimizing support and decision making.

In order to critically explore the epistemological roots of HR (the genealogy of the IHRL corpus) and interrogate the dominance of the Euro-Western HR discourse (coloniality of knowledge, power and ideology), the theoretical framework of analysis will bring together Third World Approaches to International Law theory (TWAIL) and decolonial approach. Based on the outcomes of such exploration, a subsequent stage of the analysis will anchor the theoretical stance on a concrete proposition as an alternative: the epistemologies of Southern African indigenous peoples (IPs) to advance ideas in an attempt to transform HR and debunk HR universalism.

HR are proclaimed universal in their scope of application, entitlements and formulation of content. However, the particular conceptualization and concrete meta-narrative where the discourse is rooted undermines any alternative ones, defying their claim of universalism. Despite critical stands questioning the universalism of HR and its particular ideological sources, concrete proposals on how to shuffle what will be referred here as the ‘HR hegemonic legal order’ (dominant HR discourse)³ do not abound. Alternative understandings inspired in different logics and non-dominant epistemologies and cultural backgrounds have been minimally included in the mainstream discourse. To overcome ‘ideological coloniality’ (Ndlovu-Gatsheni, 2018, p. 25) and navigate around existing plurality, delving into the worldviews of Southern African IPs is the alternative proposed here to remedy the current epistemological bias. The justification of this approach is aptly summarized in the following excerpt:

It creates space for the sorely needed unfettered nurturing of African thought-forms. For the discipline of philosophy in general, this paradigm is instrumentally necessary as the polycentric production of knowledge ensures the enrichment of philosophy by an open cross-pollination of ideas and intellectual experiences from diverse geo-cultural perspectives. (Lamola, 2015, p.13).

The point of departure of this critique is the relationship between HR and a particular idea of justice, which consequently implies the normativisation of the corresponding ethical values and principles deemed necessary for a good life in accordance to such a conception. The logic behind the positivisation in IL of those underlying values lies in a *promise* of universality that is derived from the belief on the unity of the human species,

³ Discourse as the expression of ideological representations. (Van Dijk, 2013).

which implies, in turn, the existence of certain universal values applicable to every human being all over the world. According to Argentinian political theorist and philosopher Ernesto Laclau, the term universal was first understood as the ‘logic of incarnation’. Later on, that interpretation was surpassed by the logic of rationalism that emerged with modernity and consolidated with the Enlightenment, and at a later stage, the universal became ‘the symbol of a missing fullness’ (the empty signifier).⁴ That logic constitutes the terms and the frame of the conversation that articulates the specific message of the current HR grammar.

The particular conceptualization and legalistic discourse of the dominant HR grammar vested with the universalising logic mentioned above remained far from embracing the diversity represented by the cultures and societies upon which it aims at exerting authority and justiciability (the logic of rule). Instead of becoming a reflection of extant plurality (shifting from universality to pluriversality), that promise of universalism turned into a claim that has been presented as an undisputed fact. Thus, the unresolved controversy around the particular ideological groundings, the western philosophical roots of the HR discourse, will be part of the analysis in relation to the making of IHRL instruments below.

For the purpose of this text, the concept of universalism will be distinguished from that of universality, following Goodale’s distinction by which

Universality refers to the claims at the core of the modern idea of human rights: that everyone at all times is the same because they share a common humanness... Human rights universalism, by contrast, refers to the complicated discursive presence of these claims as they are acted upon within existing legal, moral and political practice (Goodale 2009, p. 15).

Regarding the universal attribute of HR, we can therefore distinguish between two perspectives: concerning the universality of certain claims and prerogatives, and in relation to the underlying principles of HR as a concept protecting human dignity⁵ and worth. Connected to the latter view, the universal character will be analysed in connection with the modern HR conception⁶ and conceptualization, namely universalism.

As pointed out above, this piece problematizes the HR conceptualization as it is embodied in the IHRL corpus. HR are placed here within the limiting characteristic of the “ideological processes” described by Herrera Flores. He distinguishes ideological processes from cultural ones. The difference lying in the inability of the former to intervene

⁴ “The relation by which a particular content becomes the signifier of the absent communitarian fullness is exactly what we call a hegemonic relationship. The presence of empty signifiers... is the very condition of hegemony” (Laclau, 2007, p. 13).

⁵ Ugandan academic Mahmood Mamdani and Beninese philosopher Paulin Hountondji both defend the approach by which HR are understood as a philosophical basis for the protection of human dignity.

⁶ By conception it is understood here the construction of a concept which might vary with time and circumstances. It provides the rationale of the need for completing a discourse that comes out incomplete.

in the hegemonic methodology, therefore, limiting alternative social action intended to influence, challenge, and change hegemonic relationships.⁷

IL is seen here as a site of politics, of power. Decolonial theory, beyond having enabled noticing the imbalance between what has counted so far and what has been rendered invisible, assists in the task of decentring; it implies reimagining and rearticulating power, change and knowledge through multiple epistemologies, ontologies and axiologies. However, in dealing with alternative epistemologies and other world-views distinct from the dominant ones (as in the case of IPs and of peripheral categories in general), one must keep in mind Grosfoguel's caveat: "the fact that one is socially located in the oppressed side of power relations does not automatically mean that he/she is epistemically thinking from a subaltern epistemic location" (Grosfoguel 2011, p. 6). Decolonial theory allows for the critical approach necessary to analyse those relevant aspects for decentring beyond a mere postcolonial critique. It more aptly accounts for the perpetuation of the colonial features in a post-independence era⁸ as it happens at present in the African context.

Acknowledging Grosfoguel's caution and aware of the complexities around issues such as identity, collective representation, culture, etc., an enlargement and addition of richness can and should be advanced arising from those marginalized realities and excluded epistemologies, including the ones of IPs. Thus, thinking HR in the current global context of pluralism, multiculturalism,⁹ secularism in dialogue with religion/s (both revealed and unrevealed), of globalization¹⁰ and parochialism, requires decentring universalism. It calls however for a dialogical inclusive and transformative collaboration, to challenge the limitations of the hegemonic discourse and explore relational ways of being and existing in a common world, in order to transition from be-ing into we-ing.

2. "THE CONTINGENCY OF LAW'S GROUNDS"¹¹

"The future demands thinking beyond the Greeks and eurocentrism",
 "a radical reconceptualization of the human rights paradigm"

(Mignolo, 2003, p. 85; 2000, p.12)

⁷ "Con esto lo que se hace es desplazar la primera tensión cultural hacia el campo de una acción social funcional a los intereses hegemónicos, pues cualquier tipo de universalismo apriorístico a lo que nos conduce es a legitimar la expansión, universalización o globalización de un particularismo" (Herrera Flores, 2005, p. 100).

⁸ For a distinction between the terms neo-colonialism and post-independence see cultural-studies academic Shohat, 1992.

⁹ Comaroff and Comaroff refer to the more apt term 'policultural', in which the prefix poli marks both plurality and its politicization. It refers to "an argument grounded in a cultural ontology, about the very nature of the pluri-nation". Comaroff, J. and Comaroff, J., 2012, p. 77.

¹⁰ "Globalization can be understood as development without nation-states." Sachs, W. in Kothari, 2019, p. XII.

¹¹ "The unity of the world remains diverse, multiple. But law has to have a foundation, for there is no authority in the world arising ex nihilo. The key to any possible praxis of decolonising IL thus lies here. Making clear the contingency of law's grounds." (Pahuja, 2011, p. 260).

The following lines aim at reconstructing the genesis of what is comprised within the contemporary use of the term ‘HR’ as per its mainstream meaning.¹² In the horizon is the comparison between what the concept entails as per the dominant conceptualization¹³ within the IHRL corpus, and the understanding of what it signifies from the perspectives of non-dominant world-views and epistemologies, for this proposal, those of IPs in Southern Africa.¹⁴

Since its inception, given the leading and deciding role played by the main European powers in the creation of IL and HR Law, as well as the marginal and subordinate position of the majority of non-Western countries and societies (including those of IPs), IL could be characterised as a hegemonic discourse, and consequently, as a source of domination.¹⁵ The contingency of law has been drawn by power imbalances. Gómez-Isa considers a civilizing mission as one of the core aspirational principles of IL (2017, p. 173).¹⁶ Along the same lines, Elvira Pulitano has referred to traditional IL as “quintessentially Eurocentric” (Gómez-Isa, 2017, p 173). In a similar vein, Haskell asserts that:

International law has perpetuated the colonial legacy by crystallizing the European-oriented political model of a centralized administrative state as the sole gateway to international legal personality... thereby suppressing indigenous modes of organizing political life or structuring the distribution of material resources and social power. (Haskell, 2014, p. 399).

However, the erasures have been plenty, not just circumscribed to political organization structures and state’s centrality, but including aspects such as customary rules and traditional justice systems, indigenous conflict resolution strategies etc.¹⁷ The reach and daunting impact of that hegemony requires a critical interrogation to identify biases, wicked schemes and strategic positionings in disguise, as well as an analysis to help exploring alternative paths. After realizing the limits of one’s own conceptual

¹² “The strange thing about legal objectivity is that it quite literally is *object-less*.” (Latour, 2004, p. 35).

¹³ The construction of concept (abstract meaning) that might vary with time and circumstances. Quoting Donnelly (2007): “HR are (relatively) universal at the level of the concept... Particular rights concepts, however, have multiple defensible conceptions. Any particular conception, in turn, will have many defensible implementations.” It is at the level of concept, despite partial disagreement on the foundations, where the functional and ‘overlapping consensus’ universality lies. P. 299.

¹⁴ The Preamble of the African Charter on Human and Peoples’ rights of 1981 (ACHPR 1981) refers to “Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples’ rights”. In the same line, other voices highlight that “the communitarian and obligation-oriented cultures of East Asia generate particular Asian values that are incompatible with western, individualistic human –rights notions, and in fact generate different conceptions of justice, solidarity, and governance that ‘work’ as effectively as (if not better than) those found in the West.” Rajagopal, 2004, p. 213.

¹⁵ “God may have died, according to Nietzsche, but at least we have international law.” Douzinas, 2000, p. 9.

¹⁶ This is in line with Douzinas consideration of HR as “the latest version of the civilising mission”, “a hybrid category of liberal law and morality”. In Douzinas, 2008 (accessed 14-3-2018).

¹⁷ Despite pre-eminence of those forms are also influenced by the same power imbalances: “Articulations of cultural norms are expressions of power relations that are often limited to the dominant voices in a specific social interaction.” (Nyamu, 2000, p. 11).

repertoire (Holbraad, in Blaser, 2013), complementary epistemological frameworks will help to overcome the bias contained in the features of the hegemonic HR conception, which is rooted in the European constructed identity: secular, anthropocentric, universal. The option suggested here is to theorize HR through IPs' worldviews. Such an approach would contribute to the incorporation into the mainstream discussions and discourse of conceptualizations grounded in IPs' own epistemologies: concerning the relationship towards unity with nature;¹⁸ the past, present and future, the visible and the invisible; the living, undead and non-living entities; the self and the whole, etc. As well as other features favoured for example by many African traditions: duty-rights conception,¹⁹ non-state centric logic, individuality-community, peoples' rights, citizenship- membership (of family, clan, kinship), family as natural unit and basis of society.²⁰

Therefore, in aiming at attaining cognitive, axiological and normative justice and genuine participation in global affairs and IL, IPs' have to move to the centre of the discussion and contribute to the terms of the conversation by redefining the framework where the deliberation is taking place. This is the first step for a pluri-cultural exchange grounded in an inter-epistemic communication "toward pluri-versality as a universal project" (Mignolo, 2007, p. 499).

2.1. Locating the Making, Rooting the Discourse:

"When Western speech becomes universal, its native speakers - the West – will be running the show." (Koskenniemi, 2011)

This section strives to unveil the Eurocentric foundations of the HR discourse. It has as its point of departure the solid and profuse critiques that point at Eurocentrism (western epistemology and western legal thought) as the foundational logic behind HR and the principles of justice behind it.²¹ Such a Western hegemonic paradigm of knowledge is what Peruvian sociologist Anibal Quijano names 'the provincial [pretence] to universality' (Mignolo, 2007, p. 493). Realizing the different degree of influence and unequal contributions from different cultures, belief systems and traditions, evinces the hierarchical position of the various actors involved in the process.

IL professor Antony Anghie stresses the colonial origin of IL and its role in legitimizing imperialism. His analysis points at the concept of sovereignty (Westphalian sovereignty)²² as central for the bias of the discipline and the subordination of non-Western states. The proclamation of those standards as universal (European turns international) emerged from the XIX century onwards, deriving and consolidating in what he calls the 'dynamic of difference' between European culture (considered universal) and the rest.

¹⁸ Pointing at what Gudynas refers to as the 'biocentric turn', in Escobar, 2012.

¹⁹ "Individual rights are not absolute. ... The duty is based on the presumption that the full development of the individual is only possible where individuals care about how their actions would impact on others." Mutua, 1995, p. 369. Duties are owed to the family and community, not only to the state.

²⁰ Art 18 para 1, Organization of African Unity, 1981.

²¹ Anghie, Barreto 2012, Burke, Mutua, Nussbaum, Pahuja, Pulitano, Sinha.

²² In the terms conceived by the West even though they were presented as neutral and universal; secular, rooted in principles of legal personality, justice, political institutions, etc.

Thus, negating it to the later and therefore justifying the civilizing mission upon ‘inferior’ cultures, intervention and conquest that were until then justified by natural law.

The shift from doctrines of naturalism to positivism, the sovereign state becoming the central entity of power leaving aside other traditional societal formations and growing into the source of law and the subject of it upon consent, discriminates between some states which are subject of IL (the West, civilised) as opposed to those considered object of it (the rest, uncivilised). State sovereignty consolidated the state centric vision according to which the primary responsibility as duty bearer lies on the state, reinforcing the state as the source of normative framework, of enforceability, protection, accountability, provider, etc. This dichotomous understanding exempts other actors from bearing any form of responsibility (being them corporations, development actors, non-governmental organizations NGOs, communities, etc.). Furthermore, focusing mainly on the role of the state as the guarantor of rights, legitimizes and reinforces its role within a system (market, economic development, globalization, welfare state) that generates many of the crisis, violations and challenges that are paradoxically, connected to the wrongs that IHRL should right. Simultaneously, this doctrine allowed for the maintenance of the terms defined by the West in the international arena,²³ given that the only law binding to a state would be the one to which that state had consented. This differentiation would translate into economic subordination. It brought about the categorization of developed and underdeveloped states (economically considered) influenced by an understanding of development as a linear path, resulting from the geo-economic reality while reinforced and sustained by the system designed by IL (Bassey, in Kothari, 2019).

A decolonial approach brings a new perspective to the analysis, one that places the accent on the different historical locations and contexts behind the making of IL, and investigates their reach. This study sees the consolidation of the dominant HR grammar that translated into the IHRL corpus from the specific context where it took place, the colonial encounter and ‘colonial subtexts’ (Flynn, 2016). It was that particular context of power asymmetries what marked not only the content and development of the discourse, but also its global expansion, consolidation and its later pre-eminence as it is known nowadays.

A critical genealogy of the dominant HR narrative traces its conceptual foundations back to the enlightenment, which crystallized the rationalisation of life and the world, the universalisation of reason, the individual as the centre and the rule of a secular rationale.²⁴ That determining theoretical background, which contributed to the process that culminated in the birth of modern IHRL in the XX century and its strengthening ever since, developed in the context of modernity. Its main defining features being liberal democracy, rationalism, individualism, secularism, industrialization and capitalism. That context, which influenced and defined the main features of the mainstream HR formulation, made them ill-suited for contexts other than Western societies (according to Ibhawoh’s interpretation of Sinha’s

²³ While operating at every level, “international, national; economic, political and social; private and public” page 752, Anghie continues: “International law seeks to transform the internal characteristics of societies.” Anghie, 2006, p. 751.

²⁴ “From Theo-logy to secular Egology” Mignolo, 2007, p. 451.

argument). Sinha identified three main elements that define the Western conception of HR: the individual as the unit of society (rather than the family),²⁵ rights as the basis for securing human existence (instead of duties and obligations), and lastly, legalism as the method for securing those rights (as opposed to reconciliation, education, repentance). These elements coincide with the values previously identified by Sinha as the “axiology of the international bill of HR” (Sinha, 1989). His main claim being that the central values around which HR are erected correspond to a particular Western historicity (a ‘single catalogue approach’) not accounting for the plurality of value systems present in other civilizations that are equally aimed at protecting human emancipation and guaranteeing the spiritual, physical existence and well-being of the person and the group. While some elements are not exclusive of the Western civilization, the main principles respond to the values that govern the social and political organization privileged in the West. There is no doubt that the world reflects a tendency towards a global cosmopolitanism with some shared models and values concerning different spheres of life; issues such as life, protection against inhuman and degrading treatment, working and living standards to a certain degree, education, are common basic concerns. However, different cultures might have a different understanding of those aspects, of how to resolve them in practice and thence, exercise them in plural and diverse ways. The following quote exemplifies this paradox:

We assumed that this was because women did not know their rights, so we ‘educated’ them. But then we saw that even when women were ‘educated’ about the law, they still did not go to court to enforce their rights. We then assumed that was because there were ‘other factors’ such as fear of courts and inadequate finances. To overcome these we then helped women enforce their rights. But this did not always work either. One of the running point in our ideas was when group of WLSA members helped a woman go to court and obtain a court order declaring that all the property which she had [been] in her house was hers and that her deceased husband’s family should return it to her. They did so. However subsequently, the widow took all the property and delivered it back to her husband’s relatives. (Juma, 2006, p. 199).²⁶

When particular qualifiers rooted in a specific tradition are translated into the articulate of HR instruments, they might not correspond with what the same or similar ideas, values and perceptions mean in different cultural setting or societal models beyond the basic commonalities that the concepts themselves enclose. This inconsistency does not refer to controversial practices that are being progressively discarded by members of the cultures where they have traditionally been part. The quandary appears when a system, claiming to be universal, opts for one model (out of the many) preventing an alternative model which is felt as one’s own from thriving. Examples of this relate to the definition

²⁵ See Chantal Mouffe’s view of ‘non-individualistic conception of the individual’: “la individualidad solo se construye a través de la inscripción en un conjunto de relaciones sociales... sin reducirla a mero componente de un todo orgánico.” (Mouffe, 1999).

²⁶ Report statement about widow inheritance in Southern Africa exemplifying the complexity of strict application of HR law.

of family (nuclear versus joint, extended, lineage or kinship), the understanding of life (when it starts and when does it end), equal versus hierarchical human relationships that give value to the person and relationships, an industrial economic system versus other economic models, private property versus communal uses, judicialisation versus diverse conflict resolution mechanisms, and so forth. That points toward a civilizational uniformity (Sinha, 1989), which does not correspond to the plurality of worldviews and apprehensions of reality. Once the genesis of the HR discourse is outlined, the bias and limitations of the particular ideology supporting it unveil, and the lack of inclusive and plural underpinnings is revealed.

Notwithstanding, the structure of the modern world is grounded in the epistemology of the world's capitalist economy whose intellectual and cultural scaffolding is rooted in elements such as: liberalism,²⁷ division between science (the truth) and the rest (the good and beautiful), longing of universality, discriminatory and excluding practices. However, the crisis of the capitalist world economy when it comes to the unfeasibility of its sustainability, comprises its epistemological foundations and knowledge structures as well as the modern world itself.²⁸

After locating HR in the historical context of modernity and shedding light on the ideological features which were the backbone leading to the formulation of HR (in the sense mentioned above; IHRL), this paper will examine the conceptualization of HR themselves. Despite exploring the foundations of a normative system implies digging for its authoritative features (being them God, the human being,²⁹ human dignity, duty,³⁰ morality, etc.), this study will not delve into the philosophical and metaphysical foundations of HR. Paraphrasing Goodhart (in Goodale 2014), the focus of HR debates around their philosophical foundations, have caused more heat than light. Thus, settling that debate goes beyond the aim of this paper. The argumentation here concentrates on the study of the ideology³¹ behind the content of the dominant discourse of HR, namely; those characteristics that shaped the precepts influenced by the context from which they emerged. It will also critically analyse the positioning and determining role of the actors participating in the adoption of those instruments that conform the IHRL corpus, that

²⁷ According to Zaidi and Normand thesis regarding the foundations of HR, they “grew out of the triumph of liberalism over its two main rivals- communism and fascism.” (Normand, R. and Zaidi, S., 2008).

²⁸ The “Euro-North American-centric modernity”; the asymmetrical world system characterised by the coloniality of power, the global or international order/European world order (defined by imperialism and coloniality), capitalism, techno-scientific epistemology, a hierarchized conception of being, Christian-centrism. (Ndlovu-Gatsheni, 2015).

²⁹ Maldonado-Torres' genealogy of HR and of the notion of the human as the foundation of HR, reveals a secular humanist project which led to the conception of the human which became the dominant, characterised by the following traits: secularism, individualism and racism. (Maldonado-Torres, 2017).

³⁰ “All rights to be deserved and preserved came from duty well done.” Statement by M. Gandhi in his ‘Letter to the DG of UNESCO’ of 1949. Ulrich, G. in (McCall-Smith, K., Wouters, J. and Gómez-Isa, F., 2019).

³¹ Ideology is understood here as the system of ideas that is instrumental for hegemonic purposes of domination and maintenance of control. It deals with the values, terms and understandings comprehended in IHRL instruments and precepts as well as the views and perspectives of a certain epistemology. As opposed to a metaphysical approach of an ontological inquest that would put the accent on what exists, a vision of the human being.

‘ideological-institutional complex’ (Pahuja, 2011) which is IL. Those actors served as persuasive and influencing vehicles in advancing a specific discourse grounded in a particular tradition of thought and values.

The results arising from the study of the origins and roots of the theoretical construction behind the dominant HR discourse unveil the factors that gave rise to the protection of certain values over others that crystalized in the current mainstream HR narrative and its current dominance. The *modus cogens* whereby the European intellectual inventory and assumptions are taken as universal to the detriment of other epistemic cultures, values and traditions, responds to specific patterns of reasoning that can be transformed by the selected theories. The chosen theoretical framework where this study locates itself relates to decolonial theory and TWAIL approach. They enable unveiling the epistemic injustice behind the process of endorsing a set of normative principles under the rubric of HR whose content is loaded with an aspiration of universal validity, and an illusion of consensual global agreement and support.

Summarizing, this piece defends a thesis that locates the dominant HR ideology in western principles and values as explained above. It asserts that the hegemonic HR discourse (positivized in the IHRL) is grounded in a parochial and anthropocentric culture with a narrow understanding of the (human)-being and its relationship with other/s (beings, nature, past-future, etc.). One of the features of a western understanding of HR is universalism,³² a consequence of HR arising as ethical, symbolic and normative guidelines and standards as in a unitary globalized world. Stemming from that particular conception³³ that lies at the basis of the creation of HR and its intrinsic universalism, some authors infer imperialism³⁴ as the necessary logic consequence of this claim of universal character (Huntington, 1996), or at the minimum, its instrumentalisation as an enabling discourse for empire (McMinn, 2012). As Wallerstein puts it, paradoxically, “there is nothing so ethnocentric, so particularist,³⁵ as the claim of universalism”³⁶ (Wallerstein, 2006, p. 40).

³² The universal as a ‘hegemonic act of radical *construction*’ (emphasis added). Laclau, 1990, p. 29.

³³ “These values cannot be privileged globally if they are identified as ‘ours’. Instead, they must be seen as universal in everyone’s estimation; the world must ‘recognize’ their universality. The representational violence inherent in the appropriation of ‘our’ name hints at the way that the recognition does not entail actually globalising or sharing the universal values, whether or not that be a good thing. Instead, it entails ‘recognition’ of the rightful superiority of some values, and the maintenance of the hierarchy that places those values at the top, along with the maintenance of all the divisions and advantages that entails.” Pahuja, 2011, p. 257.

³⁴ What has been described as ‘moral imperialism’ (Hernández-Truyol, 2002). Among the authors that defend that imperialistic trait of Eurocentric root bound to HR are the following ones: Shivji, Mutua, Pollis and Schwab, Burke, Douzinas, Moyn, Mbaya, 1997.

³⁵ “The conclusion seems to be that universality is incommensurable with any particularity yet cannot exist apart from the particular.” Laclau, 1992, p. 90.

³⁶ “So European imperialist expansion had to be presented in terms of a universal civilizing function, of modernization, etc. As a result, the resistances of other cultures were presented not as struggles between particular identities and cultures, but as part of an all-embracing, epochal struggle between universality and particularisms- the notion of peoples without history expressing precisely their incapacity to represent the universal.” Laclau, 1992, p. 90.

This European claim of universalism is in fact, a particularism derived from European values and views that aspire to become a universalism of global validity.³⁷

Thus, the ideas endorsed in HR were promoted within a framework of imperialism³⁸ in order to protect the status quo and maintain hegemonic power. That reveals a strategic approach consisting of advancing certain rights whereas the enforcement and respect of those same rights elsewhere to the benefit of the colonized population was not recognized.³⁹ Examining the dominant HR grammar from a historical perspective by looking at the strategic positioning of states contributes to unveiling the interests and preferences that propelled a specific HR view over another along the history of HR making. A critical and contextualized historical account of the intricacy of the making of the IHRL corpus reveals a multi-faceted process located within complex political, security and economic frameworks and narratives (Jensen, 2016). For reasons closely connected to geopolitics and interests determined by the historical situation, the stance taken by country representatives shifted in time, accommodating itself to the vicissitudes and changes of the historical-political context. This will be illustrated in the following section through the study of the making of the UDHR.

2.2. Relative Universalism or “Not at All”

In preparation for the drafting of what would become the UDHR, the United Nations Educational, Scientific and Cultural Organization UNESCO conveyed a committee of philosophers to work on the philosophical underpinnings and foundational principles of HR in order to bring stronger legitimacy to the question of its universality. In addition, a survey was undertaken before the Conference of Philosophers. However, the participation was limited and unrepresentative despite its global aim, as were the responses and the background of the contributors: 45 replies came from the USA and UK only, 16 from Western Europe, three from South Africa, two from Australia, one from Canada, (accounting for 80 per cent of the total number), six from the Soviet Bloc, three from India, two from Latin America, one from China (Goodale, 2018b). The lack of agreement among the thinkers and philosophers present at the symposium evidenced the distance between the diplomatic stands in charge of the drafting of the Declaration and that of the intellectuals concerned about the topic (Goodale, 2018a).

One of the main drafters of the Universal Declaration of Human Rights in 1948, René Cassin... knew at the time they were deferring for the sake of consensus all the difficult questions about the authority of human rights so as not to ‘delve into the nature of man and of society and to confront

³⁷ “Any instantiated ‘universal’ is always particular.” Pahuja, 2011, p. 256.

³⁸ “The essence of imperialism is the evacuation of alternative discourses on the basis of what the imperial power believes – earnestly or not- is the correct, or morally superior, or economically more advantageous set of perspectives and practices. Since HR norms do not emerge fully formed in different parts of the world... there will always be the problem of how ideas about human rights are accompanied and shaped by political, economic, and other forms of power.” Goodale, 2009, p. 108.

³⁹ In the period of the early 50’s, “cultural relativism was the language of the Western colonial powers, which resisted any attempt to extend human rights to their colonies.” Burke, 2010, p. 114.

the metaphysical controversies, notably the conflict between spiritual, rationalist, and materialist doctrines on the origins of human rights. (Hopgood, 2013, p. 188).

The quote above illustrates the shifts in positioning to come regarding the universalism/relativism discussion, starting with the preparation of a universal document on HR in the 40s'. Agreeing on the sources to achieve consensus seemed unrealistic at that time. At this point it is useful to clarify the distinction between accepting an outcome based on the same reasons (consensus), or based on different reasons (leading to agreement). The former consolidates moral rules whereas the latter leads to legal rules. Following Donnelly (2007), it is at the level of the concept (of human dignity and the nature of justice), in spite of disagreement over the conceptualisations, where the functional and overlapping consensus enabling universality lies.

Thus, the proclaimed universality of HR was more a rhetoric label that contributed to confer validity and legitimacy to the ideological doctrine as has been previously explained. The 'institutional complex' and intentional commitment towards the HR project was propelled by the events of the World War II as well as by the optimism for a peaceful future that was vested in the HR project. Rather than a truly embracing set of values and ideas depicting the diversity and richness of the world's spectrum of cultures in truly comprehensive, plural and inclusive terms.

The question of universality can therefore be understood twofold: with regards to the content comprised in the HR conceptualization and IHRL, and concerning its applicability. In relation to the latter, it relates to who fell under the category of beneficiaries of HR "along the same axis of inclusion and exclusion that has characterized their liberal antecedents" (Kapur in Rathore and Cistelean, 2011, p. 37): the man, the civilized/non-European colonized, women, black people, the other, the human being, etc. It determined who those subjects of the rights and liberties enlisted in the different HR legal instruments were. The focus of this analysis lies in the former; namely, the universalism of the elements that fed the content of HR as a set of values and goals of fundamental relevance as to be proclaimed essential for every human being (at least in theory). Baxi denounces that the notion of universality (understood in the sense just explained), does not merely deny "difference but also monopolizes the 'authentic' narrative voice" (Baxi, in Rathore and Cistelean 2011, p. 61). For Hopgood, this grand narrative (corresponding to universal humanist norms) is the "ideological alibi to a global system whose governance structures sustain persistent unfairness and blatant injustice" (Hopgood 2013, p. 2). He argues that humanism resulted from the social transformations, industrialization and scientific order (the ideology of modernity) being its main manifestations international justice, humanitarianism and *HR*.

At the time of the making of the UDHR, only around 50 countries were part of the United Nations (UN). The discussions and approval of the Declaration took place at the beginning of the period of gaining independence from colonial power (only four African countries were part of the UN), and the political context of the time marked the process as well as the outcome of the drafting. By the year of its adoption in 1948 not

a single state in Africa was considered a democracy. More than 30 years later, in 1981 (the year of the adoption of the African Charter), only four states (out of 38 worldwide) were considered democratic states (namely Botswana, the Gambia, Mauritius and Nigeria).⁴⁰ Once the number of independent African countries grew bigger, they played a countering role as non-aligned countries as per their contributions to the HR debate. They positioned themselves as supportive of certain rights and categories of rights that are part of the HR discourse, namely: self-determination (in defence of national sovereignty and democracy) and freedom (in opposition to racism and discrimination). During the so-called Bandung⁴¹ era, non-Western country representatives were defendants of HR universality (at least in theory, as an instrument to advance anti-colonialism and as a tool against racism):

The successful defence of the UDHR at Bandung by the small countries of Asia, and to a lesser extent Africa, was a remarkable achievement. It demonstrated the significant engagement many of the new states had with the concept of HR in the early phase of their achieving political independence, and the absence of any prejudice against the principles in the universal Declaration, despite the Western intellectual provenance of both its form and a considerable number of its provisions” (Burke, 2010, p.33).⁴²

Recently independent African states pushed for the universality of the text of the declaration, HR and the principle of self-determination: “There was no call to preserve traditional ways of living or other ways of protecting cultural spaces, though colonialism and racism were condemned as means of cultural suppression” (Rajagopal, 2004, p.76). Those priorities and views were stated in many debates during the period comprising the transition towards independence: at the Conferences of African Independent States (Accra 1958 and Addis Ababa 1960), during the Monrovia meeting for Foreign Ministers (1959), in the United Nations General Assembly resolution 1514 ‘Declaration on the granting of independence to colonial countries and peoples’ (1960), during the African Conference on the Rule of Law (Lagos 1961). During that meeting, former Senegalese president Abdoulaye Wade considered that certain ideas and institutions given by the West had become “our common property” (International Commission of Jurists, 1961).

However, this position will change two decades later. The agreement around the universality of HR would fluctuate from the Tehran conference⁴³ onwards (May 1968).

⁴⁰ Based on data retrieved from Roser, 2013, online source.

⁴¹ The Bandung Conference took place in April 1955 bringing together 29 countries from Asia and Africa against colonialism and to agree on guiding principles for their cooperation as non-aligned powers. During the conference, the full support “of the fundamental principles of Human Rights as set forth in the Charter of the United Nations and took note of the Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations” was declared. Bandung Conference, 24 April 1955, p. 5.

⁴² In this regard “The appearance of consensus, however, did little more than paper over ideological cracks within the human rights idea. Fundamental philosophical questions about human rights were suppressed in favour of a dominant western paradigm of individual rights; practical disputes were resolved quickly and expediently on the basis of U.S. power and, when necessary, the vote.” (Normand and Zaidi, 2008, p.177).

⁴³ The Tehran conference was organized by the UN General Assembly in order to “promote further the principles contained in the UDHR, to develop and guarantee political, civil, economic, social and cultural

Historical analysis evidences a shift of priorities that peaked at the Tehran conference: “from the Western-inflected concept of individual human rights exemplified in the 1948 Universal Declaration to a model that emphasized economic development and the collective rights of the nation” (Burke, 2008, p.276). The importance of individual rights,⁴⁴ national sovereignty or self-determination, was asserted until then against the background of the threat of communism (in the case of western countries) and colonialism (by non-western countries that defended racial equality). States’ territorial integrity, inviolability of borders and non-intervention were given preference by recently independent countries, due to the end of the territorial colonial domination and the consolidation of self-governance and sovereignty (not emancipation). Rights were strategically prioritized by all parties based on the historical context and worldwide power struggles in a period between the colonial era and the rise of post-colonial dictatorship in many independent African countries. The convergence and prominent agreement among those powers was therefore of a negative nature (Eckel, 2014), namely as an opposition to western ideology and colonialism (“a strategy of anticolonial legitimation”).⁴⁵

Following Jensen’s analysis (2016), we can interpret the support of European countries in the process leading to the adoption of the UDHR as a strategic way of solving the issues of the post-Cold War context. Not that much based on a firm conviction that those rights and principles enshrined should be extended to those in the Global South, which were still at that time under colonial rule. Paradoxically, “the Western countries were calling for adherence to international standards and binding instruments to which they themselves had not committed” (Jensen 2016, p. 232). This type of timeserving pushes were part of the HR and IL making politics and diplomacy. They were used by the states to achieve their own strategic aims and to justify their own foreign policies, domestic shortcomings, and to denounce other countries’ practices and records (within their own borders and abroad) in order to gain legitimacy and support. Several factors guided the lack of interest of Western powers in defending the universality of rights at the time (understood as applicable to everyone), namely, reacting against the self-determination claims of peoples under colonial rule that endangered their colonial enterprise as well as racial discrimination⁴⁶ concerns voiced by non-western countries that defended universality. Those were the main reasons for universality not being a priority in the political agendas of western countries, which prioritized individual rights such as freedom of thought, conscience, religion and belief.

rights and to end all discrimination and denial of human rights and fundamental freedoms.” (United Nations 1968) Out of the 84 countries present, one fifth of the representatives attending this HR conference were from African countries (17 countries, equalling 20 per cent), in comparison to the 7 per cent of the 58 members voting the UDHR 20 years earlier (four countries). According to Burke (2008), more than two-thirds of the countries represented in the Conference were undemocratic.

⁴⁴ Quoting Ibhawoh: “the modern concept of human rights stems from the contemporary articulation of legal entitlement, which individuals hold in relation to the state” in Tiyambe Zeleza and McConaughay ed 2004, p. 23.

⁴⁵ “The Afro-Asian group’s shaping of the UN human rights agenda cannot be considered as a series of steps developing a universal rights regime. Rather, their human rights policies were part of a symbolic struggle to counter the dominance of First World nations in the international sphere.” Eckel, 2014, p. 129.

⁴⁶ The Convention on the Elimination of All Forms of Racial Discrimination was only approved in 1965.

That same differentiation which hampered universality reinforced by the reluctances to worldwide applicability of the same rights for all peoples, lies behind the American Anthropological Association (AAA) position at that time, in a famous statement submitted to the United Nations Commission of HR (HRC):

Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole. ... Today the problem is complicated by the fact that the Declaration must be of worldwide applicability. It must embrace and recognize the validity of many different ways of life. ... The rights of Man in the XXth century cannot be circumscribed by the standards of any single culture, or be dictated by the aspirations of any single people. ... Only when a statement of the right of men to live in terms of their own traditions is incorporated into the proposed Declaration, then, can the next step of defining the rights and duties of human groups as regards each other be set upon the firm foundation of the present-day scientific knowledge of Man. (AAA, 1947, p. 542).

This excerpt evidences the view of the AAA at the time in two ways: firstly, the standards contained in the UDHR were rooted in a specific particular tradition (western). Secondly, the values enshrined in a declaration aimed at having global validity and universal applicability could not emerge from a single culture. However, with the adoption by the AAA membership of the Declaration on Anthropology and Human Rights Committee for Human Rights in June 1999, AAA's position shifted to embracing the mainstream HR rhetoric.⁴⁷ This presents us with the challenge posed by Wallerstein of particularizing our universals and universalizing our particulars.

In addition to the situation described above and exemplifying the feeble support and value conferred to HR, the use of its terminology was not a prominent one in the claims among activists, leaders from African countries,⁴⁸ nor by anti-colonial figures. Besides, when it was present it did not always had the meaning conferred to in the IHRL corpus. Several authors highlight a shift in the official support of HR from countries formerly under colonial rule in the late 60s' and 70's:

The cultural relativist turn⁴⁹ was not merely an expression of authoritarianism. In addition, it was a reaction to the new HR interventionism of Western actors, both governments and NGOs, rapidly expanding in the 1970s and primarily directed against Third World nations. (Eckel, 2014, p. 122).

⁴⁷ Despite this apparent turnaround, some authors claim that the issues and positioning of anthropologist did not vary, being culture the focus of concern and the controversies extent (Engle, 2001).

⁴⁸ Even though, as Burke acknowledges, some colonial leaders and nationalist manifestos showed support to HR in the 50s'. (Burke, 2006).

⁴⁹ However, cultural relativistic views in relation to HR were first declared by Western democracies in the terms explained above.

Universality was now imperialist. Western countries strongly advocated for HR in order to pressure the so-called Third World countries for their poor records. As for non-Western countries, cultural differences, local cultural practices and traditions, customs, ancient laws and practices were put forward as the basis for refusing to concede ‘universality’ to HR. Within the UN, the division between blocs was felt not only in terms of the voting majority (which was still dominated by western countries despite the influx of newly independent states). The challenge/threat to western hegemony and the divide between colonial powers and the rest was manifest in the discourse of several influencing figures, which referred to the circumstances of the time in the following terms: “backward countries in revolt”,⁵⁰ “dark skinned people against the white”,⁵¹ “the antithesis between the developed and the less developed”.⁵² The increasing weight of non-western powers was evident by the time the two Covenants developing further the rights enshrined in the declaration were adopted in the late 60’s⁵³ (International Covenant on Civil and Political Rights ICCPR and International Covenant on Economic, Social and Cultural Rights ICESCR)⁵⁴. Moyn reads this lapse of time as illustrative of the “fiction of ideological consensus about basic values could no longer be maintained” (Moyn 2012, p. 79). Furthermore, authoritarian and undemocratic regimes pushed for a decrease of the relevance of individual rights and democracy, which according to Rajagopal “has replaced modernization as the discourse of social transformation in the Third World” (2004, p. 160). A few years later, the new grammar would be development rather than democracy, veiled under the HR rhetoric. A relativistic approach dominated the debates from then on during the 80’s and 90’s until the Vienna Conference in 1993 where universality was strongly endorsed.⁵⁵

2.3. Uprooting the Discourse, Dislocating the Making

The previous section described the complex process and ideological turns that culminated with the conceptualization of HR in their contemporary sense, and their

⁵⁰ John Humphrey (Canada), first Director of the United Nations Human Rights Division, he had a significant role in drafting the UDHR. In Burke, 2008, p. 279.

⁵¹ Eleanor Roosevelt (USA), US delegate to the UNGA (1946-1952) and first chair of the HRC (1947-1951). She played an important role in drafting the UDHR. Burke, 2008, p. 279.

⁵² Charles Malik (Lebanon), Lebanese representative to the UN, president of the UN Economic and Social Council ECOSOC, second chair of the HRC. He played a crucial role in drafting the UN UDHR. Burke, 2008, p. 279.

⁵³ Quoting Burke’s visual description: “Structurally, the Commission on Human Rights was no longer tilted toward the West, with an expansion and redistribution of seats to Asia and Africa in 1967. As the Western diplomats looked up to the newly computerized voting boards of the General Assembly, they saw a graphic representation of their minority status. If they looked down at the agenda of human rights items, dominated by economic development, apartheid, and racism, the effects of the UN’s postcolonial transformation were unmistakable.” Burke, 2008, p. 282.

⁵⁴ In relation to the content of those instruments, “What Western states sought to achieve was moral leadership through rhetorical support for economic and social rights, while at the same time ensuring that such rights did not bring any obligations”. Kirkup, A. and Evans, T. 2009, p. 232.

⁵⁵ “The only unequivocal ‘fact’ that emerges from this ambivalent and diffuse historical picture is that human rights emerged in the 1940s from earlier incarnations as a *powerful signifier* which, because of its very *conceptual openness* and *semantic indeterminacy*, has engaged people’s imagination all through to the 1970s and on to the contemporary period.” (Emphasis added). Hoffmann, F. & Assy, B. forthcoming.

positivisation in the IHRL corpus. The account focusing on the agency of delegates and representatives of states who defined and shaped debates and discourses that crystalized in a particular body of rights is considered as the diplomatic forefront of the discussion and of the consolidation of the theoretical debate. The positions and ideological priorities supported by the different actors and factions were deeply connected to the political context of the times, as has been showed above. The different stances varied along the process of consolidation of the mainstream discourse, in correlation with historical events, shifts in power and interests, illustrating the motivations (political and other) behind state representatives' articulations (Kang, 2009). Rights were strategically prioritized based on the historical context and worldwide power struggles.

Having stated the importance of the historical circumstances and how the context influenced the inception of the dominant HR grammar, two related aspects emerging from that observation need further attention. Firstly, the element of agency of the actors involved in the process. As mentioned above, so far, the focus lied on the diplomatic process and their perspectives around HR. Moyn refers to “the global diplomatic elite, often schooled in Western locales, who helped tinker with the declaration at a moment of symbolic unity.” (2012, p. 66). Secondly, the representation and legitimacy of those actors in relation to the more abstract debate around the values of a society captured in the viewpoint advanced at diplomatic discussions, is connected to elements such as power, identity, interests, ideas⁵⁶ and cultural orientations influencing different choices.

A more detailed explanation of the transformation and unfolding of the theoretical debate around the concept of HR and its conceptualisation needs to be developed from a different perspective than the mainstream one referred to so far. The alternative proposal suggested here refers to the contributions arising from African philosophies as well as from the rationale of IPs in the African continent. Such a reflection will help illustrate the limited cross-fertilization that fed the Eurocentric conceptualisation of HR despite its aspiration to universalism. At the same time, that undertaking will set the grounds for the proposal advanced here which propounds an inter-epistemic conversation inclusive of other visions of ‘rights conceptualizations’ and a cross-paradigmatic approach that incorporates IPs’ epistemologies in order to enlarge the dominant discourse and its current normative content. Such an attempt strives at redressing epistemic injustices of the past and enabling sustainability in the future. Both have been hindered so far in part due to the prevalence of the western imaginary in the present dominant HR discourse.

The dynamics and structures that prevent non-dominant conceptions, rationalities, perspectives, epistemologies and traditions, to permeate the hegemonic positioning,⁵⁷ have been conceptualized as coloniality; the aftermath of colonialism (Quijano,

⁵⁶ When analysing the politics of development, Lavers’ political settlements framework (PSF) introduces the notion of ideas and how ideas, values and beliefs, shape policy choices and political settlements. He claims that ideational processes also shape interests, power and institutions (main elements of Khan’s PSF), as well as actors and legitimacy. (Lavers, 2018).

⁵⁷ “La concepción “occidental” o el “eurocentrismo” es un componente cultural cuyo sustrato epistemológico ha pretendido universalizar y naturalizar la concepción del mundo a partir del marco cognitivo, valorativo y normativo de una particular tradición cultural” (Garzón López, 2013, p. 307) This quote from Garzón-López

Ndlovu-Gatshehi). Its outcomes being: “long-standing patterns of power that emerged as a result of colonialism, but that define culture, labour, inter-subjectivity relations, and knowledge production well beyond the strict limits of colonial administrations” (Maldonado-Torres, 2007, p. 243). In reaction to the continuation of patterns of domination and oppression once colonial territories started achieving independence, the decolonial project emerged as a project of liberation from colonialism (according to Dussel) and of emancipation from modernity (Maldonado-Torres) to enable a dialogue between different rationalities and locus of enunciation (world-views conceptualization). It aimed at recovering what had been rendered invisible.

2.4. Inclusion of *Alter-natives* through Decolonial Theory

Having revealed that the claim of universalism results from specific predicaments grounded in a particular thinking, calls for reworking the process by which a particular conceptualization is achieved, in an inclusive and dialogical way. Such is the aim of a decolonial approach.

Decolonial thought is rooted in the ideas present already in authors such as Fausto Reinaga and Silvia Rivera Cusicanqui in Latin America. As a concept, it has been coined and elaborated primarily by authors such as Castro Gómez, Dussel, Grosfoguel, Maldonado-Torres, Mignolo, Quijano and Walsh. Following Mignolo’s definition:

De-coloniality is a planetary critical consciousness that emerged and unfolded, precisely out of the limits of abstract universal of its current manifestations and out of the dangers that, in the future, a ‘new’ abstract universal will attempt to replace the existing ones; or that the existing ones will renew themselves as ‘new’. (Mignolo, 2007, p. 500).

This critical approach to the universal, to HR, is here in dialogue with TWAIL⁵⁸ theory and Eurocentric Visions of International Law (EVIL) in order “to unpack and deconstruct the colonial legacies of IL and engage in efforts to decolonise the lived realities of the peoples of the Global South” (Natarajan et al., 2016). Despite some authors argue that TWAIL lacks a revolutionary focus,⁵⁹ too accommodating of Western liberal theory, it does offer valid and important elements for change and reform, among other aspects, by shifting attention from state as the centre of IL towards individuals and social movements, therefore redefining “law in radically pluralistic terms”. (Rajagopal, 2004, p. 400).

Both decolonial theory and TWAIL emphasize the importance of context and global history (not just from a western European perspective), in order to understand

connects with post-structuralist thesis of the role of power in the creation of knowledge and discourse theory (Foucault).

⁵⁸ This approach includes authors like Antony Anghie (colonial origins of IL), Upenda Baxi, B.S. Chimni and James Thuo Gathii.

⁵⁹ “The argumentative logic of TWAIL ultimately operates according to the very conservative analytical framework it sets out to transcend.” Haskell, 2014, p. 385. What would be alternative structures and logic to overcome this claim?

the defining features of the development of IL, which for decolonial thought stem from coloniality and for TWAILers reside in eurocentrism. Other shared characteristic are their emphasis on equality and equal dignity, caution towards assertions of universality that have often masked domination, and representation of all voices.⁶⁰

In a broad sense, TWAIL theory is critical of Eurocentric international legal regimes. However, its methodological approach focuses on global historicisation (Mickelson, 1998) rather than in the West, therefore, bringing the ‘third world’ to the centre. Okafor stresses the following as the main defining elements of TWAIL analysis: insistence on history, continuity, centring the Third World, resisting global hegemony, demanding increased global equality, and unmasking the hand of power in the construction of knowledge.⁶¹ These elements situate this research within the scope of this approach.

TWAIL theory is a response against the unjust global order and the hegemony of the West legal, political, economical. The changes brought about by the wave of independence of states in the second half of the twentieth century consolidated among others the principle of non-interference in sovereign states. However, despite non-intervention was accepted in theory, the dynamics of powerful states continued as they had operated previously. What shifted was the terms used as the justification of those interventions. As Wallerstein puts it:

The justification of Christian evangelization was no longer available to legitimate imperial control, nor was that of the religiously more neutral concept of the civilizing mission of colonial powers. The rhetorical language now shifted to a concept that came to have new meaning and strength in this postcolonial era: human rights. (Wallerstein, 2006, p. 12).

The shift that took place, displacing religion as foundational of a moral order was in part a consequence of the consolidation of scientific and quasi-scientific knowledge. In this context, and following Fichte’s thesis, philosophy appeared to enable and ‘rescue utopian hope’ from natural sciences. The moral justification to legitimize interventions shifted from theological and natural law grounds to HR and democracy.

Democratization has supplanted modernization as the discourse of social transformation in the Third World and, therefore, as the driving ideology behind IL as the law that governs the relations between the West and the

⁶⁰ Karin Mickelson (1998) defines TWAIL at the intersection of two discourses: traditional IL and legal scholarship, and the discourse of decolonization. Kenyan-American Law professor Makau Mutua defines TWAIL as the “dialectic of opposition to international law” understood as a discourse of domination whose universalization was “essential to the imperial expansion” (Mutua and Anghie 2000).

⁶¹ “TWAIL scholars (or “TWAILers”) are solidly united by a *shared ethical commitment* to the intellectual and practical struggle to expose, reform, or even retrench those features of the international legal system that help create or maintain the generally unequal, unfair, or unjust global order. They accomplish this through a commitment to centre the *rest* rather than merely the *west*, thereby taking the lives and experiences of those who have self-identified as Third World much more seriously than has generally been the case.” (Okafor, 2005, p. 176).

Third World, and provides a principal explanation for its expansion through institutionalization. (Rajagopal, 2004, p. 135).

NGOs and INGOs have joined Western governments in their role as promoters of democracy and HR.

In addition to the secularization trait, Maldonado-Torres (2017), in his analysis on the coloniality of HR, locates a crucial factor in the way the notion of the human is understood. Despite he recognizes the value of the UDHR when it came to the recognition of the human, he also acknowledges “the effort made in European countries to find a place for man involved the creation of a *new entity* separate from God and nature or animals” (Maldonado-Torres, 2017, para. 16). However, this conceptualization of the man still enabled in his view, the categorization based on hierarchical ontological differences. Thus, tinged with one of the basic characteristics of coloniality: the ontological difference (which he defines in terms of damnation following Fanon).

Nevertheless, consensus around HR remains an open to question. Supporting it does no longer come from undisputed knowledge. On the contrary, at the most it is grounded in speculative knowledge (rather than in scientific universalism), therefore non-falsifiable and consequently contestable, lacking authoritativeness and irrefutability. That is where we are situated nowadays in the debate around the validity and universalism of HR. Perhaps the foundations of what we can refer to as intuitions in the realm of the good life and justice, will find theoretical basis in the future by including types of knowledge which are rejected and casted out currently for their lack of scientificity, or by *better science* in the future (Van Binsbergen, 2008). In any case, sceptical and critical voices concerned about the lack of pluriversality might cling to HR as “the most we can hope for,” (Ignatieff et al. 2001, p. 173) even if that justification is just a temporary one.

Awareness of the justifying elements and reasoning that helped legitimating certain imperial projects in the past allows one to examine the development of IHRL corpus through critical lenses that seek to unveil power, interest and ideas as paramount players within the HR discourse making and the knowledge paradigms it contains. This approach lies within a broad goal of ideational change and epistemic transformation.⁶²

3. CONCLUSION: THE SIGNIFICANCE OF HUMAN RIGHTS

What are HR to assert their universalism? Many answers have been advanced from various disciplines and areas of study. Are they ideals? Axiological decisions (Ramose),

⁶² It is in line with efforts of many authors aimed at addressing the gap of “carefully unpacking and resisting the sophisticated and complex processes of denial and mythmaking that have enabled this deceptive posture of innocence [of many global powers] to be maintained. This, of course, includes unpacking the myth of newness that grounds the current agitations for international law reform by certain great powers. This is one way in which room for international social (and thus legal) change can be created and enlarged.” (Okafor, 2005, p. 190).

moral claims, legalized moral norms, political demands,⁶³ the last utopia (Moyn), a myth of liberal democracy (Mutua), cultural capital (Hopgood), an idolatry, the “major article of faith of a secular culture” (Ignatieff et al 2001, p. 320), a minimum accepted everywhere, a strategic epistemology (Niezen), an instrument of emancipation or a mechanism of domination (Beitz), “the latest version of the civilising mission” (Douzinas), an empty vessel (Skinner), a site of power (Kapur, in Rathore and Cistelegan 2011, p. 49). Whatever their definition and contestation around them, they are still playing a major role in ordering the world and the lives of people/s.

The argument asserted along these pages is not antagonistic towards HR. The universalism of HR is certainly questioned, not their universal scope of application but rather their current mainstream conceptualization. The emergence of HR can be located in the context of eurocentrism and the western hegemonic paradigm of knowledge with the following features: rationalism, secularism, anthropocentrism, and universalism. HR are thus seen as a construct stemming from a specific ideology, that of the Western modern worldview. Consequently, the western HR conception was characterised by precedence of rights versus duties, of the individual versus the collective or communal, and legalism versus reconciliation. This specific HR conceptualization, this particularism, was turned into a universal with an aspiration of global validity. However, portraying HR as universal entails an inherent hierarchisation that leaves out the rest (other particular conceptualizations) and denies pluriversalism. This hierarchisation justifies critiques of imperialism given that by erasing alternative discourses, those at the margins, it allows for the maintenance of the status quo, the hegemonic power and hence the dominant discourse itself. The dominance of the current hegemonic HR discourse consolidated across changes in ideological positioning and shifting support. This fluctuation responded to strategic interests and priorities connected to the political circumstances and historical context of the time. As a result, the hegemonic discourse of IHRL became a source of domination positioning itself as a universal grammar, denying difference and monopolizing the narrative voice enclosed within. However, that background casts doubts on its universalism that could be seen as opportunistic and rhetoric.

In an interconnected and fluid era like the present one and given the inherent incompleteness of every one culture, dialogue is unavoidable and indispensable in order to rearticulate power, change and enable knowledge to feed the Eurocentric conceptualization presented above. Intercultural philosophy and critical legal theory can assist in unfolding and fulfilling such a dialogue of many (a polylogue), transcending a mere harmonization of different normative traditions and delving into the spaces where certainties blur. Firstly, by identifying factors that can enable the exchange between asymmetric epistemologies (a dialogue of many) in order to expand the horizons and reconstruct the flawed current paradigm by building on alternatives to compose valid and solid solutions. To this end, the next step would be to advance concrete formulations stemming from peripheral

⁶³ “As political claims, human rights are socially constructed; their meaning varies in different contexts and is profoundly shaped by the social forms of power they confront. Their validity is thus and intersubjective phenomenon rather than an objective fact that can be evaluated independently of what people actually think and do.” in Goodale, 2014, p. 38.

knowledge(s), subaltern legalities, counter-hegemonic narratives and alternative universes (towards the pluriverse).⁶⁴ Such a critical exploration would focus on *alternative* worldviews, those of African IPs' epistemologies, their systemic formulations of knowledge, models of societal organization, justice and value systems: a situated knowledge with "extensible" potential. Those elements would inspire the decolonized HR alternative and enrich with ex-centric content the HR construct in an attempt to render epistemological justice and valuable inputs to the dominant IHRL order and HR discourse.

Unveiling the epistemological roots of the HR grammar turned hegemonic, the situatedness of the knowledge it encompasses, its particularism, parochialism and purposive choice as that of any given system of legal rules has been the purpose of this text. However, the enquiry can go further. The same logic of domination that besets the current HR narrative imbues the development practice and praxis⁶⁵ through the centrality of rights (with its neo-liberal twist). Thus, the implications of the critique applied to HR could extend to development cooperation as far as it is connected with the expansion of the mainstream HR grammar as its conceptual framework (depoliticised and ideologically neutral), in disregard of alternative basis for advancing and grounding its goals. The programs and projects of development organizations revolve around and build on HR dominant paradigm and approaches, and it has been the NGOs that set themselves up to sustain HR as their main concern in response to the inaction on the side of governments. They became the preferred channel to make up for governments' shortfalls and absences and found a moral justification to legitimize their interventions in defence of democracy⁶⁶ and HR.⁶⁷ Moreover, the concept of development has become a cornerstone supporting the edifice of contemporary IL (Pahuja, 2011).

Therefore, a practical application of the argumentation presented here would incorporate development interventions. Analysing the 'developmentalisation of HR'⁶⁸ would contribute further to this attempt to reconstruct HR through the examination of

⁶⁴ "A world where many worlds fit" ideal of the Zapatistas.

⁶⁵ The relationship between development and assistance programs and human rights has been devised, systematized and operationalized through the so-called human rights based approach/es (HRBA) to development cooperation and programming. HRBA was agreed as a guiding principle by UN agencies in 2003 and ever since (UNSDG Human Rights Working Group, 2003). HRBA is being applied by many development actors rather than traditional poverty oriented or needs-based approaches.

⁶⁶ "A discourse of democracy- interpreted mostly in human rights term- has attempted to constitute itself as the 'approved' discourse of liberation and resistance." Rajagopal, 2004, p. 137.

⁶⁷ "Intervention is in practice a right appropriated by the strong. But it is a right difficult to legitimate, and is therefore always subject to political and moral challenge. The intervenors, when challenged, always resort to a moral justification- natural law and Christianity in the sixteenth century, the civilizing mission in the nineteenth century, and human rights and democracy in the late twentieth and twenty-first centuries." Wallerstein, 2006, p. 27.

⁶⁸ "By grounding the planning for development in human rights, an attempt is being made now to make development into a legal project. The motive for this move to escape ideology, and ground development normatively, comes from two sources" legitimacy crisis, [a] "a belief in law as a neutral, trans-ideological, meta-cultural terrain that is beyond contestation. By grounding development in such (an international) law of human rights, the development profession is hoping that the normative basis of the discourse will decrease contestation over its interventions." Rajagopal, 2004, p. 228.

the role of western development actors⁶⁹ in legitimizing and consolidating specific justice and development discourses when implementing donor-assistance interventions. Development actors are catalyst of ideas connected to epistemic communities; agents that bring about ideological impact, contribute to shaping beliefs, shift discourses legitimizing actions and policies and reinforce specific ideologies.⁷⁰ The focus on development actors such as NGOs would hence lie in the ascertainment of the role they play within the international scene, including their influence in political⁷¹ and domestic legal processes (as maintained by TWAIL scholarship). While supporting beneficiaries in their struggles, development actors and assistance organizations act as vehicles of power, ideas and values, and consequently, their influence might go beyond the measurable goals aimed with the projects they implement. The proliferation of those type of organizations during the period since the adoption of the UDHR onwards, is significant and revealing of the weight and influence they have attained. Furthermore, including development actors in the picture would help to overcome the limitations that arise from placing the focus solely on states as players within the legal international arena and policymaking when it comes to tackling HR shortcomings. It is a matter of coherence and of epistemic justice to reveal the way that influence takes place and the scope of its effects by determining how and to what extent, the dominant HR ideology and its epistemological premises are reinforced not least by the development enterprise.

Elucidating these unanswered questions as a way forward will add to the quest for transforming and des-absolutizing HR and their contested universalism to make them suitable for the challenges ahead.

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⁶⁹ This proposal depicts western development actors as "missionaries of Themis" (Themis was the goddess of Justice in ancient Greek culture who first instructed humankind in the primal laws of justice and morality). The hypothesis being that they operate neglecting their role as agents of social transformation and of radical structural change. The civilizing mission endeavour of earlier religious missionaries is somehow continued nowadays by the work of development actors in their HR enterprise. Other authors have referred to them as the "ideological foot soldiers" of civilization (Shivji, 2006), "saviours" (Mutua, 2001).

⁷⁰ "Part of our 'unlearning' project is to articulate that ideological formation... into the *object* of investigation" (italics in the original). Spivak, 2001, p. 199.

⁷¹ "International law must decentre itself from the unitary conception of the political sphere on which it is based, which takes the state or the individual as the principal political actor." Rajagopal, 2004, p. 236.

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