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THE UNIVERSAL DECLARATION AND THE CONSCIENCE OF HUMANITY

The opening clauses of the Universal Declaration articulate what I call in this essay *the doctrine of inherent human rights*. This doctrine consists of two universalist theses: a *universal inherence* thesis, which maintains that human rights inhere in people simply by virtue of their humanity; and a *universal accessibility* thesis, which maintains that people can come to know they have these inherent rights, unaided by experts and using their own natural epistemic equipment. It is this second thesis of universal accessibility that I have in mind by suggesting a connection between the Universal Declaration and the conscience of humanity. Teachers on all levels, from grade school through university, can appeal to this conscience to show students the full range of available human rights, the indispensability of these rights to our humanity, and the ways in which our conscience alerts us when they are grossly violated. The drafters of the Universal Declaration draw on the universal *inherence* thesis by using terms like “inherent,” “inalienable” and “born with” in the first recital of the Preamble and the first sentence of Article 1. They draw on the universal *accessibility* thesis in their references to conscience in the second sentence of Article 1 and in the second recital of the Preamble. Article 1 states that every human being is “endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”¹ The drafters also mention the concept of conscience, with its suppressed reference to the crimes of National Socialism, in the second recital, which begins: “Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind... .” Most theorists trace the origin of human rights to the drafting chambers of international conferences, such as those in which the Declaration was written. These conferences, often organized by the United Nations and attended by

¹ United Nations, *Universal Declaration of Human Rights*, accessed on Nov. 27, 2009 from <http://www.un.org/en/documents/udhr/>; all subsequent references to the UDHR are to this text. In a marriage of East and West, the endowment of conscience mentioned here was added to that of reason upon the suggestion of Chung Chang, the Chinese representative. What he called “two-man-mindedness” – which his colleagues translated into “conscience” – was added to the Article without opposition; see UN Doc. E/CN.4/SR.8 (1947).

international lawyers, diplomats, and civil servants, have produced some 200 human rights texts, including declarations, treaties, covenants, and protocols that aim to deliver enjoyment of their human rights to people around the globe. This postwar whirlwind of normative activity has, of course, been a very *human* activity, staffed as it was by representatives and delegates who attended thousands of meetings in which they made hundreds of proposals and cast thousands of votes. Since these texts are so clearly man-made, many theorists assume that human rights themselves are also man-made. As a result, they have tended to interpret the universality of human rights as linked to international peace and good relations between nations, rather than as moral riders on our biological births.

I see a disconnect between this procedural account of the origin of human rights and the Universal Declaration. The founding document of the human rights movement emphasizes that our human rights are birthrights and not the result of any judicial, parliamentary or political procedures. The standard objection to the idea of birth-based human rights is that this kind of metaphysical universality cannot be reached from our position in a world of flux. Such skepticism regarding the inherence of our human rights has prompted many to ignore the deep experiential and emotional roots of the Universal Declaration. Critics claim that we cannot arrive at the inner sanctum of inherence from our locatedness in a multicultural world. I share with most drafters of the Declaration my belief in human rights as inherent in human nature. Philosopher Emil Fackenheim accused the great theologians of the latter half of the 20th century of passing by Auschwitz in silence and averting their theoretical gaze as they constructed pristine theological systems. According to Fackenheim, these theologians had failed to mend “the total rupture” of our world that the Holocaust had caused.² Similarly, many human rights theorists have averted their gaze as they passed the gates of Auschwitz. Their espousal of almost exclusively procedural accounts of justice and their consistent denial of inherent rights fail to mend the ruptures of our moral and political worlds.

Universal Accessibility of Human Rights

Universal accessibility is the idea that people everywhere must know, or have the potential to know, that they possess human rights. While in the exact sciences, metaphysical and epistemic universality need not and usually do not go together, in morality and law they cannot be separated. These areas at the very least assume a connectedness between the way the world is and our knowing that it is that way. Our consciousness of the human rights in the Declaration is analogous to the promulgation of legal rights and duties in positive systems of law. A law is not just if it is not transparent and promulgated. Printing new legal ordinances in the Congressional Record (as in the United States) or in a town’s local paper is intended to achieve these goals. Analogously, the rights asserted in the Declaration would have been meaningless without a normal or natural way for human beings to know that they have them. If human beings have human rights because of their very status as human beings, as Article 1 says, they should also be able to discover these birthrights through their own powers of reason and conscience. The drafters of the Declaration believed that human beings with these two powers immediately know when their rights have been violated. The experience of such violations leads individuals to recognize their rights.

For that reason the Declaration’s drafters did not address their document to jurists, scholars, international lawyers, diplomats, or to any other kind of expert, but rather to ordinary men and women around the world. Whenever they worried about their text becoming too long, they cut it back. As Hansa Mehta, an Indian del-

² Emil Fackenheim, *To Mend the World: Foundations of Post-Holocaust Jewish Thought* (Bloomington, 1940): 250.

egate, explained, “It was to be understood by the common man.”³ Similarly, Rene Cassin, the French delegate, wanted to “shorten and clarify the Draft Declaration” to ensure that ordinary people would understand it.⁴ The Chinese delegate, Chung Chang, agreed that the Declaration “should be as simple as possible and in a form which was easy to grasp.”⁵ Michael Klekovkin, their colleague from the Ukraine, also worried that the text had become too long, “with the result that it would be difficult for the ordinary people to understand it.”⁶ More than once, Eleanor Roosevelt, as Chair, felt it necessary to remind her colleagues of the need for “a clear, brief text, which could be readily understood by the ordinary man and woman.”⁷ The Declaration, she often said, “was not intended for philosophers and jurists but for the ordinary people.”⁸ Amid thorny discussions on Article 1, Alphonso De Alba, the Mexican representative, stressed that “the declaration was intended primarily for the common man and for that reason it was important that it should be as clear as possible.”⁹

A Direct and Immediate Reaction

The moral epistemology of human rights proceeds from the bottom up. We are repulsed by gross violations of human dignity and, to use Albert Camus’ terminology in *The Rebel*, that shared revulsion lays bare the metaphysical character of our rebellion.¹⁰ Our commitment to human rights emanates from our encounter with gross injustices, wherever they are perpetrated. As Martin Luther King Jr. wrote in his famous “Letter from Birmingham Jail,” “Injustice anywhere is a threat to justice everywhere.”¹¹ Most of the articles and rights in the Declaration were adopted as direct and immediate reactions to the horrors of the Holocaust. At the first meeting of the Drafting Committee, UK delegate Geoffrey Wilson reminded his colleagues “of the historical situation in which the Committee met. It was, he said, “a situation where Germany and other enemy countries during the war had completely ignored what mankind had regarded as fundamental human rights and freedoms. The Committee met as a first step toward providing the maximum possible safeguard against that sort of thing in the future.”¹² By the fall of 1948, that view had shaped a consensus on 30 articles. Lakshimi Menon from India informed the General Assembly that the Declaration had been “born from the need to reaffirm those rights after their violation during the war.”¹³ Henry Carton de Wiart from Belgium thought that “the essential merit of the Declaration was to emphasize the high dignity of the human person after the outrages to which men and women had been exposed during the recent war.”¹⁴ Another UK representative, Ernest Davies, warned, “It should not be forgotten that the war by its total disregard of the most fundamental rights was responsible for the Declaration, for previous declarations had lived in history long after the wars and disputes which had given rise to them” had been forgotten.¹⁵

The minutes of the discussions make it clear that the drafters were responding to the cruel deaths of millions

3 UN Doc. E/CN.4/SR.50/8 (1948).

4 UN Doc. E/CN.4/AC.1/SR.35/2 (1948).

5 UN Doc. E/CN.4/SR.50/7 (1948).

6 UN Doc. E/CN.4/SR.41/7 (1948).

7 UN Doc. E/CN.4/SR.41/9 (1948).

8 UN Doc GAOR, *Third Committee*, 138 and 609 (1948).

9 *Ibid.*, 162.

10 Albert Camus, *The Rebel: An Essay on Man in Revolt* (New York, 1992); see esp. chapter titled “Metaphysical Rebellion.”

11 Martin Luther King, Jr., “Letter from Birmingham Jail,” reprinted in *The Best American Essays of the Century*, ed. Joyce Carol Oates and Robin Atwan (New York, 2001): 263-279; see esp. 264.

12 UN Doc. E/CN.4/AC.1/SR.7/5 (1947).

13 UN Doc GAOR, *Third Committee*, 893 (1948).

14 *Ibid.*, 879.

15 *Ibid.*, 883.

in the concentration camps and on the deportation trains with Article 3's right "to life, liberty and security of person." The explicit condemnations of discrimination in Articles 2, 7, 16, and 23 were responses to the virulent racism of the Nazis, as were the reiterations of "everyone" and "all" at the start of almost every article. The drafters responded to the Nazi deportation of men and women for forced domestic, agricultural and factory labor with the right in Article 4 not to be "held in slavery or servitude" in any form. Article 5 addressed Nazi medical experiments on concentration camp inmates by guaranteeing the right not to be subjected to "torture or to cruel, inhuman or degrading treatment and punishment." The right "to recognition as a person before the law" in Article 6 refers in part to the Third Reich's legal exclusion of the Jews. The drafters also had the 1933 Nazi marriage laws in mind when they based marriage on "the full and free consent of the intending spouses" in Article 16's prohibition of discrimination. The political rights enumerated in Articles 18 through 21 were a direct response to the suspension of civil liberties that followed the Reichstag fire. The cruel working conditions in camp factories informed the fundamental human right to work in Article 23 and to "rest and leisure" in Article 24. The drafters also responded to the Nazi indoctrination of German youth in Article 26 by establishing that education "shall be directed to the full development of the human personality," and that parents have a "prior right to choose the kind of education that shall be given to their children." Other rights in the Declaration responded in similar ways to the atrocities of National Socialism.

What is now the first clause of our second recital ("Whereas disregard and contempt for human rights have resulted in barbarous acts that have outraged the conscience of mankind") stemmed from a proposal made by the French delegation to the Third Session of the Commission in the spring of 1948. It came from the pen of René Cassin, who had a Nazi arrest warrant posted on the door of his Paris apartment. The proposal asserted that "ignorance and contempt of human rights have been among the principle causes of the suffering of humanity and of the massacres and barbarities which have outraged the conscience of mankind *before and especially during the last world war...*"¹⁶ The Third Session of the Commission adopted this text, but upon its arrival in the Third Committee later that fall, the explicit connection between the camps and the declaration ran into trouble. Within the context of the Berlin Airlift and intensification of the Cold War, the delegates could no longer agree on the causes of the war. The communists blamed Western capitalist impulses, while the Allied powers blamed the suspension of democratic governments by totalitarian regimes. The French delegation wanted to tighten the connection between the war and the Declaration with the further addition of "Nazism and racialism" to the already adopted text so that it read: "Whereas ignorance and contempt for human rights are one of the essential causes of human suffering; whereas particularly during the Second World War, Nazism and racialism engendered countless acts of barbarism which outraged the conscience of mankind."¹⁷ Drawing out these connections so clearly led other delegations to argue that a declaration with universal and trans-historical ambitions should not anchor itself in any one historical epoch. Reflecting this view, the Australian delegation suggested deleting the phrase "before and during the Second World War" from the text that had come from the Third Session, leaving only the general claim that "disregard and contempt for human rights [have] resulted in barbarous acts which have outraged the conscience of mankind."¹⁸ Although the time and the place of the outrage were in the end left unspecified, the proposals cited above and the minutes of the meetings make the specific "barbarities" that underlie and feed into the Universal Declaration abundantly clear.

One other vote goes to the heart of the concept of universal accessibility. The second recital now begins with

¹⁶ UN Doc. E/CN.4/AC.1/Add.3 (1947), emphasis mine.

¹⁷ UN Doc. E/CN.4/AC.3/339 (1948).

¹⁸ UN Doc. E/CN.4/A/C.3/314/Rev.1 and A/C.3/257 (1948).

a reference to “disregard and contempt for human rights.” In the Third Committee, the word “disregard” replaced the word “ignorance.” At first, the British delegate asked that the word “of” be inserted after the word “ignorance” in order to emphasize that ignorance of human rights, not a more general kind of ignorance, had led to the barbarous acts of the Nazis.¹⁹ This suggestion made the delegates realize that the word “ignorance” was not the right word. Alexei Pavlov, the representative of the USSR, said that “the retention of the word ‘ignorance’ would give the impression that the acts of the Germans and of the Japanese were being excused,” which he said was “the most serious error in the whole paragraph... . There had been no ignorance on the part of the aggressors, but a natural development of a system which had led to war.”²⁰ The Chinese delegate, Chung Chang, agreed that “the Germans and the Japanese were to blame for their contempt of human rights, but it could not be said that they had been ignorant of those rights.”²¹ This is a remarkable statement, since the military discipline in both nations was notoriously strict and even cruel, and involved the deployment of ever-younger soldiers as the war progressed. The military law of most civilized nations incorporates the doctrine of “manifest illegality.” This doctrine requires soldiers to disobey orders that are “manifestly illegal” or grossly immoral. It was used in the Nuremberg and Tokyo Trials, in cases that have come before the Yugoslavia and Rwanda Tribunals, and has been incorporated into the Rome Statute of the International Criminal Court. Article 33 of the Rome Statute asserts that acting on the orders of a superior “shall not relieve that person of criminal responsibility unless ... the order was not manifestly unlawful.”²² In other words, soldiers cannot escape criminal responsibility for manifestly unlawful orders simply because they are orders. This doctrine can only reasonably be applied to all persons across cultures if they possess the ability to recognize when an act is manifestly unlawful. Their conscience (inner voice, moral intuition, faculty or sense) tells them an act is “manifestly illegal” only because it is obviously immoral.

Chang pointed out that the German and Japanese soldiers who perpetrated the horrors of the Second World War could not be exonerated because they had acted under “higher orders.”²³ The terms “disrespect” and “contempt” are better than the weaker “ignorance” and “disregard” because of the presumed capacity to know when an act is manifestly illegal. As a French delegate suggested, this language also fits better with the French word “*méconnaissance*,” which carries connotations of “intentional ignorance.”²⁴ Such consideration prompted the change from “ignorance” to “disregard” in the second recital, with a vote of 10 for, 1 against, and 5 abstentions.²⁵

This vote supports my thesis that the drafters of the Declaration worked with the idea that humans have an operative moral conscience that recognizes gross violations of human dignity. This conscience puts us in touch with moral values and inherent rights that the drafters traced in their 30 articles. Unless hindered, ordinary people from diverse backgrounds can understand and exercise their inherent rights with their own capacity for judgment. If the military discipline of the German and Japanese armies could not excuse the crimes committed by their soldiers, perpetrators of other gross human rights violations must also be held account-

19 UN Doc. E/CN.4/SR.78/5 (1948).

20 *Ibid.*, 7.

21 *Ibid.*

22 *Rome Statute of the International Criminal Court*, accessed on Nov. 27, 2009 from <http://untreaty.un.org/cod/icc/statute/romefra.htm>. The full text of Article 33 reads: “1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.”

23 Eichmann himself also made such a claim. See Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York, 1994).

24 UN Doc GAOR, *Third Committee*, 7.

25 *Ibid.*

able for their actions. Even though the final text does not explicitly refer to the Second World War, the Holocaust or Nazi ideology, the delegates built a common platform upon the outraged consciences of the peoples they represented. In the opening clause of the second recital, they confidently generalized their own feelings of outrage to humanity as a whole.²⁶ This moral confidence makes the Universal Declaration such a powerful document.

A Widely Shared Revulsion

The connection between experiencing or witnessing a particular injustice and the realization that people everywhere have human rights helps us respond to charges of Western ethnocentrism that are so often leveled at the Declaration. The delegates represented nations from across the globe. They were all repulsed by the Nazi horrors and wanted to prevent a repeat of that kind of abuse of state power. The success of the Universal Declaration resides in the similar revulsion that affects the conscience and morality of people everywhere when they confront oppression and injustice.

The Universal Declaration was drafted between January 1947 and December 1948. At that time, the membership of the United Nations was roughly one fourth of its current membership.²⁷ One scholar has estimated that of the 56 nations that participated in drafting the Declaration, “North and South America, with 21 countries, represented 36 % of the total; Europe with 16 countries, represented 27 %; Asia with 14 countries, represented 24 %; Africa, with four countries, a mere 6%; and Oceania, with 3 countries, represented 5 %.”²⁸ Africa and Asia were grossly underrepresented in the process of drafting the Declaration. Only Egypt, Ethiopia, Liberia and South Africa represented the African continent, and of these four, only the Egyptian and South African delegations played an active role. Only India, China (with the Chiang Kai-shek regime still clinging to power) and Siam (now Thailand) represented the Asian continent, but the Siamese delegation was totally inactive. Moreover, it is difficult to argue for the universal applicability of any international document adopted before the collapse of the colonial empires in the 1950s and 1960s.

From this perspective, the title of the Universal Declaration seems a misnomer, and because this document is the moral backbone of the human rights movement, it might cast doubt on the idea of human rights more generally. Indeed, it is difficult to escape the conclusion that the 37 nations of Western Europe and the Americas imprinted the Declaration with their own value system. In a 1947 letter to the UN Human Rights Commission, the American Anthropological Association openly expressed its concerns about a Western bias in the Declaration. It argued that, unlike previous declarations, “the rights of Man in the twentieth century cannot be circumscribed by standards of any single culture or be dictated by the aspirations of any single people.”²⁹ Subsequent critics have charged the Declaration with demonstrating “moral chauvinism” and “ethnocentric bias,” arguing that it is “based on Western cultural and philosophical assumptions” which impose “an alien values system” and “a Western imprint” on the rest of the world.³⁰

26 When I show my classes tapes of the liberation of the Nazi death camps, my students invariably share the reactions of the drafters. At first, they cry or are stunned into silence, after which they no longer doubt that people really do have human rights. The same thing happens when we see a CBS video on the Rwanda massacres, or a film on the Cambodian Killing Fields. It is true that these images need to be put into an interpretive framework, but (if Susan Sontag has it right) we need not worry that these iconic images will dull us, or our students, into insensitivity. As a rule, they do not. However we do need to guard against viewing them in settings that are not respectful of the moral outrage that the photographs elicit. To create such settings is part of the task of human rights educators and of the creators and presenters of these images. See Susan Sontag, *Regarding the Pain of Others* (New York, 2003).

27 As of late 2008, membership in the United Nations is close to 200.

28 Philippe de la Chapelle, *La Déclaration Universelle Des Droits De L'Homme Et Le Catholicisme* (Paris, 1967): 44.

29 American Anthropological Association, “Statement on Human Rights,” in *American Anthropologist* 49:4 (1947): 539-543, see esp. 543.

30 Regarding the issue of moral chauvinism and ethnocentric bias, see Abdullahi A. An-Na'im, “Conclusion” in *Human Rights In Cross-Cultural Perspectives: A Quest for Consensus*, ed. Abdullahi A. An-Na'im (Philadelphia, 1992): 427-436, esp. 427-428. On the issue of the “western cultural and philosophical assumptions” inherent in the Declaration, see Adamantia Pollis and Peter Schwab, “Human Rights: A Western Construct with Limited Applicability,” in *Human Rights: Cultural and Ideological Perspectives*, ed. by Adamantia Pollis and Peter Schwab (New York, 1980): 1-18. Regarding the issue of the Declaration as an “alien values system” with a “Western imprint,” see Alison Dundes Renteln, *International Human Rights: Universalism Versus Relativism* (Newbury Park, CA, 1990): 53.

However, the Declaration resulted from a genuinely international effort that drew on far more than Western perspectives. The delegations came from nations with very different political, cultural, religious, ethnic, economic and legal traditions. Their adoption of this international bill of moral rights suggests that blatant atrocities and gross violations of human rights create a shared moral outrage. This shared sense of outrage gave birth to the Declaration and continues to foster the dramatic growth of the human rights movement today. Due to the Nazi atrocities, the very first task of the Human Rights Commission, the only commission mandated by the UN Charter, was to draft an International Bill of Human Rights. This shared revulsion against the horrors of the Second World War helps explain the shortsightedness of the charges of ethnocentrism leveled at the Declaration; it affected all delegations, not only those that had experienced Nazi genocide in their own countries. A human rights consensus based on moral values developed among delegations from a wide range of cultural, economic and religious traditions. The atrocities of the concentration camps elicited a moral reaction from the delegates that transcended their national and cultural backgrounds. As a result, the Declaration enumerated rights that were inherent in the human person, as such, and not culturally specific.

Charges of ethnocentrism against the Universal Declaration imply that the Western delegations imposed their ideological perspectives on non-Western delegates. In fact, disagreements were as significant within regional blocks as they were between regional blocks. The 21 representatives from North and South America did not agree on several major issues. While the American position on whether to include social, economic and cultural rights in the Declaration vacillated, the Latin American nations consistently fought for the inclusion of the entire range of these rights.³¹ On the recommendation of the Cuban delegation, the second recital ultimately included the call for a “world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want,” echoing the late US President Franklin Roosevelt’s famous 1941 State of the Union address.³² However, the United States remained reluctant to accept the second generation of human rights in the Declaration. The Canadians generally abstained from these debates, which placed the United States closer to some of its European allies. The Europeans also did not speak with one voice. Several times, the French delegation was rebuffed in its attempts to give the new United Nations organization a prominent place in the Declaration.³³ The United Kingdom was unsuccessful in having its version of the draft Declaration, which was in the form of a convention, adopted as the main text for discussion. In addition, the Belgian and French delegations undercut the joint British and Australian approach for an all-or-nothing approach (a declaration *and* a convention).³⁴ The Dutch delegation, with support from Brazil, was unable to garner sufficient votes to give the human rights in the Declaration a religious foundation.³⁵ Furthermore, through its representation on the Commission on the Status of Women, the Danish delegation had enormous positive influence on the shape of the Declaration, removing most of its sexist language. In doing so, it frequently clashed with the American delegation (headed by Eleanor Roosevelt) and with some of Denmark’s European neighbors. The campaign by the women’s lobby cut across blocks of votes, drawing on delegations from Latin American (especially Ecua-

31 The Latin American position was heavily influenced by the socialist and Catholic traditions of Central and South America. For a defense of this position, see Chapter 4, “Human Rights Cosmopolitanism,” in Johannes Morsink, *Inherent Human Rights Philosophical Roots of the Universal Declaration* (Philadelphia, 2009).

32 Franklin Roosevelt made this famous State of the Union speech on Jan. 6, 1941. See *American Political Rhetoric: A Reader*, 5th ed., ed. Peter Augustine Lawler and Robert Martin Schaeffer (Lanham, MD, 2005): 357-360. See also Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia, 1999), especially Chapters 5 (“The Socialist Shape of Work Related Rights”) and 6 (“Social Security, Education, and Culture”).

33 *Ibid.*, Chapter 2, section 5.

34 *Ibid.*, Chapter 1, section 3.

35 *Ibid.*, Chapter 8, section 1.

dor) and Asia (especially India).³⁶ All these disputes cut across the Western block of votes and presented deep intellectual challenges that persist today.

In short, there was no such thing as *the* Western position on the overall structure of the document or on many of its details. There were, of course, the usual diplomatic alliances, which John Humphrey of Canada, the first Director of the Secretariat's Division of Human Rights, describes in his memoirs.³⁷ However, there was no pre-established plan to impose a Western agenda. Humphrey was asked to write the first draft, which a small group of drafters headed by French delegate René Cassin subsequently streamlined. As the raw material for his first draft, Humphrey used numerous proposals and a collation of relevant articles drawn from various extant domestic constitutions. The process of writing the Declaration moved from the domestic level up to the international level and then – in the process of postwar international implementation – down again to the domestic contexts that Humphrey had initially drawn on. Drafters had very little difficulty voting to internationalize and universalize rights that they recognized from their own constitutions. Their challenge came when they were asked to vote on rights that crossed national borders, guaranteeing rights to asylum, movement between countries, cross-border information and an international order friendly to the idea of inherent human rights. The delegates saw that the implementation of these kinds of transnational rights required the diminution of their carefully guarded national sovereignties. The Declaration was born out of a genuine international give-and-take, with the usual political alliances, but with no single individual or delegation, or even group of delegations, as its main author. None of the disagreements I just mentioned can be construed as a case of “the West versus the rest.” Other than the numerical imbalance between different regions, there was nothing particularly Western about the drafting process. Moreover, the numerical imbalance did little to undercut the metaphysical and epistemic universalities of the Declaration.

I want to also briefly mention the nondiscrimination campaign waged by the communist delegations, which led to the acknowledgment of colonized subjects twice in the text of the document. The last clause of the operative paragraph states that the Declaration applies to all peoples, including “the peoples of the territories under the ... jurisdiction” of the Member States. This clause was included to extend the protections of the Declaration to colonized subjects. The second paragraph of Article 2 also protects colonial subjects by asserting that the rights enumerated in the Declaration make “no distinction ... on the basis of the political, jurisdictional, or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” In other words, persons have human rights regardless of the political arrangements under which they are born or now living. These two inclusions represent clear endorsements of the idea that human rights are inherent in the human person and not simply the result of international agreements.

The Eight Abstentions

The disagreements between Western delegations created ample room for non-Western contributions to the drafting process. With this point in mind, I want to examine the eight nations (South Africa, the USSR, the Ukrainian SSR, the Byelorussian SSR, Czechoslovakia, Yugoslavia, Poland and Saudi Arabia) that abstained in the final vote of 48 in favor and 0 opposed to the adoption of the Declaration, which was held on December 10, 1948.

The South African Abstention. In 1946, the Union of South Africa was asked by the UN General Assembly to

³⁶ *Ibid.*, Chapter 3, section 5.

³⁷ John P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry, NY, 1984).

bring its treatment of Indians “in conformity with ... the relevant [human rights] provisions of the Charter.”³⁸ South Africa was the first UN Member to be censured by the General Assembly because of its refusal to place the territory of South-West Africa under United Nations trusteeship. During the drafting of the Declaration, South African delegates took a conservative stance, one that would have been legitimate if it had not been tainted by South Africa’s racist regime. E. H. Louw, South Africa’s delegate to the Third Committee, argued that by “fundamental rights and freedoms” the UN Charter meant only those rights that were connected to human dignity and that were “indispensable for physical and mental existence as a human being.” He did not see “how that dignity would be impaired if a person were told that he could not live in a particular area.”³⁹ As he made this observation, his country was in the process of establishing its infamous system of apartheid with segregated “homelands” for black workers and their families. His government’s view was that “what the Charter envisages is the protection of that minimum of rights and freedoms which the conscience of the world feels to be essential, if life is not to be made intolerable at the whim of an unscrupulous government.”⁴⁰ The Declaration’s second recital also appeals to the “conscience of mankind,” but that appeal covers a great deal more than the short list of rights recommended by South Africa to “freedom of religion and speech, the liberty of the person and property and free access to courts of impartial justice.”⁴¹ The lack of integrity in the South African abstention does not relate to its defense of a short list of rights, but from the weak rationale behind that list. Human dignity is affected when a government discriminates against its people in its official housing policy. Louw revealed the racism of his country’s position when he argued that the right to freedom of movement in Article 13 “would destroy the whole basis of the multi-racial structure of the Union of South Africa and would certainly not be in the interest of the less advanced indigenous population.”⁴² In its written reaction to the draft Declaration, the South African government explained the need for these “homelands” as arising from the requirements of “good government” which involved preventing “the influx of large numbers of unskilled workers into urban areas” and requiring “individuals ... to work in specified industries.”⁴³ No other government had bothered to comment on the right to freedom of movement. Louw also argued that Article 21’s right to take part in the government of one’s own country “was not universal; it was conditioned not only by nationality and country, but also by the qualifications of franchise.”⁴⁴ These qualifications could, of course, be tinkered with, which the South African Constitution had done by openly stating that only a person of European descent could have a seat in the House of Assembly or the Senate.⁴⁵ Racism was woven into the South African constitution, which held that “the inability of convicts, aliens, and in some cases absentee voters” in homelands prevented all these groups from participating in elections. Nor could any person vote “who cannot comply with property and literacy or educational qualifications where such ... are in vogue.”⁴⁶ Like the Jim Crow laws in the United States, these measures in the South African constitution effectively barred the black population from participation in political culture. The right to freedom of association was similarly gutted when the Union gave its Minister of Justice the prerogative to “prohibit a public gathering if ... the gathering will engender feelings of hostility between European inhabitants of the

38 Morsink, 1999, Chapter 1, section 4.

39 UN Doc. GAOR, *Third Committee*, 39 (1948).

40 UN Doc. E/CN.4/82/Add.4/25.

41 UN Doc. GAOR, *Third Committee*, 40 (1948).

42 *Ibid.*, 39.

43 UN Doc. E/CN.4/82/Add.4/15 (1948).

44 UN Doc. GAOR, *Third Committee*, 39 (1948).

45 UN Doc. E/CN.4/82/Add.4/43 (1948).

46 *Ibid.*, 23.

Union on the one hand and any other section of the inhabitants of the Union on the other hand.”⁴⁷

The Six Communist Abstentions. The six communist delegations struggled with the idea of transcendent and inherent rights. According to Marxist doctrine, morality is an epiphenomenal reflection of whatever social group possesses the means of production in a given society. There can be no such things as *inherent* human rights that are not based on social or legal practices and procedures. This philosophical stance probably should have made the communist nations vote against the Declaration, but just as moral relativists can change their minds in the face of Nazi ovens, Bosnian woods, Cambodian killing fields, or Rwandan courtyards, delegates to international conferences can “overlook” or “forget” party doctrine and vote their individual or national conscience. This may have happened when the communist delegations forgot to abstain when the first recital, which contained the phrases “inherent dignity” and “inalienable rights,” was adopted unanimously in the Third Committee.⁴⁸ In the final General Assembly vote, the communist delegates could have “safely” voted against the Declaration instead of abstaining, for any opportunity to participate in the Marshall Plan for Europe had by that time passed.

For the communist delegations too, there was too much at stake beyond politics as usual. They were as eager as any other delegation to formally condemn what the Nazis had done. In spite of party doctrine, they were tempted by an international code of ethics that would openly and objectively condemn the Nazi atrocities. They insisted on the adoption of very strong anti-discrimination language in the document, attended all meetings and submitted (unsuccessful) amendments that would have prevented Nazi groups from gaining the rights of freedom of speech and association.⁴⁹ In short, the communists wanted to join the rest of the world in its formal condemnation of Nazi atrocities, from which they had suffered enormously.

Marxist ideology is probably incompatible with the idea of inherent human rights. However, the communist delegations cooperated from the start and remained with the project to the end because their desire to condemn the Nazis in the court of world opinion was stronger than their theoretical objections. Their cooperation fits the pattern of what Martha Nussbaum has described as “upheavals of thought,” which are caused by the independently operating intelligence of our emotions.⁵⁰ Jonathan Glover reports that in 1941, Himmler “watched a hundred people being shot at Minsk. He seemed nervous, and during every volley he looked to the ground. When two women did not die, he yelled to the police sergeant not to torture them.”⁵¹ Decades later, millions of communist hearts woke up to the transcendent truths of the Declaration during the revolutions of 1989, when they judged their regimes to fall short of the human rights norms that had for the first time been openly allowed behind the Iron Curtain with the signing of the Helsinki Agreements in 1975. Since then, all the post-communist states in Eastern Europe and in Eurasia have joined the United Nations and allowed themselves to be judged by the human rights standards of the Universal Declaration and its offspring. Many of these nations have enshrined human rights norms in their new constitutions.

The Saudi Arabian Abstention. In the late 1940s, there were ten Member Nations in the UN that had been significantly shaped by the religion of Islam: Afghanistan, Egypt, Iran, Iraq, Lebanon, Pakistan, Saudi Arabia, Syria, Turkey, and Yemen. Nine of these ten voted for the Declaration, while one, Saudi Arabia, abstained. Of these ten Arab delegations, only Egypt and Lebanon were members of the Commission that had drafted the text.

47 *Ibid.*, 19.

48 UN Doc. GAOR, *Third Committee*, 786 (1948).

49 Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, (Philadelphia, 1999), Chapter 3, section 1 and Chapter 2, section 4.

50 Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge, 2001), especially Chapter 8, “Compassion and Public Life.”

51 Jonathan Glover, *Humanity: A Moral History of the Twentieth Century* (New Haven, 2000): 345.

Procedurally, this is a very weak representation for the Islamic perspective, especially since the main Lebanese representative, Charles Malik, was a Christian and a Thomist. However, all ten of these Arab delegations had a chance to air their views in the fall of 1948 in what have come to be known as “the great debates” of the Third Committee. The Saudi delegation took the lead in making Islamic objections. These objections focused on the texts of Article 14 (on asylum), Article 16 (on marriage) and Article 18 (on the right to change one’s religion). On the question of asylum, the Saudi delegation led a successful effort to have the right to *be granted* asylum deleted from the text, so that Article 14 now refers to the human right to seek asylum and enjoy it once it has been granted. This unfortunate success was followed by two setbacks that involved the secular character of the document, which ultimately led to the Saudi abstention.

The Arab delegations split between the desire to see Shari’a law prevail over international human rights norms and the desire to accommodate both systems. This conflict has still not been resolved, although in the late 1940s, nine of the ten votes favored accommodation, while today that tally might go in the other direction. At first, Jarim Baroody, the Lebanese-born Saudi delegate, “called attention to the fact that the Declaration was based largely on Western patterns of culture which were frequently at variance with patterns of culture of Eastern States. That did not mean, however, that the declaration went counter to the latter, even if it did not conform to them.”⁵² This possibility left the door open for Saudi support of the document. However, the debates drew out the further implications of the Declaration, which led to the Saudi abstention.

The Pakistani delegate, Shaista S. Ikramullah, articulated the more liberal Islamic position for the other nine Arab delegations. According to the record of the Third Committee debate, Ikramullah explained that “her delegation fully supported the adoption of the declaration because it believed in the dignity and worth of man. It was imperative that the peoples of the world should recognize the existence of a code of civilized behavior which would apply not only in international relations but also in domestic affairs. It was her hope that the declaration would mark a turning point in history of no less importance than the works of Tom Paine and the American Declaration of Independence.”⁵³ The affirmative vote of nine out of ten Arab delegations confirms our thesis that the Declaration was adopted by a remarkable consensus among delegations from a wide variety of cultural, religious and economic traditions. The active Arab-Muslim support for international agreement on human rights continued at least through the 1960s and 1970s when the two International Covenants were written and adopted by the United Nations membership.⁵⁴ The Islamic fundamentalist challenge of today did not rear its head until long after the international bill was on its way to universal acceptance.

Conclusion

Our media floods us with images of massacres and incredible suffering from around the world on a regular basis. These images draw on an ever-expanding range of our moral sentiments, which in turn has helped make the human rights movement into the mass movement it has become. This movement is sustained by millions of people whose moral outrage leads them to political engagement on the full range of rights enumerated in the Declaration. Television images of girls lured into prostitution or young boys sold to neighbors affect our conscience and remind us of the human right not to be held “in slavery or servitude” (Article 4). Other images remind us that we have a “right to a nationality” (Article 15) or of our “right to peaceful assembly and association” (Article 16). Images of the devastating effects of global warming can raise our awareness of the human

52 UN Doc. GAOR, *Third Committee*, 49 (1948).

53 *Ibid.* 37.

54 Susan Waltz, “Universal Human Rights: The Contribution of Muslim States,” in *Human Rights Quarterly* 26 (2004): 799-844.

right “to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized” (Article 28). These images and others bombard our consciences; they can make us activists in a movement that takes the Universal Declaration as its moral and increasingly legal anchor.

Fifty years after the adoption of the Universal Declaration, the 1998 Rome Statute of the International Criminal Court confirmed that in creating the long-awaited Court, the States Parties were “mindful that during this century, millions of children, women and men have been victims of unimaginable atrocities that deeply shocked the conscience of humanity.” In a similar vein, by using the phrases “the conscience of mankind” and “the conscience of humanity,” the drafters of the Universal Declaration generalized their personal abhorrence of barbarous acts to the rest of humanity. These phrases express the moral epistemology of human rights, according to which basic human rights are discovered in the obvious injustices that we encounter in our experiences. The human rights abuses on the minds of the 1948 drafters occurred during the Holocaust, while today we can point not only to the Nazi atrocities, but to atrocities in Bosnia, Cambodia, Rwanda, Darfur and in other contexts. The experience of the most barbarous oppression, injustice, and violence forged a consensus among the Declaration’s drafters on a list of human rights that belong to every human as their moral birthright. The different ideological positions of the delegates and the eight abstentions in the final vote do not negate or undercut the thesis that ordinary people across national and cultural boundaries have the capacity to recognize these moral birthrights. The Universal Declaration has universal legitimacy because it taps that rich vein of moral common sense that exists – unless blocked by a corrupt and abusive state or organization – in the lives of ordinary people everywhere. Because they had all encountered the brutality of the Holocaust, no delegation voted against the Declaration. The human rights abuses of the Nazis had been so egregious that none of the delegates doubted the rights they were enumerating.

The drafters of the Universal Declaration borrowed the wording of the Preamble to the United Nations Charter to “reaffirm [their] faith in fundamental human rights” and “in the dignity and worth of the human person.” The 30 articles of the Declaration are the authoritative interpretation of the seven human rights references in the UN Charter. The United Nations Charter is not usually thought of as an ethnocentric document. Neither should we read a Western bias into the Universal Declaration. Immediately following the Second World War, a remarkable human rights consensus emerged from the discovery of the moral abuses that had occurred in the concentration camps. It is difficult for us, even 60 years later, to improve on the list that came out of this abomination.

Rainer Huhle

“JEWISH RIGHTS ARE HUMAN RIGHTS”: JEWISH CONTRIBUTIONS AND CONTROVERSIES IN THE INTERNATIONAL ESTABLISHMENT OF HUMAN RIGHTS AFTER 1945

During the Second World War, the ideal of human rights was often advanced as the basis of the global struggle against fascism. Nonetheless, human rights initially played only a marginal role in the vision of the great powers for the postwar world order, at least in the eyes of most observers of the United Nations Conference on International Organization convened on April 25, 1945 in San Francisco. The United States, the Soviet Union, Great Britain and ultimately China had drawn up the draft of the United Nations charter in Washington in the fall of 1944. And indeed, that document made only a single, incidental reference to human rights, in Chapter 9, which addressed issues of international economic and social cooperation.¹

For the overwhelming majority of observers and participants at the conference, this reference to human rights was decidedly too modest. Only a few weeks before the San Francisco conference, the Latin American representatives had met at Chapultepec Castle in Mexico for the Inter-American Conference on Problems of War and Peace and agreed to press for more substantive human rights protections in the forthcoming United Nations charter.² The majority of other states represented at San Francisco – including states as diverse as Egypt, Lebanon, the Philippines, and New Zealand – made similar demands.

Jewish Positions at the Founding of the United Nations

Many non-governmental organizations joined the international community in demanding that the charter of the new world organization contain strong protections for human rights. US non-governmental organizations enjoyed particularly strong influence, in large part because the United States was the driving force behind the creation of the United Nations, and because the US delegation had adopted a policy of deliberate openness to input from non-governmental organizations that held official consultancy status.³

Some of the most active non-governmental organizations that influenced the deliberations in San Francisco

1 Chapter 9 of the draft stated: “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, the Organization should facilitate solutions of international economic, social and other humanitarian problems and ‘promote respect for human rights and fundamental freedoms.” These diplomatic meetings in Washington D.C. were officially known as the Washington Conversations on International Organization, Dumbarton Oaks. For further information, see Robert C. Hilderbrand, *Dumbarton Oaks: The Origins of the United Nations and the Search for Postwar Security* (Chapel Hill and London, 1990).

2 The Inter-American Conference on Problems of War and Peace met from Feb. 21 to March 8, 1945.

3 US Department of State, *Charter of the United Nations: Report to the President on the Results of the San Francisco Conference By the Chairman of the United States Delegation, The Secretary of State* (Washington, D.C., 1945): 27ff. 42 non-governmental organizations held official consultancy status to the US delegation; see also 262-266 for the full list of non-governmental advisors who were admitted as consultants. Many representatives from the non-governmental organizations later affirmed their strong cooperation with the US delegation.

were several Jewish organizations that in part had drawn up plans for the international protection of human rights years earlier. Some of the leading representatives of these organizations also held other important positions that enabled them to exert influence on the proceedings. However, their role was limited to the “old methods of unofficial influence,” as Hannah Arendt noted with some bitterness. Arendt contended that the “Jewish people” by right deserved equal status “among the 44 nations” with full standing to “take part in the organization of the victory and peace.”⁴ Whether or not Arendt believed this option was realistic, she was one of the few to articulate it.

One of the central advisors in the US delegation was Joseph Meyer Proskauer. Alongside his partnership at a leading law firm, Proskauer also held a number of official positions, including a judgeship at the New York State Court of Appeals. From 1943 to 1949, Proskauer was president of the American Jewish Committee (AJC), which was founded in 1906 after a series of pogroms aimed at Russian Jews. In its charter, the AJC stated that it aimed “to prevent the infringement of the civil and religious rights of Jews, in any part of the world” and to oppose all forms of discrimination against Jews.⁵ With its universalist conception of Jewish rights that strove for the full integration of Jews in all nations, the AJC came into conflict with Zionist tendencies among Jews inside and outside the United States. In 1944, in his annual address to the AJC, Proskauer defined the persecution of Jews as a problem for all humanity: “After eleven years of Hitlerism it has been demonstrated to the whole world that the infringement of the rights of Jews is inevitably an attack on the rights of all mankind and on the very foundations of human decency and progress.”⁶ Proskauer later described this step as the recognition that the protection of Jews “could be best achieved if it was made part of the far greater and more fundamental protection of the rights of *all* human beings.”⁷

In light of these views, it is not surprising that Proskauer and the American Jewish Committee placed a great deal of hope early on in the potential of the United Nations. The AJC allied itself with other American civic organizations that advocated international engagement for the United States and above all the creation of a new world organization, including the Commission to Study the Organization of Peace, the Carnegie Foundation for International Peace, and former activists in the League of Nations. Long before the meeting in San Francisco, these groups became convinced that human rights would have to form the basis of this new world organization. Several months before the conference convened, Proskauer wrote a draft declaration of human rights for the AJC, which was published on December 15, 1944, the 153rd anniversary of the US human rights declaration of 1776.⁸ The draft declaration was signed by 1,326 public figures in the United States, with President Roosevelt writing a letter of support.⁹

In contrast to the 1948 Universal Declaration of Human Rights, the first sentence of the AJC declaration referenced the “inevitable end of Hitler” and called for reparations and assistance to the victims of National Socialism. The events of the war had proven the need for a new postwar order anchored in principles of human rights. The AJC declaration also stressed the new and still controversial notion that the principle of international human rights could limit national sovereignty. It thus concluded that attacks by a “barbaric nation”

4 Hannah Arendt, “Die jüdischen Chancen: Geringe Aussichten – gespaltene Vertretung,” in *Aufbau* (April 20, 1945), reprinted in *Vor Antisemitismus ist man nur noch auf dem Monde sicher: Beiträge für die deutsch-jüdische Emigrantenzeitung 'Aufbau' 1941-1945*, ed. Marie Luise Knott (Munich, 2004): 181.

5 Marianne Sanua, *Let Us Prove Strong: The History of the American Jewish Committee 1946-2006* (Lebanon, NH, 2007): 6.

6 Proskauer was a partner at Proskauer, Rose & Paskus. See Joseph M. Proskauer, *A Segment of My Times* (New York, 1950): 209.

7 Proskauer, 216, emphasis in original.

8 Oscar I. Janowsky, “The Human Rights Issue at the San Francisco Conference: Was it a Victory?” in *The Menorah Journal* 34:1 (Spring 1946): 32.

9 American Jewish Committee, *A World Charter for Human Rights: The Story of the Consultants to the United Nations Conference on International Organization and their Historic Achievement – The Inclusion of Human Rights Provisions in the Charter of the New World Organization* (New York, 1948). The full text of the declaration is reprinted in Proskauer, 217ff.

carried out on fundamental human rights were a legitimate matter of international concern.

The AJC declaration was part of a comprehensive civic initiative designed to influence the UN conference. Joseph Meyer Proskauer and Jacob Blaustein had been named official representatives of the AJC and consultants to the US government delegation. As many contemporary observers later confirmed, Proskauer soon became the informal spokesperson of the 42 consultant NGOs. At a session described by participants as dramatic, together with Frederick Nolde, who represented the American Protestant churches, Proskauer convinced the chairman of the US delegation, Secretary of State Edward Stettinius, to include human rights principles in the UN charter.¹⁰ In any case, however, the United States was already more receptive to human rights issues than the other great powers that had convened the conference, although it had not stressed the issue with the Soviet Union and Great Britain.

However, the American Jewish Committee was not the only Jewish organization that attempted to exert influence on the new United Nations charter. As Hannah Arendt noted shortly before the start of the conference, “Rather than a single representative of the Jewish people, there will be two delegates from American Jewish organizations in San Francisco,” adding pointedly that, “in contravention of all laws of arithmetic, in this case *two Jewish advisors are fewer than one.*”¹¹

In any event, the Jewish presence in San Francisco was large and diverse, which frustrated the organizations that believed they were the official representatives of the Jewish community.¹² Like the American Jewish Committee, the American Jewish Conference held official consultancy status to the US delegation. The American Jewish Conference had been founded as an umbrella organization in 1943 in order to shape the postwar order and support the creation of a Jewish state in Palestine. At its peak, the American Jewish Conference represented 64 American Jewish organizations, initially including the American Jewish Committee. By the time of the UN conference, however, the American Jewish Committee had left the American Jewish Conference, and took a different position on the Palestine question than most of the organizations represented by the American Jewish Conference in San Francisco.¹³

Like the American Jewish Committee, the representatives of the American Jewish Conference also sought to represent Jews worldwide at the conference. As part of this endeavor, the Conference established a Joint Committee together with the World Jewish Congress and the Board of Deputies of British Jews.¹⁴ In addition, this Joint Committee regarded itself as the representative of the Jewish Agency for Palestine.

The American Jewish Conference also lobbied the US delegation in favor of strong human rights protections in the new UN charter. On April 25, the opening day of the San Francisco conference, the three organizations of the Joint Committee distributed a comprehensive “Memorandum on Human Rights and Fundamental

10 Frederick Nolde was the director of the Churches’ Commission on International Affairs (CCIA) and the representative of the Federal Council of Churches of Christ in America.

11 Arendt 2004, 182, emphasis in original.

12 At the end of the conference, I. L. Kenen, Executive Secretary of the American Jewish Conference, noted rather pointedly: “...there were many other Jewish groups in San Francisco, and the multiplicity of statements and press conferences and public appearances of others who sought to speak in the name of Jewish interests served to confuse both the delegates and the public”; see I. L. Kenen, “The Jewish Position at San Francisco,” in *The Jewish Position at the United Nations Conference on International Organization: A Report to the Delegates of the American Jewish Conference*, ed. American Jewish Congress (New York, 1945): 34. In the following years, the competition among Jewish organizations was also evident in their race to obtain recognition as non-governmental organizations with consultative status at the United Nations. Initially, the World Jewish Congress applied to be considered the representative of all Jewish organizations, but the United Nations also granted consultative status to additional Jewish organizations; see Michael Galchinsky, *Jews and Human Rights: Dancing at Three Weddings* (Lanham, 2008): 35. Nehemiah Robinson provides a comprehensive description of the policies of the World Jewish Congress with respect to the United Nations; see Nehemiah Robinson, *The United Nations and the World Jewish Congress* (New York, 1956). Robinson’s appendix also includes a list of the written statements submitted to the United Nations by the WJC until 1955.

13 Proskauer provides an extensive description of this conflict from the Committee’s point of view; Proskauer, 198ff.

14 In the “Memorandum on Human Rights and Fundamental Freedoms,” the Joint Committee claimed to “represent the great majority of the organized Jews of the world.” See American Jewish Congress, *The Jewish Position at the United Nations Conference on International Organization: A Report to the Delegates of the American Jewish Conference* (New York, 1945): 61.

Freedoms” to the assembled delegates that detailed why the protection of human rights was an indispensable guarantee of Jewish rights. According to the memorandum, the abolition of fundamental freedoms in Germany, not the invasion of Poland, marked the true beginning of the Second World War. The memo argued that this combination of domestic human rights violations and external aggression would prove fateful for Jews. As a minority wherever they lived, the Jewish people had a special interest in the international protection of human rights and fundamental freedoms, since only this protection could ensure that they would share the same rights as their fellow citizens.¹⁵ The authors concluded that the 1944 Proposals of Dumbarton Oaks, which was the document that set the agenda for the San Francisco conference, was vague, contradictory, and unsatisfactory regarding human rights.¹⁶ They were joined in this assessment by many of the other official delegations at the conference, which nevertheless generally expressed their criticism in a more diplomatic fashion. The memorandum suggested a number of amendments to the Dumbarton Oaks proposals and concluded with an enumeration of concrete demands for the protection of human rights, including the demand that the new charter establish a Commission on Human Rights and Fundamental Freedoms.¹⁷ When it seemed that the issue of human rights would nonetheless remain sidelined, the Jewish and non-Jewish American non-governmental organizations wrote a pointed letter to Stettinius, arguing that, “It would come as grievous shock if the constitutional framework of the Organization would fail to make adequate provision for the ultimate achievement of human rights and fundamental freedoms.” The appeal to Stettinius ultimately succeeded in bringing the issue of human rights to the forefront of the agenda in San Francisco.¹⁸

In addition to their human rights lobbying, the American Jewish Conference and Joint Committee representatives were also active on a number of other issues. Unlike the American Jewish Committee, the American Jewish Conference was deeply involved in the question of Palestine, which was another controversial issue at San Francisco. The Conference lobbied to preserve the status quo of Palestine within the new United Nations trusteeship system in order to facilitate Jewish immigration to Palestine. It focused strongly on the specifically Jewish concerns and did not consider the human rights concerns raised by delegates from other affected territories under UN trusteeship, as these concerns were not adequately addressed in the UN charter.¹⁹

Even after the San Francisco conference, many Jewish organizations and journalists continued to monitor the issue of human rights. In May 1946, the Institute of Jewish Affairs of the American Jewish Congress and the World Jewish Congress published a comprehensive legal study by its director, the Lithuanian jurist Jacob Robinson. The study focused on the human rights provisions in the UN charter. Robinson agreed that the UN had deliberately established constraints to its own responsibility in the area of human rights. However, he nonetheless argued that the charter represented a major advance because for the first time, a “powerful international organization” would shape the discourse on human rights instead of simple public opinion. For the first time, the impregnable fortress of national sovereignty had also been breached. But Robinson concluded on a note of sober realism, predicting that the willingness of the member states of the UN would be decisive in determining whether the UN as a whole could protect human rights.²⁰

Another prominent Jewish scholar, Oscar Janowsky from New York City College, also offered a frank assess-

¹⁵ *Ibid.*, 65.

¹⁶ *Ibid.*, 67.

¹⁷ *Ibid.*, 74.

¹⁸ Reprinted in American Jewish Committee, 77f. and in Proskauer, 221-224. This initiative appears to have been one of the few joint efforts of the two Jewish organizations.

¹⁹ See the corresponding documents in American Jewish Committee, 86-121.

²⁰ Jacob Robinson, *Human Rights and Fundamental Freedoms in the Charter of the United Nations: A Commentary* (New York, 1946): 104f.

ment of the treatment of human rights at the San Francisco conference.²¹ Janowsky's conclusions were even more sobering than Robinson's. According to Janowsky, the mood at San Francisco had never been favorable to human rights. Instead, the great powers engaged in political “new realism,” in which peace would be secured in the postwar order only through their own strength, and if necessary, by force. Only the intervention of the American non-governmental organizations and the Jewish representatives persuaded Stettinius and the remaining US delegation to include the issue of human rights in the new charter. However, Janowsky warned, there was little cause for celebration, as the human rights provisions in the charter were entirely unbinding and unenforceable. In the charter, the principle of non-intervention prevailed, which meant that the United Nation's commitment to human rights was “without even the remotest implication of supervision or enforcement.”²² In a lengthy aside, Janowsky argued that even the often-criticized efforts by the League of Nations to protect minorities were preferable to the vague promises in the UN charter, as the League's provisions had proven enforceable in several cases. The attempt to “universalize” human rights protections in the UN charter thus represented a “catastrophic retreat,” Janowsky continued, noting, “International supervision and enforcement have been abandoned: the protection of human rights has been emphatically, and perhaps irretrievably, riveted in the domain of domestic jurisdiction.”²³ According to Janowsky, the human rights advocates in San Francisco let themselves be deceived by empty promises and failed to learn the most important lesson in the history of human rights: that only clear, legally binding regulations that applied to all states, no matter how powerful, could guarantee the protection of human rights.

In Janowsky's rather skeptical judgment, the human rights commission envisioned under Article 68 of the Charter was a modest achievement at best. For one, the strict guidelines of the charter placed severe limits on the future commission's authority. Janowsky hoped the commission would issue a Bill of Rights, but the UN charter was silent on this topic. Any such Bill of Rights, should it one day come, would be entirely at the discretion of the world powers.

Janowsky's skeptical assessment also informed his mistrust of the US government's commitment to human rights, which he felt more acutely than representatives of the American Jewish Committee in particular, who had close ties to the political establishment. “It should be noted, however,” Janowsky continued, “that even the United States Government does not contemplate the international guarantee and enforcement of human rights.”²⁴ Indeed, Stettinius had noted in a report to President Truman that the purpose of any future “international bill of rights” would be to provide a model for the national constitutions of the member states.²⁵ However, as Janowsky concluded, the fate of the Weimar constitution demonstrated that national protections lacking any mechanism for international enforcement held only limited value for the preservation of human rights.

Janowsky's analysis was published in the *Menorah Journal*, one of the most important Jewish forums in the United States, and also reflected some of the differences that divided the Jewish community. For example, Janowsky was sharply critical of the American Jewish Committee, which had articulated clear standards on human rights as well as the need for mechanisms of enforcement. However, Janowsky continued, when these

21 Oscar Janowsky taught at New York City College. He was named a special advisor to the League of Nations High Commissioner for Refugees in 1935. See Harry Schneiderman and Itzhak J. Carmin, eds., *Who's Who in World Jewry* (New York, 1955). See also Janowsky, 29-55.

22 *Ibid.*, 40.

23 See also Janowsky, 51.

24 *Ibid.*, 42.

25 US Department of State 1945, 118f. It should be kept in mind, however, that both at San Francisco and thereafter, the US delegation had to walk a political tightrope in order to enact the internationalist ideals of the charter despite what remained strong isolationist interests in the US Congress. Indeed, Roosevelt, Stettinius and Truman were all keenly aware of the failure of Wilsonian internationalism after the First World War.

enforcement mechanisms were not enacted at San Francisco, AJC President Proskauer and his fellow advocates converted their defeat into a rhetorical victory and contented themselves with pious hopes instead of facts. Janowsky pointedly rejected Proskauer's "carelessly" formulated declaration of victory, which confused hopes with legal and political realities.²⁶

However, Janowsky's criticisms of Proskauer were more concerned with matters of strategy than goals: "We are not inveighing against what was achieved at San Francisco but against what was asked for. Our point is that one does not abandon even an insecure position ... before the battle has been joined; and if retreat is inevitable, one does not retire to 'noble sentiments'." In Janowsky's view, replacing the partial guarantees for minority rights enacted by the League of Nations in favor of a universal but less enforceable principal of human rights constituted a grave strategic mistake: "The gains of a century have indeed been lost."²⁷ Although Janowsky made no direct reference to the Palestine question, his desire to preserve the protections granted to minorities under the League of Nations, most likely motivated by his own life experiences, was largely based in Jewish particularity and aimed to secure the rights Jews had already achieved or could soon achieve. From this perspective, the American Jewish Committee's celebration of a new and universal conception of human rights that would guarantee human rights for Jews seemed like pure utopian fantasy. Ultimately, however, even Janowsky called on human rights advocates to make the best of their slim gains, which above all meant establishing the human rights commission as the focus for future work on international human rights.

The history of the following decade supported aspects of both the particularist and universalist positions. After heated debate, the United Nations agreed in 1947 to allow the establishment of a Jewish state in Palestine. One year later, with the Universal Declaration of Human Rights and the ratification of the Convention on Genocide, it took the first steps towards the creation of a Bill of Human Rights.

Jewish Contributions to the General Declaration on Human Rights

The UN Conference on International Organization was convened by the states that had opposed the Axis countries in the Second World War. The states that had allied themselves with the Axis powers or remained neutral were deliberately excluded from San Francisco. Representatives from civil society and non-governmental organizations had only indirect influence on the negotiations for the new UN charter. Nevertheless, the US delegation encouraged the participation of non-governmental organizations as an "innovation in the conduct of international affairs" that would help persuade the American public of the usefulness of US engagement in the United Nations.²⁸ As already mentioned, international Jewish organizations also used this conduit. Prompted in part by lobbying from the American non-governmental organizations, the UN charter also enacted an influential shift in the role of non-governmental advisors in Article 71, which granted the Economic and Social Council the authority to consult with non-governmental organizations. This provision later gave rise to the current tiered accreditations of NGOs with consultative status at the United Nations.

When the Universal Declaration of Human Rights was debated in 1948, the 41 NGOs that had official consultative status could thus participate to some extent in the official deliberations, and in the human rights commission. In addition, the NGOs were still able to take advantage of informal means of influence and collaboration.²⁹ This allowed international Jewish organizations to successfully influence negotiations on hu-

²⁶ Janowsky, 41.

²⁷ *Ibid.*, 55.

²⁸ Quote by Stettinius, cited in Dorothy Robins, *Experiment in Democracy: The Story of U.S. Citizen Organizations in Forging the Charter of the United Nations* (New York, 1971): 103.

²⁹ William Korey, *NGOs and the Universal Declaration of Human Rights* (New York, 1998): 2.

man rights protection.

In late March 1947, the Consultative Council of Jewish Organizations was granted consultancy status at the Economic and Social Council.³⁰ Comprised of the American Jewish Committee, the Alliance Israélite Universelle and the Anglo-Jewish Association, the Consultative Council was not the sole Jewish voice at the United Nations. Other accredited consultancy organizations (under Category B) included the Jewish World Congress, the religiously orthodox Agudas Israel World Organization and the Coordinating Board of Jewish Organizations for Coordination with the Economic and Social Council of the United Nations, which also included B'nai B'rith.³¹

From March 1948 on, Isaac Lewin served as Agudas representative at the Economic and Social Council, where he advocated the human rights positions of his organization before the human rights commission and other UN committees. Lewin was only able to influence the final phase of negotiations over the Universal Declaration of Human Rights, and many of his contributions followed the enactment of the Declaration, when the human rights commission tried to draft a legally binding human rights package. This package was finally enacted two decades later, divided into a political pact and a social pact. Lewin's main focus was on fairly narrow and specialized issues of religious freedom. For example, in the human rights package debate before the Commission on Human Rights, Lewin argued that orphaned children should have the right to be raised in the religion of their deceased parents.³² Lewin also approached the Subcommission on Prevention of Discrimination and Protection of Minorities to argue that kosher butchering practices were another key element of religious freedom.³³

However, Lewin also made important contributions that clarified and extended key human rights issues. For example, in the debate about the prohibition on torture in the human rights pact negotiations of May 1949, Lewin criticized the US proposal that only prohibited state-ordered torture. Lewin pointed out that many of the crimes committed under National Socialist rule had actually been carried out by party organizations, in collusion with the state. Moreover, Lewin emphasized that the Nazi state was responsible for many atrocities and violations of human dignity that did not meet a narrow definition of torture. For this reason, Lewin proposed a broader definition that encompassed all forms of torture and ill-treatment that violated human dignity, whether carried out or only condoned by the state.³⁴

One of Lewin's first contributions addressed the issue of freedom of religion under Article 18 of the Universal Declaration, which was drafted by the Commission on Human Rights in June 1948. The original draft had included only freedom of thought and conscience, although it was assumed that this would also include the freedom to profess and practice a religion. However, the Soviet delegate argued that national law should take precedence over the practice of religion. As a result, France, Lebanon, Great Britain and Uruguay proposed a new draft that expressly included freedom of religion, which was subsequently enacted in the final version.³⁵ Lewin also supported the revision because it explicitly stated that freedom of thought and conscience also included freedom of religion:

“Everyone has the right to freedom of religion, conscience and belief, has the right, either alone or in community with other persons, in public or in private, to hold, change or manifest any belief and has the right to

30 American Jewish Committee, *Annual Report* (New York, 1948/49).

31 United Nations, *Yearbook of the United Nations 1947-48* (Lake Success, New York, 1949): 694.

32 E/CN.4/SR.116, reprinted in Isaac Lewin, *Religious Jewry and the United Nations: Addresses before the United Nations* (New York, 1953): 51ff. and 69ff.

33 Lewin, 44.

34 E/CN.4/SR.91, reprinted in Lewin, 66ff.

35 Gudmundur Alfredsson and Asbjorn Eide, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Den Haag, 1999): 38f.

practice any form of religious worship and to teach and practice any form of observance.”³⁶

Although Lewin replaced the concept of freedom of thought with freedom of religion, this move likely reflected his own belief that freedom of religion was the overarching and universal value, rather than a rejection of freedom of thought per se. However, another Jewish participant, the French delegate René Cassin, ensured that the final draft explicitly included the concept of freedom of thought.

As the official French delegate to the Commission on Human Rights, René Cassin played an important role in conceptualizing the Declaration, elaborating its individual rights, and publicizing and explaining the final document. Cassin’s status as an official representative of the French government often lent decisive weight to his proposals. However, he also held several key offices in Jewish organizations, including the Alliance Israélite Universelle, where he served as president from 1943 to 1969. In this capacity, Cassin also served on the governing board of the Consultative Council of Jewish Organizations, which was one of the Jewish non-governmental organizations that lobbied the Commission on Human Rights where Cassin served in his official capacity as a French diplomat.

As his political biography demonstrates, Cassin was first and foremost a fervent French patriot who offered his services to the exile government of General de Gaulle at the start of the war. As a member of the Commission on Human Rights, Cassin repeatedly emphasized the glorious French tradition of human rights. He described his Judaism in more modest terms, once describing himself in a radio address to the “Israelites of France” as a man who was not “a faithful adherent of your rituals.”³⁷ Twenty years later, in an anthology honoring the renowned Israeli jurist Haim Cohen, Cassin implicitly confirmed his stance, arguing that there was no direct line “from the Ten Commandments to the Rights of Man.”³⁸ In this sense, Cassin’s work on behalf of Jewish interests was always subsumed within his larger commitment to the defense of human rights. Cassin also wrote the foreword to the volume of documentation on the persecution of French and West European Jews submitted by the French prosecution at the International Military Tribunal in Nuremberg. At the end of the foreword, Cassin concluded with a programmatic sentence, “The Jews, who had the sad privilege of becoming the object of an attempt to extinguish almost six million souls, feel the utmost solidarity with all other victims and all feeling persons who, regardless of nationality, have even martyred themselves to victoriously resist the power of evil.”³⁹

In addition to his references to the glories of the French tradition, Cassin’s appeals to the Commission on Human Rights also made frequent reference to the crimes of National Socialism. One of Cassin’s most significant proposals, which derived from his confrontation with the inhuman principles of National Socialism, posited a collective right to rebel against oppression and tyranny. This proposal was incorporated only indirectly into the final version of the charter’s preamble. Cassin’s proposal to ban fascist propaganda, which he wanted to include in the article granting the right to the freedom of opinion, was also not adopted in the final version of 1948. Cassin also called for the preamble of the charter to enumerate the crimes of National Socialism. Although several early drafts of the charter, including the 1944 American Jewish Committee draft, had opened in this manner, this proposal also failed to win approval in the final charter.

³⁶ Lewin, 62.

³⁷ In his BBC address to the “Israelites of France,” this was phrased as “fidèle attaché à vos rites”; see René Cassin, *Les hommes partis de rien: Le réveil de la France abattue, 1940-1941* (Paris, 1975): 480f.

³⁸ René Cassin, “From the Ten Commandments to the Rights of Man,” in *Of Law and Man: Essays in Honor of Haim Cohn*, ed. Schlomo Shoham (New York, 1971): 13-25.

³⁹ René Cassin, “Préface,” in *La persécution des juifs en France et dans les autres pays de l’ouest, présentée par la France à Nuremberg*, ed. Henri Monneray (Paris, 1947): 20.

Towards the Implementation of Human Rights

Cassin repeatedly emphasized that the Universal Declaration was only the first of three indispensable steps. Implementing human rights would also require an internationally binding human rights convention and concrete instruments for implementation. These instruments for implementation would include provisions for human rights education, the creation of international human rights courts as well as the establishment of a right to petition that would grant individuals and associations the right to appeal to international authorities, including the United Nations. However, the Commission on Human Rights quickly declared on pragmatic grounds that it would not hear petitions. Conservatives also opposed the full right to petition on the grounds that the UN should only consider petitions from the state, and not private individuals.⁴⁰ However, Cassin argued that it was “morally impossible to declare petitions a priori inadmissible unless they are sponsored by a state.”⁴¹ To address the pragmatic objection of the Commission, Cassin proposed the establishment of a tiered administrative body to ensure that the Commission would not be flooded by petitions.

The right to petition was also the topic of a memorandum submitted by the Consultative Council of Jewish Organizations to the Commission on Human Rights in its fourth session in 1949. In the memo, the Consultative Council offered comprehensive suggestions for an “international machinery of implementation of human rights.”⁴² The suggestions included a detailed proposal on the right to petition, elaborated organizational changes in the Commission on Human Rights that would facilitate petitions, and finally, envisioned a path to the establishment of international legal jurisdiction over human rights issues. Like many of its contemporary proposals, the Consultative Council proposal argued that the International Court of Justice, which had already been established by the UN charter, should assume temporary jurisdiction until the creation of a court of human rights, which many still hoped would become a reality.

The memorandum opened with a renewed and emphatic avowal of the commitment to human rights, clearly borrowing from Cassin in both tone and spirit:

Human Rights are the common denominator of modern civilization. ... From the point of view of both politics and ethics ... it is not only warranted but imperative that the international community should consider itself in duty bound to be the guardian of the human rights of the individuals of whom, in the last analysis, this community consists.⁴³

The Consultative Council drew a number of conclusions from this conception of the individual as the ultimate bearer of human rights. First, there would have to be an individual right to petition that would grant private individuals the right to make human rights complaints. This Council’s interpretation of the protection of minority rights under the League of Nations bolstered this point. Next, the system of human rights protection would require an essentially “non-political character.” The Consultative Council was realistic enough to acknowledge that human rights enforcement by the United Nations would never be entirely free of political influence, but the Council argued that “politics must be eliminated both in the construction of the machinery of implementation and in setting that machinery in motion.”⁴⁴ The Consultative Council believed that this goal could be best achieved by the creation of a court of human rights and the development of an elaborate

40 This conservative objection was advanced by Great Britain, China and the USA.

41 Cited in Consultative Council of Jewish Organizations, *Implementation of an International Covenant of Human Rights: A Memorandum Submitted to the Commission on Human Rights, Fourth Session* (New York, [1949]): 4. The Consultative Council was an accredited association of Jewish organizations at the United Nations.

42 *Ibid.*, 1.

43 *Ibid.*

44 *Ibid.*

but pragmatic petitions process at the Commission on Human Rights. These expansive suggestions for an international petition process were never realized. The procedure established in 1976 to submit complaints before the Committee of the International Pact on Civil and Political Rights applies only to states that signed the optional protocol to the pact. It was a modest remnant of the originally far-ranging proposals for an international petitions process.

The Convention on the Prevention and Punishment of the Crime of Genocide

The third and final step in human rights protection was the step of implementation. Here again the focus was on establishing international courts of human rights, a process that would ultimately take many years. The proposals of Jewish organizations also contained this legal perspective on the protection of human rights. However, in the immediate postwar years, there were only two successful legal implementations: the International Military Tribunal of Nuremberg and the Convention on the Prevention and Punishment of the Crime of Genocide.

The Nuremberg Trials were convened at the behest of the United States, the Soviet Union, Great Britain and France, and were not formally part of the UN process of human rights implementation. However, the Allies claimed to be “acting in the interests of all the United Nations,” and the treaty that established the International Military Tribunal was made available for signature by all the member states of the United Nations.⁴⁵ Nineteen UN member nations signed the agreement, which formally placed the Nuremberg Trials under the aegis of the United Nations even though only the Allies had actual power over the proceedings.⁴⁶ The Nuremberg Trials were also conceived as part of an overall international effort to come to terms with the crimes of National Socialism. But as ad-hoc trials of a specific group of perpetrators, they could establish no precedent for any future international jurisdiction over human rights cases. In 1946, the General Assembly declared that the Nuremberg Principles were one of the basic tenets of international law, but these principles could not be implemented without an international criminal court. After the UN Commission on Human Rights proclaimed the Nuremberg Principles in 1950, the World Jewish Congress soon adopted the principles as the standard for international jurisprudence.⁴⁷

Another remarkable aspect of the Nuremberg Trials is the comparatively minor role that the “Jewish factor” and the Holocaust played in the proceedings.⁴⁸ Although Edgar Faure, the French Deputy Chief Prosecutor at the International Military Tribunal, would later write in his memoirs that the persecution of the Jews was “the most enduring and without a doubt the most important aspect” of National Socialist criminality, this factor assumed at best a secondary role in the proceedings.⁴⁹ As the historian Donald Bloxham notes, “The overall effect was that crimes against Jews were subsumed within the general Nazi policies of repression and persecution.”⁵⁰

Another advisor to the US prosecution at Nuremberg was Raphael Lemkin, who introduced the term genocide

45 Agreement of August 8, 1945, reprinted in Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials London 1945* (Washington, 1949): 420.

46 The 19 states were Abyssinia (whose hopes for a similar treatment of Italian war crimes against Ethiopians were not fulfilled), Australia, Belgium, Denmark, Greece, Haiti, Honduras, India, Yugoslavia, Luxembourg, New Zealand, the Netherlands, Norway, Panama, Paraguay, Poland, Czechoslovakia, Uruguay and Venezuela. See Telford Taylor, *Final Report of the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10* (Washington D.C., 1949): 139.

47 World Jewish Congress, *Memorandum Concerning the Formulation of the Nuremberg Principles, Submitted to the Second Session of the U.N. International Law Commission by the World Jewish Congress*, New York, June 2, 1950, accessed on March 3, 2009 from http://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1950-06-02&documentid=C194-3-4&studycollectionid=&pagenumber=1.

48 Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford, 2001): 57ff.

49 Quoted in Annette Wieviorka, *Le procès de Nuremberg* (Rennes and Caen, 1995): 172.

50 Bloxham, 57.

to legal scholarship.⁵¹ Lemkin was a Polish Jew who spent the first years after the war searching for survivors from his family, who had nearly all perished in the Holocaust.⁵² Lemkin’s personal tragedy makes it all the more remarkable that he always understood the Holocaust within the overarching concept of genocide. In his seminal work *Axis Rule in Occupied Europe*, Lemkin provided a comprehensive account of the murderous occupation policies of Nazi Germany. According to Lemkin, National Socialist policies in the occupied territories were genocidal by definition.⁵³ The persecution of the Jews was the most extreme example of this murderous impulse, but he treats the annihilation of the Jews as part of the larger project of genocide. Lemkin’s postwar analysis thus remained consistent with his earlier work, in which he developed the concept of genocide to describe the persecution of the Armenians by the Turkish state. The National Socialist policy of expansion and conquest was fundamentally one of genocide, “aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”⁵⁴ In this sense, Lemkin’s concept of genocide included both the victims and the perpetrators. In Lemkin’s analysis, “Genocide has two phases: one, the destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor.”⁵⁵

Ultimately, the Nuremberg verdict focused almost exclusively on war crimes, making no mention of the crime of genocide. Lemkin later described it as “the blackest day” of his life.⁵⁶ In an essay published several months after the trials, Lemkin argued that the International Military Tribunal had adopted an overly narrow and flawed interpretation of its mandate that failed to create a workable precedent for international law.⁵⁷ Despite his disappointment, Lemkin soon shifted his efforts to the United Nations, which he believed might serve as a new platform for convincing the international community of the need to define the crime of genocide and its punishment. Lemkin’s efforts ultimately resulted in the Convention on the Prevention and Punishment of the Crime of Genocide, which was passed by the General Assembly of the United Nations on December 9, 1948.

Although Lemkin was a central figure in the formation of Convention on Genocide, its establishment had less to do with the Holocaust and Jewish initiatives than might be assumed. Throughout his life, Lemkin remained a lone warrior, described by his biographer William Korey as a “modern Don Quixote.”⁵⁸ Lemkin never held office in a Jewish organization. He spent the wartime years working tirelessly to call public attention to the persecution of Jews under National Socialism and to mobilize opposition to the genocide, especially in the United States. However, he appears to have found his primary identity, his true “community,” in the sphere of law, even more than in the secular Jewish tradition: “He was one of those Jews of the inter-war period for

51 Little is known about Lemkin’s precise function at Nuremberg. Lemkin was probably a member of the research team of the OSS, which tracked down evidence for the trials. Most of Lemkin’s biographers also describe him as an “advisor” or “member” of the prosecution. However, Lemkin is not listed in the official transcript of the Nuremberg Trials, although his book, *Axis Rule in Occupied Europe*, was cited several times in the trial. In addition, although the term “genocide” was employed several times in the trial, it was not one of the counts in the indictment, and did not play an important role in the trial itself. Samantha Power probably captures Lemkin’s role most aptly as a “semiofficial advisor (or lobbyist)”; see Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York, 2002): 49. Benjamin Ferencz, who was the only American prosecutor who was also Jewish, describes Lemkin as a “somewhat lost and bedraggled fellow with the wild and pained look in his eyes.” Ferencz also describes Lemkin as a rather isolated figure, whom many would go out of their way to avoid: “Like the Ancient Mariner of Coleridge’s poem, he collared anyone he could, to tell them the story of how his family had been destroyed by Germans.” See <http://www.benferencz.org/stories/4.html>, accessed on April 9, 2008, as well as personal communication from Ben Ferencz, Aug. 23, 2008). Another member of the US prosecution team, Henry T. King, described Lemkin in a similar manner: “Lemkin was very focused on pushing his points. After he had buttonholed me several times, I had to tell him that I was powerless to do anything about the limitation in the Court’s judgement. I thought that Lemkin was a ‘crank’ at the time, and gave him short shrift.”; remarks of Henry T. King Jr., in *Case Western Reserve Journal of International Law* 40:1/2 (2008): 14.

52 Power, 49.

53 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress* (Washington, D.C.1944).

54 Lemkin 1944, 79. The term “Holocaust” was not yet in common use.

55 Lemkin 1944, 79.

56 Power, 50.

57 Raphael Lemkin, “Genocide as a Crime under International Law,” in *American Journal of International Law* 41:1 (1947): 145-151.

58 William Korey, *An Epitaph for Raphael Lemkin* (New York., 2001): 2; Korey was a leading member of B’nai B’rith in the United States.

whom the only place you could belong was in the imaginary kingdom of the law.”⁵⁹ Even after his experience of the Holocaust, Lemkin continued to recognize other genocides and fought for the establishment of universal legal principles to prevent and punish the crime. Decades later, Robert S. Rifkind, director of the Jakob Blaustein Institute for the Advancement of Human Rights at the American Jewish Congress, incisively summarized Lemkin’s contribution: “To move from particular experiences to general principles of law requires a high order of imagination, historical knowledge and persuasive skill.”⁶⁰

Lemkin’s commitment to the establishment of binding legal norms and to the importance of the concept of genocide led him to view other contemporary human rights initiatives with suspicion.⁶¹ He was particularly skeptical of the UN International Law Commission’s effort to draft an international penal code and the UN Commission on Human Rights’ campaign for an international human rights pact. Lemkin worried that a number of leading human rights experts, including René Cassin, Moises Moskowitz, Frederick Nolde, Clark Eichelberger, and Vespasian Pella were against ratification of the Genocide Convention because of their focus on the human rights pact initiative.⁶² Lemkin’s suspicions probably reflected his concern that the Convention on Genocide, which was his life’s work, would be sidelined.

However, Lemkin’s unabating advocacy for the enactment of legal norms for the crime of genocide, supported by several other Jewish scholars such as Jacob Robinson and Hersch Lauterpacht, did contribute to the development of new human rights norms. Both Lauterpacht and Lemkin were sharply critical of the Universal Declaration’s failure to establish mechanisms for human rights enforcement. These criticisms helped ensure that the issue of enforcement remained on the human rights agenda.⁶³ In contrast, a number of other Jewish scholars, including René Cassin and Egon Schwelb, a scholar of international human rights law from Czechoslovakia, assumed that the Universal Declaration would be legally binding despite its lack of explicit enforcement mechanisms.⁶⁴

However, the majority of Jewish scholars after the Second World War did not share this faith in legal norms as an effective weapon against the crime of genocide. The Zionist movement, for example, instead placed its hopes in political and social initiatives to secure the future of the Jewish people. But even the Zionist agenda could coexist with a universalist understanding of Jewish persecution and the Holocaust. For example, the philosopher Hans Jonas, who was a fervent Zionist during the war, issued an impassioned call in 1939 for the formation of a Jewish resistance army, noting: “Everything is at stake for us, everything, not just a part. We face what is truly a total war against us. We are being negated as part of the human race, regardless of our political, social or ideological position.”⁶⁵ Hannah Arendt also called for the creation of a Jewish army during

59 Michael Ignatieff, *Lemkin’s Legacy*, accessed on Jan. 26, 2008, from <http://www.usimm.org/conscience/analysis/details.php?content=2007-12-27>.

60 Robert S. Rifkind, “Foreword,” in William Korey, *An Epitaph for Raphael Lemkin* (New York, 2001): iii.

61 Lemkin’s co-worker James Rosenberg wrote to the State Department in 1952, for example, that the article titled “Right to Life” in the draft of the human rights package might lead some to believe that the ratification of the Convention on Genocide would be unnecessary and superfluous. See John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (New York, 2008): 223.

62 Moses Moskowitz, who was born in the Ukraine in 1910, was a prominent member of the American Jewish Committee. From 1947 to his death in 1990, Moskowitz was also the secretary general of the Consultative Council of Jewish Organizations. His best-known work is *Human Rights and World Order* (New York, 1958). Frederick Nolde represented the human rights tradition of the US Protestant churches; Clark Eichelberger had been a leading proponent of internationalism since the League of Nations; Vespasian Pella was a Romanian and one of the most prominent experts on international law of his time. See also Cooper, 215ff.

63 A student of Hans Kelsen, Hersch Lauterpacht left Vienna for London in 1923. See also Lauterpacht, *Human Rights, the Charter of the United Nations, and the International Hersch Bill of the Rights of Man, Report by H.L. to the Human Rights Committee, International Law Association, Brussels Conference 1948* [n.p., 1948]; and Hersch Lauterpacht, *International Law and Human Rights* (New York and London, 1950).

64 Egon Schwelb was a German-speaking jurist from Czechoslovakia who escaped to London in 1939. He became an important member of the UN War Crimes Commission in London, but left in 1947 to become deputy director of the Division on Human Rights at the UN in New York. See Rainer Huhle, *Egon Schwelb*, accessed on June 19, 2009 from www.menschenrechte.org/beitraege/menschenrechte/Egon_Schwelb.pdf.

65 Hans Jonas, “Unsere Teilnahme an diesem Krieg: Ein Aufruf an jüdische Männer” [1939], reprinted in Hans Jonas, *Erinnerungen* (Frankfurt a.M. and Leipzig, 2003): 186-199.

the war and regarded herself as a Zionist, albeit a somewhat unorthodox one. She, too, wrote in 1943 that, “For the first time Jewish history is not separate but tied up with that of all other nations. The comity of European peoples went to pieces when, and because, it allowed its weakest member to be excluded and persecuted.”⁶⁶ One year earlier, Arendt declared in an address to the “United Nations” (which at that point still referred to the Allied nations) that “the real criterion for the justice of this war will be seen in the degree to which other nations are prepared to fight their, our, and humanity’s battle shoulder to shoulder with Jews.”⁶⁷ The call for national civil rights legislation which would also protect minority rights later became one of the central themes of Arendt’s political philosophy. Arendt thus had much in common with other leading Jewish scholars, even though she later became embroiled in a bitter dispute with Hans Jonas and Jacob Robinson over her analysis of the Eichmann trial. And, although Proskauer rejected Zionism, many Zionists shared his belief that an “infringement of the rights of Jews is inevitably an attack on the rights of all mankind and on the very foundations of human decency and progress.”⁶⁸

The debates among Jewish intellectuals primarily centered on how best to secure Jewish rights. In the 1940s, many participants in these debates were divided over whether the United Nations Charter and the Universal Declaration of Human Rights, with their lofty but initially unenforceable promises, represented a true advance in the struggle for human rights. This issue also divided many Jewish as well as non-Jewish scholars and organizations. In retrospect, it is clear that both sides of the debate had valid arguments, and that the debate itself served to strengthen the overall commitment to a new postwar order. Moreover, participants on both sides of the debate shared a willingness to extrapolate from the injustices and persecutions of their own experience, and of the experience of the Jewish community as a whole, to fashion universalist responses. Jewish scholars and organizations thus participated in what was one of the greatest achievements of the postwar era: forging a progressive and universalizing human rights response to the horrors of National Socialism. However, the Jewish scholars and organizations that joined in this effort did so from various perspectives. There was no specifically Jewish perspective on how best to achieve a new postwar order founded on the primacy of human rights. What was significant about the Jewish contribution was not its specifically Jewish perspective, but rather the intense and collaborative engagement of Jewish scholars in the discussion as a whole. For that discussion to take place, Jewish scholars and organizations joined forces with many other individuals and organizations. For example, Joseph Proskauer worked with advisors from the 42 non-governmental organizations to lobby for stronger human rights provisions in the United Nations charter. Raphael Lemkin collaborated with Panama, Cuba and India to introduce the first resolution on genocide to the UN General Assembly. Jewish voices resonated within the global call for a truly universal conception of human rights.

66 Hannah Arendt, “*We Refugees*,” in *The Menorah Journal* (Jan. 1943): 69-77, reprinted in: Hannah Arendt, *The Jewish Writings*, ed. by Jerome Kohn and Ron H. Feldman (New York, 2007): 264-274, see esp. 274.

67 *Ibid.*, 263.

68 Proskauer 1950, 209.

William A. Schabas

FROM THE HOLOCAUST TO THE GENOCIDE CONVENTION: A HUMAN RIGHTS LEARNING PROCESS

“The blackest day of my life” is how Raphael Lemkin described the delivery of the verdict in the Nuremberg trial.¹ War crimes prosecutor Henry T. King Jr., who met Lemkin in the lobby of Nuremberg’s Grand Hotel at the beginning of October 1946, described him as “unshaven, his clothing was in tatters, and he looked disheveled.”² According to King:

When I saw him at Nuremberg, Lemkin was very upset. He was concerned that the decision of the International Military Tribunal (IMT) – the Nuremberg Court – did not go far enough in dealing with genocidal actions. This was because the IMT limited its judgment to wartime genocide and did not include peacetime genocide. At that time, Lemkin was very focused on pushing his points. After he had buttonholed me several times, I had to tell him that I was powerless to do anything about the limitation in the Court’s judgment.³

Lemkin had recently learned that virtually his entire family had perished, victims of the crime to which he had given a name. He himself had been hospitalized in Paris, and was evidently going through a period of great physical and emotional turmoil. According to biographer John Cooper, from his hospital bed “he happened to hear on the radio about the forthcoming meeting of the General Assembly of the United Nations in New York” and was “electrified by the news, believing that here at last was a forum which would listen to him.”⁴ He organized a passage on a troop transport back to New York, and went immediately to the General Assembly, then to a meeting in a disused factory in Lake Success, on Long Island, in the suburbs of New York City.

Lemkin launched a campaign at what was the first session of the United Nations General Assembly that led to the adoption of Resolution 96 (I), which condemned genocide as an international crime. Two years earlier, in his seminal book *Axis Rule in Occupied Europe*, Lemkin had lamented the shortcomings of existing international law and called for the recognition of a new crime, to which he gave the name “genocide.” “New conceptions require new terms,” explained Lemkin. “Genocide” referred to the destruction of a nation or of an ethnic group, he explained, describing it as “an old practice in its modern development.”⁵ At the General Assembly, Lemkin quickly obtained the support of three delegations – India, Cuba and Panama – for a proposed reso-

1 William Korey, *An Epitaph for Raphael Lemkin* (New York: 2001): 25.

2 Henry T. King Jr., “Origins of the Genocide Convention,” in *Case Western Reserve Journal of International Law* 40 (2008): 13-34.

3 King, 13-14.

4 John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (Hampshire, 2008): 73; see esp. 74-75.

5 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington: 1944): 79.

lution on genocide that he had drafted.⁶ Explaining why the resolution was necessary, the Cuban delegate, Ernesto Dihigo, said it was to address a shortcoming in the Nuremberg Trial by which acts committed prior to the war were left unpunished.⁷ Nazi atrocities had been prosecuted at Nuremberg under the heading “crimes against humanity,” and this concept was applied by the International Military Tribunal so that it applied only to acts perpetrated subsequent to the outbreak of the conflict in September 1939, in other words, to “wartime genocide” but not “peacetime genocide,” as Henry King reported.

One of the paragraphs in the preamble to the draft resolution stated: “Whereas the punishment of the very serious crime of genocide when committed in time of peace lies within the exclusive territorial jurisdiction of the judiciary of every State concerned, while crimes of a relatively lesser importance such as piracy, trade in women, children, drugs, obscene publications are declared as international crimes and have been made matters of international concern”⁸ This paragraph never made it to the final version of Resolution 96 (I) because the majority of the General Assembly was not prepared to recognize universal jurisdiction for the crime of genocide. Nevertheless, the resolution, somewhat toned down from the text that Lemkin had prepared, launched a process that concluded two years later with the adoption of the Convention for the Prevention and Punishment of the Crime of Genocide.⁹

Thus, the recognition of genocide as an international crime by the General Assembly of the United Nations and its codification in the 1948 Convention can be understood as a reaction to the Nuremberg judgment of the International Military Tribunal. It was Nuremberg’s failure to recognize the international criminality of atrocities committed in peacetime that prompted the first initiatives at codifying the crime of genocide. Had Nuremberg recognized the reach of international criminal law into peacetime atrocities, we might never have seen a Genocide Convention. Raphael Lemkin would probably be no more than an obscure and eccentric personality, as Henry King remembered him in the Grand Hotel in Nuremberg, rather than the distinguished “Father of the Genocide Convention.”¹⁰

The Convention itself was adopted by the General Assembly on Dec. 9, 1948. It can be described as the first human rights treaty of the modern area. A few hours later, the General Assembly adopted what is assuredly the centerpiece of modern international human rights law, the Universal Declaration of Human Rights.¹¹ Over the decades, the commemoration of the Genocide Convention has been overshadowed by that of the Universal Declaration. It is a bit like the child who has the misfortune to be born on December 25, and who is forced to share his or her birthday with a much larger celebration. At the Palais de Chaillot in Paris, where the two instruments were adopted, there was a memorial plaque for the Universal Declaration but nothing for the Genocide Convention until December 2008, when an appropriate memorial was unveiled by the French Minister of Foreign Affairs. Increasingly, the importance of the Genocide Convention is being acknowledged, not only in its own right as a source of important norms in international criminal law, but also as a defining text within the overall system of international human rights law. By insisting that “peacetime genocide” be condemned as an international crime, the General Assembly took a giant step in the protection of human rights. It made the violation of the right to life or to existence of a national, ethnic, racial or religious minority both an inter-

6 Cooper, 76-87. For Lemkin’s account, see Raphael Lemkin, “Totally Unofficial Man,” in *Pioneers of Genocide Studies*, ed. Samuel Totten and Steven Leonard Jacobs (New Brunswick, NJ, 2002): 384-387. See also Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York, 2002): 51-54.

7 UN Doc. A/C.6/SR.22.

8 UN Doc. A/BUR/50.

9 U.N.T.S. 277, *Convention for the Prevention and Punishment of the Crime of Genocide* (1951) 78.

10 The words are engraved on his tombstone in New York’s Mount Hebron Cemetery.

11 UN Doc. A/810, *Universal Declaration of Human Rights*, GA Res. 217 A (III).

nationally unlawful act and an international crime.¹² It also proposed the establishment of an international criminal court to ensure the enforcement of the Convention.

The Convention entered into force in 1951, but existed in obscurity for the next half-century. It may well have arrived ahead of its time, a vehicle for radical concepts in international law that the world could just barely accept in the euphoria of the postwar context, but that became unworkable during the Cold War. Only in the 1990s was there a renaissance in international criminal law. The result was a certain revival of the Genocide Convention, and the recognition of its role at the origins of the system. The ideas and concepts conveyed by the Convention became more fully developed in newer and more modern institutions and instruments, like the International Criminal Tribunal for the former Yugoslavia and the Rome Statute of the International Criminal Court.

Human Rights, the UN and War Crimes Prosecutions

There are many possible starting points for a discussion of the origins of the Universal Declaration of Human Rights and the Genocide Convention. Each has its own ancestors, in such sources as the law of armed conflict, the international legal protection of refugees and national minorities, and the aborted efforts at international criminal justice in the aftermath of the First World War. They all share a common DNA that first becomes recognizable in the early years of the Second World War. Unlike the First World War, whose origins and whose *raison d'être* remain clouded in the Machiavellian wrangling, confusion and misunderstanding of aging empires still committed to colonialism, the Second World War was an international struggle against barbarism, genocide, totalitarianism and national oppression. Tens of millions were roused to enormous sacrifice by the urgency of defeating fascism coupled with the promise of a new world order. The Second World War was thus invested with moral authority that its predecessor had lacked.

The Atlantic Charter, signed by the United Kingdom and the United States only a few months before the latter's entry into the war, contained human rights proclamations of a general nature.¹³ It acknowledged the right of all peoples to choose the form of government under which they wished to live, called for "improved labor standards, economic advancement, and social security," and declared that all states should abandon the use of force.¹⁴ The Atlantic Charter was agreed on by Roosevelt and Churchill aboard the British battleship *Prince of Wales* in Placentia Bay, just off the coast of Newfoundland. Earlier that year, in his State of the Union address, Roosevelt had proclaimed that the postwar system would be built upon "four essential human freedoms":

The first is freedom of speech and expression – everywhere in the world. The second is freedom of every person to worship God in his own way – everywhere in the world. The third is freedom from want – which, translated into world terms, means economic understandings which will secure to every nation everywhere a healthy peacetime life for its inhabitants – everywhere in the world. The fourth is freedom from fear – which, translated into international terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor – anywhere in the world.¹⁵

12 In law, an "internationally unlawful act" is a matter of state responsibility, while an "international crime" is a matter of individual responsibility.

13 *Atlantic Charter*, [1942] CTS 1; signed on Aug. 14, 1941 by Franklin D. Roosevelt and Winston Churchill (both signatures in the original are in Roosevelt's handwriting). No official version exists; see *New Cambridge Modern History* (1968): 811-812.

14 On the role of the Atlantic Charter in the development of international human rights, see Elizabeth Borgwardt, *A New Deal for the World, America's Vision for Human Rights* (Cambridge, UK, 2005): 14-45.

15 Franklin D. Roosevelt, "1941 State of the Union Address," in *State of the Union: Presidential Rhetoric from Woodrow Wilson to George W. Bush*, eds. Deborah Kalb, Gerhard Peters and John T. Wooley (Washington D.C., 2007): 305.

Franklin D. Roosevelt's stirring and immortal words were reprised in the preamble of the Universal Declaration of Human Rights: "Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people."¹⁶

As the war was drawing to a close, diplomats meeting in San Francisco adopted the Charter of the United Nations, which placed unprecedented emphasis on human rights.¹⁷ The Charter provided several references to human rights, and declared that "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" was among the purposes of the United Nations. To the dismay of many, however, the great powers reneged on earlier commitments to include a declaration of human rights within the Charter itself. Well before the San Francisco conference in June 1945, at which the United Nations Charter was adopted, foreign ministries, academics and non-governmental organizations were at work preparing draft declarations of human rights designed to form part of the postwar legal regime and, ideally, to be contained within the constitutive document of the new organization.¹⁸ The compromise at San Francisco was to make perfunctory references to human rights in the Charter but to postpone adoption of anything substantive. Moreover, a poisonous exception was also incorporated: in pursuit of the principles of the United Nations, nothing contained in the Charter authorized the United Nations "to intervene in matters which are essentially within the domestic jurisdiction of any state."¹⁹ Three years later, a few hours after endorsing the text of the Genocide Convention, the United Nations General Assembly adopted the Universal Declaration on Human Rights, in effect completing the work it had left unfinished at San Francisco. During its third session, which was held in Paris from October to December 1948, distinct subsidiary bodies of the General Assembly labored over the two texts, with the Third Committee crafting the Universal Declaration while the Sixth Committee prepared the Genocide Convention. Both instruments were focused, in different and complementary ways, on the prevention of atrocities committed by a state against its own civilian population.

Crimes against Humanity and the Drafting of the 1948 Genocide Convention

When the text of the Genocide Convention was being negotiated in the Sixth Committee of the General Assembly, there was frequent controversy about the relationship between genocide and crimes against humanity, an issue provoked by the judgment of the International Military Tribunal at Nuremberg. The United Nations Secretariat had prepared a note addressing the relationship between genocide and crimes against humanity that insisted upon the need for a distinct crime of genocide to avoid the exclusive association of such crimes with armed conflict, as was the case at Nuremberg.²⁰ There was considerable discussion as to whether genocide was an autonomous infraction or a form of crime against humanity. France put forward a rival draft convention. Article I of its text began by affirming that "the crime against humanity known as genocide is an attack on the life of a human group or of an individual as a member of such group, particularly by reason

¹⁶ UN Doc. A/810.

¹⁷ *Charter of the United Nations*, (1946) Cmd. 7015, P. (1946-7) XXV 1, 145 BSP 805.

¹⁸ Louis B. Sohn, "How American International Lawyers Prepared for the San Francisco Bill of Rights," in *American Journal of International Law* 89 (1995); Johannes Morsink, "World War Two and the Universal Declaration," in *Human Rights Quarterly* 15 (1993): 357-405; and Hersh Lauterpacht, *An International Bill of the Rights of Man* (New York, 1945).

¹⁹ *Charter of the United Nations*, Art. 2(7).

²⁰ "Relations Between the Convention on Genocide on the One Hand and the Formulation of the Nurnberg Principles and the Preparation of a Draft Code of Offences Against Peace and Security on the Other," UN Doc. E/AC.25/3.

of his nationality, race, religion or opinions.”²¹ This was, of course, connected with the idea, included in the final version of Article I, that genocide was a crime that could be committed in time of peace as well as war.²² Brazil’s representative to the Sixth Committee said that crimes against humanity, as defined in the Nuremberg Charter, did encompass genocide, but only to the extent they were perpetrated during or in connection with the preparation of war. Genocide, however, had to be defined as a crime that could also be committed in time of peace.²³ The Brazilian delegate noted the confusion at Nuremberg about the scope of the term “crimes against humanity” and said: “In view of the vagueness about the concept of crimes against humanity, it would be well to define genocide as a separate crime committed against certain groups of human beings as such.”²⁴ The debate also arose in the context of the preamble. Venezuela submitted a draft preamble that it explained had omitted any reference to the Nuremberg Tribunal, as genocide was distinct from crimes against humanity.²⁵ France had its own proposals for the preamble, of which the most significant was the addition of a reference to the Nuremberg judgment.²⁶ Ultimately, of course, no allusion either to Nuremberg or to crimes against humanity was incorporated in the final text of the Convention.

The Genocide Convention represents an attempt to provide a prospective definition of the crimes addressed at Nuremberg, but using different terminology. Necessarily, it is the result of compromises. The Nuremberg precedent, by which crimes against humanity did not apply to peacetime atrocities, was no aberration or oversight. Rather, it was a carefully conceived legal formulation aimed at addressing Nazi atrocities that were previously beyond the pale of international law, without at the same time threatening those who established the Tribunal. These same great powers were prepared to agree to prosecution of peacetime atrocities only if they were defined much more narrowly than in the Charter of the International Military Tribunal. In other words, the Nuremberg definition of crimes against humanity covers a relatively broad range of acts but only to the extent they are associated with aggressive war, while the Genocide Convention covers a much narrower set of acts, although these may take place in peacetime.

In the beginning, however, it seems that the terms genocide and crimes against humanity were used as if they were synonyms. Within months of the publication of *Axis Rule in Occupied Europe* in November 1944, Lemkin’s neologism was being widely used to refer to Nazi atrocities. There are several references to it in the record of the London Conference and the proceedings of the Tribunal. In his “Planning Memorandum distributed to Delegations at Beginning of London Conference, June 1945,” Justice Robert Jackson outlined the evidence he planned to present in the trial. Referring to “Proof of the defendant’s atrocities and other crimes,” he listed: “Genocide or destruction of racial minorities and subjugated populations by such means and methods as (1) underfeeding; (2) sterilization and castration; (3) depriving them of clothing, shelter, fuel, sanitation, medical care; (4) deporting them for forced labor; (5) working them in inhumane conditions.”²⁷ The International Military Tribunal’s indictment charged the Nazi defendants with “deliberate and systematic genocide, viz., the

21 UN Doc. A/C.6/211, Art. I. See also UN Doc. A/C.6/SR.67 (Chaumont, France). France had been concerned that its own proposal would be forgotten if the Committee studied the Ad Hoc Committee draft. The chair assured the French representative that this was not the case; see UN Doc. A/C.6/SR.66.

22 See, for example, the comments in UN Doc. A/C.6/SR.67 (Morozov, Soviet Union) and UN Doc. A/C.6/SR.68 (de Beus, Netherlands).

23 UN Doc. A/C.6/SR.63 (Amado, Brazil).

24 *Ibid.*

25 UN Doc. A/C.6/SR.109.

26 UN Doc. A/C.6/267. The French proposal stated: “3. Substitute the following for the third sub-paragraph: ‘Having taken note of the legal precedent established by the judgment of the International Military Tribunal at Nürnberg of 30 September–1 October 1946.’” The Soviet preamble, UN Doc. A/C.6/215/Rev.1, included a similar paragraph: “Having taken note of the fact that the International Military Tribunal at Nuernberg in its judgments of 30 September–1 October 1946 has punished under a different legal description certain persons who have committed acts similar to those which the present Convention aims at punishing.”

27 Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials London 1945* (Washington, D.C., 1949): 6.

extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles, and Gypsies.”²⁸ The United Nations War Crimes Commission later observed that “by inclusion of this specific charge the Prosecution attempted to introduce and to establish a new type of international crime.”²⁹ During the trial, Sir David Maxwell-Fyfe, the British prosecutor, reminded one of the accused, Constantin von Neurath, that he had been charged with genocide, “which we say is the extermination of racial and national groups, or, as it has been put in the well-known book of Professor Lemkin, ‘a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups with the aim of annihilating the groups themselves.’”³⁰ In his closing argument, the French prosecutor, Champetier de Ribes, stated: “This is a crime so monstrous, so undreamt of in history through the Christian era up to the birth of Hitlerism, that the term ‘genocide’ had to be coined to define it.”³¹ He spoke of “the greatest crime of all, genocide.”³² The British prosecutor, Sir Hartley Shawcross, also used the term in his summation: “Genocide was not restricted to extermination of the Jewish people or of the Gypsies. It was applied in different forms to Yugoslavia, to the non-German inhabitants of Alsace-Lorraine, to the people of the Low Countries and of Norway.”³³ Shawcross referred to how “the aims of genocide were formulated by Hitler.”³⁴ He went on to explain: “The Nazis also used various biological devices, as they have been called, to achieve genocide. They deliberately decreased the birth rate in the occupied countries by sterilization, castration, and abortion, by separating husband from wife and men from women and obstructing marriage.”³⁵ Although the final judgment in the Trial of the Major War Criminals, issued from September 30 to October 1, 1946, never used the term, it described at some length what was in fact the crime of genocide. Lemkin later wrote that “the evidence produced at the Nuremberg trial gave full support to the concept of genocide.”³⁶

But genocide was not, in fact, a crime under the Charter of the International Military Tribunal. Instead, what must at the time have been viewed as a related concept, crimes against humanity, formed the legal basis of prosecutions, along with “crimes against peace” and “war crimes.” After considerable debate, the drafters of the Charter had agreed to add crimes against humanity in order to fill an obvious gap in existing international law applicable to the Nazi atrocities, namely persecution of the civilian population *within* Germany. The efforts at definition of this new category of international crime reveal why the fabled nexus with armed conflict – limiting the Tribunal’s jurisdiction to “wartime genocide” – was inserted into the crimes against humanity provision used at the Nuremberg trial.

In the Legal Committee of the United Nations War Crimes Commission, which met in 1944 and 1945, the United States representative Herbert C. Pell had used the term “crimes against humanity” to describe offenses “committed against stateless persons or against any persons because of their race or religion.”³⁷ More frequently, the concept was described using terms like “atrocities” and “persecution.” In May 1944, the Legal Committee

28 International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal: Proceedings. France et al. v. Goering et al.* (1946), vol. XXII (Nuremberg, 1948): 45-46.

29 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, 1948), esp. 197.

30 International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal: Proceedings*, vol. XVII (Nuremberg, 1947): 61.

31 International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal: Proceedings*, vol. XIX (Nuremberg, 1947): 531.

32 *Ibid.*

33 *Ibid.*, 497.

34 *Ibid.*, 496.

35 *Ibid.*, 498, 509, 514.

36 Raphael Lemkin, “Genocide as a Crime in International Law,” in *American Journal of International Law* 41:1 (1947): 147.

37 United Nations War Crimes Commission, Document No. III/1, March 19, 1944, “Resolution moved by Mr. Pell on 16th March 1944”; United Nations War Crimes Commission (1948): 175; Arie J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill, NC, 1998): 143.

submitted a draft resolution to the plenary Commission urging it to adopt a broad view of its mandate, and to address “crimes committed against any persons without regard to nationality, stateless persons included, because of race, nationality, religious or political belief, irrespective of where they have been committed.”³⁸ Lord Simon, who was the British Lord Chancellor, explained the problem this might pose for his government:

This would open a very wide field. No doubt you have in mind particularly the atrocities committed against the Jews. I assume there is no doubt that the massacres which have occurred in occupied territories would come within the category of war crimes and there would be no question as to their being within the Commission’s terms of reference. No doubt they are part of a policy which the Nazi Government have adopted from the outset, and I can fully understand the Commission wishing to receive and consider and report on evidence which threw light on what one might describe as the extermination policy. I think I can probably express the view of His Majesty’s Government by saying that it would not desire the Commission to place any unnecessary restriction on the evidence which may be tendered to it on this general subject. I feel I should warn you, however, that the question of acts of this kind committed in enemy territory raises serious difficulties.³⁹

The United States Department of State was decidedly lukewarm to the idea that war crimes prosecutions might innovate and hold Germans accountable for crimes committed against minority groups within their own borders.⁴⁰ This was reminiscent of the position taken in 1919 by Robert Lansing and James Brown Scott as representatives of the United States during attempts to prosecute atrocities perpetrated during the First World War.⁴¹

Later in 1944 and in early 1945, the position of the major powers, including the United States, evolved. A draft from the United States government dated May 16, 1945, and developed during the San Francisco conference, provided for a tribunal with jurisdiction to try “atrocities and offenses committed since 1933 in violation of any applicable provision of the domestic law of any of the parties or of [sic] Axis Power or satellite, including atrocities and persecutions on racial or religious grounds.”⁴² At the London Conference, which began on June 26, 1945, the United States submitted a text that drew upon the Martens clause of the Hague Conventions of 1899 and 1907. Yet the reference to “the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience” was linked to the crime of aggression.⁴³ The record of the meetings leaves no doubt that the four powers insisted upon an essential link between the war itself and the atrocities committed by the Nazis against their own Jewish population. It was on this basis, and this basis alone, that they considered themselves entitled to proceed. The distinctions were set out by the head of the United States delegation, Robert Jackson, at a meeting on July 23, 1945:

It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants is not our affair any more than it is

38 United Nations War Crimes Commission (1948): see esp. 176.

39 “Correspondence Between the War Crimes Commission and HM Government in London Regarding the Punishment of Crimes Committed on Religious, Racial or Political Grounds,” UNWCC Doc. C.78, Feb. 15, 1945, National Archives of Canada RG-25, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis*, vol. 3033, 4060-40C, Part 4.

40 Kochavi, 149. See also Shlomo Aronson, “Preparations for the Nuremberg Trial: The OSS, Charles Dworak, and the Holocaust,” in *Holocaust & Genocide Studies* 12 (1998): 257-281.

41 Paris Peace Conference (1919-1920), *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of America and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919* (Oxford, 1919).

42 “Executive Agreement, Draft No. 2,” in Bradley F. Smith, *The American Road to Nuremberg: The Documentary Record, 1944-1945* (Stanford, CA, 1982): 195.

43 “Revised Draft of Agreement and Memorandum Submitted by American Delegation, 30 June 1945,” in Jackson, 121.

the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.⁴⁴

Speaking of the proposed crime of “atrocities, persecutions, and deportations on political, racial or religious grounds,” Jackson indicated the source of the lingering concerns of his government:

Ordinarily we do not consider that the acts of a government toward its own citizens warrant our interference. *We have some regrettable circumstances at times in our own country in which minorities are unfairly treated.* We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state.⁴⁵

Jackson himself was surely not very proud of the “regrettable circumstances” in the United States “in which minorities are unfairly treated.” But as a representative of his government, he could not agree with anything by which international law would recognize as a crime acts of persecution based on racial origin, because this might, at least in theory, expose United States officials to prosecution. Jackson’s views manifest a candor lacking among the delegations of the United Kingdom, France and the Soviet Union, but we can readily surmise that each had concerns about circumstances equivalent to or worse than the apartheid-like regime that then prevailed in parts of the United States. The result was an agreement by the four Great Powers at the London Conference by which Nazi leaders could be prosecuted for such atrocities because they were committed in association with the war.

Article IV(c) of the Charter of the International Military Tribunal defines “crimes against humanity” as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in furtherance of or in connection with any crime within the jurisdiction of the International Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”⁴⁶ In the final judgment of the Nuremberg Tribunal, addressing implicitly the issue of the connection between crimes against humanity and the war itself – an issue that appeared fundamental to complying with the Charter of the Tribunal – the judges noted that “it was contended for the Prosecution that certain aspects of this anti-Semitic policy were connected with the plans for aggressive war.”⁴⁷ The Tribunal made a distinction between pre-war persecution of German Jews, which it characterized as “severe and repressive,” and German policy during the war in the occupied territories. Although the judgment frequently referred to events during the 1930s, none of the accused were found guilty of an act perpetrated prior to September 1, 1939, the day the war broke out.

This was the situation about which Raphael Lemkin was so exercised in October 1946 when he met Henry King in the lobby of Nuremberg’s Grand Hotel. The issue is one manifestation of a broader debate about the extent

44 “Minutes of Conference Session of 23 July 1945,” in *Ibid.*, 331.

45 *Ibid.*, 333; emphasis mine.

46 *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT)*, annex, (1951) 82 U.N.T.S. 279.

47 International Military Tribunal, vol. XXII, 492.

to which international law might breach the wall of state sovereignty when serious violations of human rights are perpetrated. By 1944, reports of the Nazi atrocities made it virtually unthinkable that these go unpunished due to the rigorous application of a traditional view by which states had no business interfering in the treatment of a civilian population by another state. The architects of the Nuremberg Tribunal finessed this matter by declaring Nazi crimes to be punishable to the extent that there was an essential link with international armed conflict. Their hypocrisy was transparent enough to other states, many of whom had historically found themselves on the receiving end of actions by the same victorious powers, who were prepared to punish the Nazis yet ensure that the underlying principles not apply to their own acts. The Genocide Convention was the initial fruit of this dissatisfaction, just as the Universal Declaration was the first important result of the failure to incorporate substantive human rights norms in the Charter of the United Nations.

Closing the Impunity Gap

It is often said that crimes against humanity were a recognized element of customary international law prior to Nuremberg. This is one way of answering the charge that the International Military Tribunal breached the principle of legality (*nullum crimen sine lege*). References to the debates in the United Nations War Crimes Commission and the London Conference should be enough to show just how unclear the state of customary law actually was. Whether it was unfair to prosecute the Nazis for their atrocities is another matter altogether. The Nuremberg judges famously said that *nullum crimen* was a “principle of justice”: “To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.”⁴⁸

The principle of legality was most adequately addressed with respect to the crime of genocide through the adoption of General Assembly Resolution 96 (I) in December 1946 and, two years later, the Genocide Convention itself. The legal clarity that this codification accomplished no doubt contributed to the stability of the definition over the ensuing six decades. Although academics and human rights activists frequently criticized the narrowness of the definition, states rarely showed any inclination to consider amendment. They were given a golden opportunity at the 1998 Rome Conference to fix any “blind spots” in the definition of genocide set out in Article 2 of the Convention, but declined to do so. In debate in the Committee of the Whole at the Rome Conference, only Cuba argued again for amendment of the definition so as to include social and political groups.⁴⁹ Otherwise, there was a chorus of support for the original text adopted by the General Assembly some fifty years earlier.⁵⁰

Crimes against humanity, on the other hand, lingered on after Nuremberg in a fog of uncertainty. In sharp contrast with genocide, whose definition has remained unchanged for nearly six decades, it seems that each time crimes against humanity is defined the result is different. As one of its first projects, the United Nations International Law Commission had been given the task both of identifying the “Nuremberg Principles” and developing a “Code of Offences against the Peace and Security of Mankind.” Principle VI of the “Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal,”

⁴⁸ *Ibid.*, 461.

⁴⁹ UN Doc. A/CONF.183/C.1/SR.3, para. 100.

⁵⁰ *Ibid.*, paras. 2, 18, 20 (Germany), 22 (Syria), 24 (United Arab Emirates), 26 (Bahrain), 28 (Jordan), 29 (Lebanon), 30 (Belgium), 31 (Saudi Arabia), 33 (Tunisia), 35 (Czech Republic), 38 (Morocco), 40 (Malta), 41 (Algeria), 44 (India), 49 (Brazil), 54 (Denmark), 57 (Lesotho), 59 (Greece), 64 (Malawi), 67 (Sudan), 72 (China), 76 (Republic of Korea), 80 (Poland), 84 (Trinidad and Tobago), 85 (Iraq), 107 (Thailand), 111 (Norway), 113 (Côte d’Ivoire), 116 (South Africa), 119 (Egypt), 122 (Pakistan), 123 (Mexico), 127 (Libya), 132 (Colombia), 135 (Iran), 137 (United States of America), 141 (Djibouti), 143 (Indonesia), 145 (Spain), 150 (Romania), 151 (Senegal), 153 (Sri Lanka), 157 (Venezuela), 161 (Italy), 166 (Ireland), 172 (Turkey), 174.

adopted by the Commission in 1950, concerned subject matter jurisdiction.⁵¹ Crimes against humanity were defined as “murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.” The wording was not identical to that of the Charter of the International Military Tribunal, but it actually clarified and entrenched the significance and scope of the association of war crimes and genocide. The Commission said it did not exclude the possibility that crimes against humanity could be committed in time of peace, but only to the extent that they took place “before a war in connexion [sic] with crimes against peace.”⁵²

Critics of this definition often point to Control Council Law No. 10, which was adopted by the Allies for the purpose of prosecutions within Germany.⁵³ Here, the association of crimes against humanity exclusively with the prosecution of war was absent, but this can be easily explained by the fact that the Allies believed they were enacting national law applicable to Germany rather than international law with the potential to apply to themselves, as had been the case at Nuremberg. Speaking of the Control Council Law prosecutions by American military tribunals, United States prosecutor Telford Taylor observed in his final report to the Secretary of the Army that “none of the Nuremberg judgments squarely passed on the question whether mass atrocities committed by or with the approval of a government against a racial or religious group of its own inhabitants in peacetime constitute crimes under international law.”⁵⁴ Taylor said that the practical significance of this problem could hardly be overstated, and cited the 1948 Genocide Convention, whose drafting had just been completed when he penned these words, as a manifestation of the interest in this question.⁵⁵

Eventually, the association of war and genocide disappeared from the definition of crimes against humanity, but it would take half a century for the evolution to become evident. In 1995, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia declared that the requirement that crimes against humanity be associated with armed conflict was inconsistent with customary law.⁵⁶ It offered the rather unconvincing explanation that the Security Council had included this definition in Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia as a jurisdictional limit only.⁵⁷ The more plausible explanation is that the lawyers in the United Nations Secretariat who drafted the Charter believed the association of crimes against humanity with war to be part of customary law, and the Council did not disagree.⁵⁸ Nevertheless, there can today be no doubt that the flaw in the Nuremberg concept of crimes against humanity, something that prompted Lemkin’s genocide-related initiatives at the General Assembly, has been corrected. The authoritative definition appears in Article 7 of the Rome Statute, which contains no reference to armed conflict as a contextual element. The only real remaining uncertainty is precisely when this limitation disappeared from the definition of crimes against humanity. As far as the International Law Commission was concerned, it was present as late as 1950, and perhaps after that. In 1954, the Commission experimented by

51 International Law Commission (ILC), *Yearbook of the International Law Commission 1951*, vol. 2 (New York, 1951); UN Doc. A/CN.4/SER.A/1950/Add.1, paras. 95-127.

52 *Ibid.*, para. 123.

53 Allied Control Council Law No. 10, “Punishment of Persons Guilty of War Crimes, Crimes against Peace and Humanity, 20 December 1945,” *Official Gazette of the Control Council for Germany*, No. 3, Berlin, Jan. 31, 1946.

54 Telford Taylor, *Final Report to Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10* (Washington, 1951): 224.

55 *Ibid.*, 226.

56 *Prosecutor v. Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, para. 141; *Prosecutor v. Tadić* (Case No. IT-94-1-A), Judgment, July 15, 1999, para. 251; *Prosecutor v. Tadić et al.* (Case No. IT-95-14/2-T), Judgment, Feb. 26, 2001, para. 23.

57 *Prosecutor v. Šešelj* (Case No. IT-03-67-AR72.1), Decision on the Interlocutory Appeal Concerning Jurisdiction, Aug. 31, 2004, para. 13.

58 For example, the Secretary-General’s report stated, “Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.”; see “Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),” UN Doc. S/25704 (1993), para. 47. See also Johnson 2004, esp. 372.

removing this definition, replacing it with another contextual element, the state plan or policy.⁵⁹ There is also some recent authority from the European Court of Human Rights supporting the view that the association of crimes against humanity with war was absent as early as the 1950s.⁶⁰ In a September 2008 decision, a Grand Chamber of the Court said cautiously that a link with armed conflict “may no longer have been relevant by 1956.”⁶¹ The issue directly confronts the Extraordinary Chambers of the Courts of Cambodia in their current efforts to prosecute Khmer Rouge atrocities.

Conclusions

The horrors of Auschwitz, Dachau and Treblinka set the context for the development of human rights law in the years following the Second World War. Prosecution of war crimes perpetrated against civilians had hitherto been confined to cases where the victims resided in occupied territories. What a country did to its own citizens had been deemed a matter that did not concern international law and the international community. Nuremberg appeared to take this bold step forward, but strings were attached. Although the Nazi persecution of Jews, even those within the borders of Germany, was deemed an international crime, the drafters of the Nuremberg Charter insisted upon a link between the crime against humanity and the international conflict. In effect, they were holding Germany accountable for atrocities committed against Germans but resisting a more general principle that might hold them responsible for atrocities perpetrated within their own borders or in their colonies. This imperfect criminalization of crimes against humanity mirrored the ambiguities of the Charter of the United Nations, adopted in June 1945, which pledged to promote and encourage respect for human rights yet at the same time promised that the United Nations would not intervene in matters which were “essentially within the domestic jurisdiction of any state.”⁶²

The recognition of genocide as an international crime by the United Nations General Assembly in December 1946 and the adoption of the Genocide Convention two years later were a reaction to dissatisfaction with the restrictions on crimes against humanity imposed at Nuremberg. It is impossible to understand the codification of the crime of genocide, and the interest it created in international law, without appreciating this situation. If the law of Nuremberg had recognized what Lemkin called “peacetime genocide,” there would probably have been no General Assembly resolution and no Convention; neither would have been necessary, as there would have been no legal gap to fill.

Two streams converged in December 1948 at the General Assembly of the United Nations: the standard-setting of international human rights manifested in the Universal Declaration of Human Rights, and the individual accountability for violations of human rights, of which the Convention for the Prevention and Punishment of the Crime of Genocide was the modest beginning. The Genocide Convention established that in the case of a particular form of strictly defined atrocity there was no longer any requirement that it be associated with a war, and thus that the crime could also be committed in time of peace. The Universal Declaration laid the groundwork for steady progress in both standard-setting and a growing recognition of the right of the international community in general and United Nations bodies such as the Commission on Human Rights in particular to breach the wall of the *domaine réservé* by which states historically sheltered atrocities from international scrutiny.

59 International Law Commission (ILC), *Yearbook of the International Law Commission 1954* (New York, 1954): 150.

60 *Kolk v. Estonia* (App. no. 23052/04), *Kislyiy v. Estonia* (App. no. 24018/04), Admissibility Decision, Jan. 17, 2006; *Penart v. Estonia* (App. No. 14685/04), Admissibility Decision, Jan. 24, 2006.

61 *Korbely v. Hungary* (App. No. 9174/02), Judgment, Sep. 19, 2008, para. 82.

62 *Charter of the United Nations* (1946) Cmd. 7015, P. (1946-7) XXV 1, 145 BSP 805.

The legal significance of the Genocide Convention has declined over the past decade or so, but not because it is inapplicable to specific circumstances or out of a perceived conservatism of diplomats and judges. Rather, new instruments and new institutions have emerged. Foremost among them is the International Criminal Court. In a different way, it accomplishes much the same thing as the Genocide Convention, but in a manner applicable to crimes against humanity as well. Moreover, the recent “responsibility to protect” doctrine extends the duty of prevention found in Article 1 of the Genocide Convention to crimes against humanity. The only legal consequence of describing an atrocity as genocide rather than as crimes against humanity is the relatively easy access to the International Court of Justice offered by Article 9 of the 1948 Convention. But Article 9 has generated more heat than light, and the recent ruling of the Court in *Bosnia v. Serbia* should discourage resort to this remedy except in the very clearest of cases.⁶³ In a legal sense, there is now slight importance, if any, given to the distinction between genocide and crimes against humanity. The importance of the Genocide Convention can probably be found not so much in its contemporary potential to address atrocities, something that is largely superseded by more modern texts, as in its historic contribution to the struggle for accountability and the protection of human rights.

⁶³ *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, Feb. 26, 2007. On the judgment, see Schabas 2007.

COMING TO TERMS WITH “CRIMES AGAINST HUMANITY” IN NUREMBERG AND BEYOND

From today’s perspective, the Nuremberg Trials are legally and historically significant because they institutionalized individual responsibility for a new category of crimes before an international court of law, even if committed by state officials at the highest levels. Although the defendants before the international tribunal at Nuremberg were charged with a number of different crimes, it was the charge of “crimes against humanity” that had the greatest influence on the development of human rights protection under international law. After Nuremberg, “crimes against humanity” were gradually withdrawn from the sphere of state sovereignty and became a matter for the international community of nations. This “revolution in international law” was welcomed by some contemporary observers and condemned by others.¹ The category of “crimes against humanity” represented the first time that crimes committed by a state against its own citizens could be subjected to international legal sanction. Although this legal innovation, which was defined by Article 6 (c) of the Charter of the International Military Tribunal, stimulated considerable hope and excitement worldwide, it was also highly controversial.²

A Comma Makes Legal History

The London Agreement of August 8, 1945, which was ratified after months of intense negotiation by the representatives of the Four Powers, established the legal basis for the International Military Tribunal.³ However, nearly two months later, an unusual “protocol” was appended to the official trial documentation to settle a point of dispute in the founding charter:

- 1 This “revolution in international law” is described by the renowned French international law expert Albert La Pradelle, who had failed in his attempt on behalf of France to bring Germany before an international tribunal to answer for its responsibility for the First World War. See Albert La Pradelle, “Une révolution dans le droit pénal international,” in *Nouvelle revue de droit international privé*, vol. 13 (1946): 360-368.
- 2 As early as 1946, La Pradelle announced that the French proverb about the “false fatherland” that was actually a “true stepmother” was now out of date: “La vieille maxime qu’il n’y a pas de droit en faveur de l’individu victime des mauvais traitements de son Etat – fausse patrie, vrai marâtre – sinon sur le terrain politique, est dès maintenant frappée de caducité.” *Ibid.*, 363.
- 3 A record of the negotiations can be found in Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials London 1945* (Washington, 1949).

Protocol Rectifying Discrepancy in the Charter

Whereas an Agreement and Charter regarding the Prosecution of War Criminals was signed in London on the 8th August 1945, in the English, French, and Russian languages;

And whereas a discrepancy has been found to exist between the originals of Article 6, paragraph (c), of the Charter in the Russian language, on the one hand, and the originals in the English and French languages, on the other, to wit, the semicolon in Article 6, paragraph (c), of the Charter between the words “war” and “or”, as carried in the English and French texts, is a comma in the Russian text;

And whereas it is desired to rectify this discrepancy:

NOW, THEREFORE, the undersigned, signatories of the said Agreement on behalf of their respective Governments, duly authorized thereto, have agreed that Article 6, paragraph (c), of the Charter in the Russian text is correct, and that the meaning and intention of the Agreement and Charter require that the said semicolon in the English text should be changed to a comma, and that the French text should be amended to read as follows:

c) LES CRIMES CONTRE L’HUMANITE: c’est a dire l’assassinat, l’extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre, ou bien les persécutions pour des motifs politiques, raciaux, ou religieux, lorsque ces actes ou persécutions, qu’ils aient constitué ou non une violation du droit interne du pays ou ils ont été perpétrés, ont été commis a la suite de tout crime rentrant dans la compétence du Tribunal, ou en liaison avec ce crime.

IN WITNESS WHEREOF the Undersigned have signed the present Protocol.

DONE in quadruplicate in Berlin this 6th day of October, 1945, each in English, French, and Russian, and each text to have equal authenticity.

For the Government of the United States of America

/s/ ROBERT H. JACKSON

For the Provisional Government of the French Republic

/s/ FRANÇOIS de MENTHON

For the Government of the United Kingdom of Great Britain and Northern Ireland

/s/ HARTLEY SHAWCROSS

For the Government of the Union of Soviet Socialist Republics

/s/ R. RUDENKO⁴

⁴ International Military Tribunal Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal Nuremberg 14 November 1945 -1 October 1946*, vol. 1 (Nuremberg, 1947): 17.

The dispute over what is probably the most famous comma in legal history reflected the controversy that surrounded the new charge of crimes against humanity. Indeed, the inclusion of crimes against humanity under Article 6 of the London Agreement was one of the most controversial issues before, during and after the Nuremberg Trials. What was at stake in the correction?⁵

The English version of the London Agreement originally read:

Article 6 (c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The Soviet delegation objected to this wording because it diverged from the Russian text. The Russians argued their version of the text, which included a comma – “before or during the war, or persecutions” – was preferable to the English version, which contained a semicolon – “before or during the war; or persecutions that ...” The Four Powers met to discuss this issue on October 6 when the counsel for the prosecution convened in Berlin to sign the indictment. The Soviet objection to the English and French versions of Article 6 of the Agreement was accepted, and the semicolon was replaced by a comma.⁶ This change was apparently made without much debate, and there is no evidence that the semicolon was deliberately “smuggled” into the document. It was a simple oversight that stemmed from the speed of events.⁷

In the French version, the semicolon was also replaced by a comma, and the text was edited slightly. The original French version read:

c) LES CRIMES CONTRE L'HUMANITE: c'est-à-dire l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre; ou bien les persécutions pour des motifs politiques, raciaux ou religieux, commises à la suite de tout crime rentrant dans la compétence du Tribunal ou s'y rattachant, que ces persécutions aient constitué ou non une violation du droit interne du pays où elles ont été perpétrés.

In its amended version, this was changed to read:

c) LES CRIMES CONTRE L'HUMANITE: c'est-à-dire l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre, ou bien les persécutions pour des motifs politiques, raciaux ou religieux, lorsque ces actes ou persécutions, qu'ils aient constitué ou non une violation du droit interne du pays où ils ont été perpétrés, ont été commis à la suite de tout crime rentrant dans la compétence du Tribunal, ou en liaison avec ce crime.

In the revised version, the repetition of the phrase “ces actes ou persécutions” (“these acts or persecutions”), set off by commas, confirms that the text following the comma directly references the whole text which precedes it. Replacing the semicolon with a comma also linked the phrase “in execution of or in connection with any crime within the jurisdiction of the Tribunal” to the preceding text. The phrase “persecution on political, racial or religious grounds” – and by extension the Holocaust itself – could only be prosecuted as an act committed “in execution of or in connection with any crime within the jurisdiction of the Tribunal.”

5 The story of the comma is described in all comprehensive accounts of the IMT. The international law expert Egon Schwelb provided a detailed account already in 1946; see Egon Schwelb, “Crimes against Humanity,” in *The British Yearbook of International Law* 23 (1946): 178-226.

6 “Protocol to Agreement and Charter, October 6, 1945,” in Jackson (1949), 429; see also United Nations, “Memorandum submitted by the Secretary-General,” in *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis* (Lake Success, 1949): 65ff.

7 Roger S. Clark, “Crimes against Humanity at Nuremberg,” in *The Nuremberg Trial and International Law*, eds. George Ginsburgs and V. N. Kudriavtsev (Dordrecht, 1990): 177-199, esp. 191.

The IMT Definition of “Crime against Humanity”

Even if it was not a circular argument, the reference to acts committed “in execution of or in connection with any crime within the jurisdiction of the Tribunal” seems peculiar at first glance, especially given that the London Agreement had included this new charge of crimes against humanity within the jurisdiction of the Tribunal. The wording of the Agreement thus implicitly established a hierarchy between crimes against humanity and the other crimes “genuinely” under the jurisdiction of the court, namely the war of aggression and war crimes.⁸ This is also reflected in the reference to “Major War Criminals” under Article 1 of the London Agreement, as well as in the judgment issued by the International Military Tribunal, which also made reference to Article 6 (c):

With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. ... The persecution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity.⁹

Whitney Harris, a prosecutor on Jackson’s team in Nuremberg, also pointed out this indeterminacy expressed by the limitation to acts committed in conjunction with a war of aggression:

This limitation was a proper one in view of the status of the Tribunal as an international military body, charged with determining responsibility for war and crimes related thereto. If the Tribunal had assumed jurisdiction to try persons under international law for crimes committed by them which were not related to war it would have wholly disregarded the concept of sovereignty and subjected to criminal prosecution under international law individuals whose conduct was lawful under controlling municipal law in times of peace. Such jurisdiction should never be assumed by an ad hoc military tribunal established to adjudicate crimes of war.¹⁰

One immediate consequence of this restrictive interpretation of the agreement was that the prosecutors had to demonstrate that Julius Streicher and Baldur von Schirach, who could not be charged with war crimes or with initiating a war of aggression, were engaged in preparations for war in order to convict them of crimes against humanity.

The dispute over the comma, the formulation of Article 6 and the verdict itself demonstrate that there was

⁸ This was explicitly acknowledged by the French international penal law scholar and judge at the IMT, Henri Donnedieu de Vabres, who noted in 1947 that crimes against humanity were only under the jurisdiction of the tribunal when they were “sufficiently connected” to crimes that were under the “normal jurisdiction of the tribunal.” See Henri Donnedieu de Vabres, “The Nuremberg Trial and the Modern Principles of International Criminal Law,” in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford, 2008): 477-582, esp. 238; emphasis in original.

⁹ International Military Tribunal Nuremberg, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis*, vol. 1, 254.

¹⁰ Whitney R. Harris, *Tyranny on Trial: The Evidence at Nuremberg* (Dallas, 1954): 512.

little clarity about the status of crimes against humanity. The published record of the London negotiations is largely silent about the arguments that determined the final formulation of Article 6 (c).¹¹ On the one hand, the delegates, especially Justice Jackson, invoked the time-honored idea that there was a category of crimes that would need to be punished whether they were committed during peacetime or wartime, regardless of the office held by the perpetrator and irrespective of national law.¹² “The real complaining party at your bar is Civilization,” as Jackson stated at the start of the trials.¹³ Jackson later formulated this issue even more pointedly:

How a government treats its own inhabitants generally is thought to be no concern of other governments or of international society. Certainly few oppressions or cruelties would warrant the intervention of foreign powers. But the German mistreatment of Germans is now known to pass in magnitude and savagery any limits of what is tolerable by modern civilization. Other nations, by silence, would take a consenting part in such crimes. These Nazi persecutions, moreover, take character as international crimes because of the purpose for which they were undertaken.¹⁴

Jackson at first left the purpose in question somewhat undefined in the section of his opening statement about “Crimes against the Jews.” In his opening comments to that section, Jackson referred in no uncertain terms to the Nazi’s goal “to annihilate all Jewish people”:

“It is my purpose to show a plan and design, to which all Nazis were fanatically committed, to annihilate all Jewish people. These crimes were organized and promoted by the Party leadership, executed and protected by the Nazi officials, as we shall convince you by written orders of the Secret State Police itself.”¹⁵

But only a short time later, Jackson returned to the Charter and situated the crimes against the Jews within the context of the conspiracy for war: “The avowed purpose was the destruction of the Jewish people as a whole, as an end in itself, as a measure of preparation for war, and as a discipline of conquered peoples.”¹⁶ Elsewhere Jackson summarized his belief in universal legal norms that apply to everyone, without making explicit reference to crimes against humanity: “The refuge of the defendants can be only their hope that international law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law.”¹⁷ This last comment proved prescient because the prosecution of crimes not directly linked to the war of aggression continued to clash with the principle of national sovereignty, which precludes outside interference in how “a government treats its own citizens.” A 1949 memorandum by the UN General Secretary to the UN International Law Commission clearly articulated this dilemma:

This effort to guarantee a minimum measure of fundamental rights to all human beings was, however, counteracted by the traditional and conservative principle “that it is for the State to decide how it shall treat its own nationals.” The force of this principle made itself felt when the definition of crimes

11 The most important source is Jackson (1949). Cherif Bassiouni, an expert on the legal history and philosophy of crimes against humanity, has suggested that there were probably extensive discussions that were not made public because many of the arguments could have provided ammunition for the defense at the IMT. See M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (Dordrecht, Boston and London, 1992): 31.

12 The idea that all nations may take action against certain deeds that affect all of humanity has been a feature of modern international law since its inception. In his summary report on the Nuremberg Trials, Telford Taylor noted that the Tribunal judges in the Judges’ Trial paid particular attention to precedents for international prosecution of religious and racial discrimination. The Tribunal cited Johann Kaspar Bluntschli, a legal scholar from Heidelberg, who stated in his 1867 book *Das moderne Völkerrecht der civilisierten Staaten* that “states are allowed to interfere in the name of international law if ‘human rights’ are violated to the detriment of any single race.” See Telford Taylor, “Nuremberg Trials: War Crimes and International Law,” in *International Conciliation* 450 (1949); reprinted in Telford Taylor, *Final Report the Secretary of the Army on the Nuernberg War Crimes Trials und Control Council Law No. 10* (Washington, 1949): 121-242, esp. 226.

13 For Supreme Court Justice Robert Jackson’s opening statement for the prosecution, see International Military Tribunal Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal Nuremberg 14 November 1945 - 1 October 1946*, vol. II (Nuremberg, 1947): 98-155.

14 *Ibid.*, 127.

15 *Ibid.*, 118.

16 *Ibid.*, 119.

17 *Ibid.*, 155.

against humanity was qualified by the provision that the inhumane acts and persecutions, to constitute such crimes, must be committed “in execution of or in connexion with any crime within the jurisdiction of the Tribunal.” It is thereby required, as has been seen, that the reprobated activities be connected with crimes against peace or with war crimes, that is, with crimes clearly affecting the rights of other States. ... *These acts may then be said to be of international concern and a justification is given for taking them out of the exclusive jurisdiction of the State without abandoning the principle that treatment of nationals is normally a matter of domestic jurisdiction.*¹⁸

During the trial itself, British prosecutor Sir Hartley Shawcross was the main representative of this point of view:

So the crime against the Jews, insofar as it is a crime against humanity and not a war crime as well, is one which we indict because of its close association with the crime against the peace. That is, of course, *a very important qualification on the Indictment of the Crimes against Humanity* which is not always appreciated by those who have questioned the exercise of this jurisdiction. But subject to that qualification we have thought it right to deal with matters which the criminal law of all countries would normally stigmatize as crimes – murder, extermination, enslavement, persecution on political, racial, or economic grounds. These things done against belligerent nationals, or for that matter, done against German nationals in belligerent occupied territory would be ordinary war crimes the prosecution of which would form *no novelty*. Done against others they would be crimes against municipal law ... the nations adhering to the Charter of this Tribunal have felt it proper and necessary in the interest of civilization to say that these things even if done in accordance with the laws of the German State, as created and ruled by these men and their ringleader, were, when committed *with the intention of affecting the international community* – that is in connection with the other crimes charged – not mere matters of domestic concern but crimes against the law of nations. I do not minimize *the significance for the future of the political and jurisprudential doctrine which is here implied*. Normally international law concedes that it is for the state to decide how it shall treat its own nationals; it is a matter of domestic jurisdiction. ... Yet international law has in the past made some claim that there is a limit to the omnipotence of the state and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the state tramples upon his rights in a manner which outrages the conscience of mankind. ... The fact is that the right of humanitarian intervention by war is not a novelty in international law – can intervention by judicial process then be illegal?¹⁹

Shawcross thus described one of the key motivations for the restrictive interpretation of “crimes against humanity” in the Nuremberg Trials. The Four Powers wanted to adhere as closely as possible to existing law in order to counter accusations that the trials were a form of “victors’ justice.” Although the prosecutors at Nuremberg were adhering to the principle of non-interference and invoking the right to intervention only when the interests of other states were affected, Shawcross implied that the status of crimes against humanity might one day be transformed under international law.

What Jackson and Shawcross referred to as crime against “civilization,” the French chief prosecutor, François

18 United Nations, “Memorandum submitted by the Secretary-General,” in *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis* (Lake Success, 1949): 72; emphasis mine.

19 International Military Tribunal Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal Nuremberg 14 November 1945 -1 October 1946*, vol. XIX (Nuremberg, 1947): 471-472, emphasis mine.

de Menthon, construed as a “crime contre l’esprit.”²⁰ For de Menthon, there was an indissoluble link between the nihilistic ideology of National Socialism and the crimes of the National Socialist leadership. In his view, Nazi ideology and war of aggression were inextricably linked. For this reason, he was less concerned with prosecuting crimes against humanity, or what he called “crimes against the spirit,” as separate charges in the indictment. In his opening statement, de Menthon said that he wanted to demonstrate to the court that:

All this organized and vast criminality springs from what I may be allowed to call a crime against the spirit, I mean a doctrine which, denying all spiritual, rational, or moral values by which the nations have tried, for thousands of years, to improve human conditions, aims to plunge humanity back into barbarism, no longer the natural and spontaneous barbarism of primitive nations, but into a diabolical barbarism, conscious of itself and utilizing for its ends all material means put at the disposal of mankind by contemporary science. This sin against the spirit is the original sin of National Socialism from which all crimes spring.²¹

Nevertheless, de Menthon also made extensive reference to crimes against humanity, which he called *crimes contre la condition humaine* (“crimes against the human condition”):

This classical French expression belongs both to the technical vocabulary of law and to the language of philosophy. It signifies all those faculties, the exercising and developing of which rightly constitute the meaning of human life. Each of these faculties finds its corresponding expression in the order of man’s existence in society. His belonging to at least two social groups – the nearest and the most extensive – is translated by the right to family life and to nationality. His relations with the powers constitute a system of obligations and guarantees. His material life, as producer and consumer of goods, is expressed by the right to work in the widest meaning of this term. Its spiritual aspect implies a combination of possibilities to give out and to receive the expressions of thought, whether in assemblies or associations, in religious practice, in teachings given or received, by the many means which progress has put at the disposal for the dissemination of intellectual value – books, press, radio, cinema. This is the right of spiritual liberty.²²

For de Menthon, a violation of this right to the “human condition” constituted a violation of “public and private law on the rights of the human person.”²³ De Menthon’s elaboration of this right constituted one of the most compelling legal arguments of the entire trial. However, even de Menthon felt the need to link his definition, which transcended all historical contingencies, to the expansionist German policies of war:

All these criminal acts were committed in violation of the rules of international law, and in particular the Hague Convention, which limits the rights of armies occupying a territory. The fight of the Nazis against the human status completes the tragic and monstrous totality of war criminality of Nazi Germany, by placing her under the banner of the abasement of man, deliberately brought about by the National Socialist doctrine. This gives it its true character of a systematic undertaking of a return to barbarism.²⁴

20 Regarding “crime contre l’esprit,” see also François de Menthon, *Le procès de Nuremberg: L’Accusation française* (Paris, 1946): 1.

21 International Military Tribunal Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal Nuremberg 14 November 1945 - 1 October 1946, The Charter and Judgment of the Nürnberg Tribunal: History and Analysis* Vol. V (Nuremberg, 1947): 373. In the French original, de Menthon employs the broader term “condition humaine,” defined as “une doctrine qui, niant toutes les valeurs spirituelles rationnelles ou morales sur lesquelles les peuples ont tenté depuis des millénaires de faire progresser la condition humaine...” See de Menthon, 1.

22 International Military Tribunal Nuremberg, vol. V, 406, 407.

23 de Menthon, 47.

24 International Military Tribunal Nuremberg, vol. V, 412.

De Menthon thus returned to the interpretation that the other three powers had advanced in the London agreement. However, the French prosecutors had serious reservations about the formulation of three of the four charges at Nuremberg. They believed that the charges of conspiracy and crimes against peace were politically motivated and legally untenable, and also argued that the definition of “crime against humanity” did not go far enough. In his memoirs, written 20 years after the Nuremberg trials, Jacques Bernard Herzog, who was a colleague of de Menthon, spoke pointedly about the French differences with the American prosecutors in particular. Herzog noted that linking the crimes against humanity to wartime events in Article 6 of the statute was an attempt to evade fundamental issues regarding the legal sovereignty of Hitler’s Germany before the war. But according to Herzog, this link led to a serious misunderstanding with fateful consequences. He concluded that in contrast to the rather bold indictment against the war of aggression, the definition of crimes against humanity was surprisingly modest, even disappointing.²⁵ André Gros, the French advisor at the London negotiations, played what was probably the most important role among the French participants in the preparations leading up to the IMT. Already in London, Gros had noted the fateful consequences of the narrowness of the definition of crimes against humanity. In his opinion, the Nazis would have little difficulty proving that their persecution of the Jews was a purely domestic matter unrelated to any aggression directed abroad.²⁶ The later IMT verdict proved the accuracy of his fears.

The Romanian international law expert Eugène Aroneanu advised the French delegation at the IMT and later wrote a groundbreaking work on the topic of crimes against humanity.²⁷ As early as 1946, in a pathbreaking essay that was also incorporated into the IMT as an official document (and was soon thereafter distributed as a German-language brochure in the French zone of occupation), Aroneanu argued against the Nuremberg definition of crimes against humanity. For Aroneanu, the humanitarian laws covering acts committed during wartime were part of the larger sphere of international law. Aroneanu argued that if they could justify international legal intervention, then the same was true for such acts committed in peacetime:

As a result, the same laws – and the same legal reasoning – apply to crimes against humanity committed during times of peace (the 4th count of the indictment) as to crimes against humanity that are committed during wartime (the 3rd count of the indictment, “War Crimes.”)²⁸

Was it inevitable that the IMT would settle on a restrictive interpretation of Article 6 (c)? René Cassin, the French jurist who played a key role in the Commission on Human Rights, argues that it was not. In his preface to the French-language volume of the collected Nuremberg Trial documents, Cassin criticized the International Military Tribunal’s reluctance to foreground the charge of crimes against humanity:

Even though Article 6 (c) specifically addresses this crime [against humanity], the Nuremberg Tribunal decided to remain on what it regarded as more solid ground, namely the law of war crimes ... This cautious stance ... runs the risk that it may appear to contradict not only the views of the authors of the IMT statute of August 8, 1945, but also the intent of the Charter of the United Nations, which was enacted in San Francisco.²⁹

Cassin also noted that the newly adopted UN Charter had already enacted limitations on the right to sovereignty and pointed out that this was an issue that had been carefully deliberated by the new United Nations

25 Jacques Bernard Herzog, *Nuremberg: Un échec fructueux* (Paris, 1975): xix.

26 Jackson (1949): 361.

27 Eugène Aroneanu, *Le crime contre l’humanité* (Paris, 1961).

28 Eugène Aroneanu, *Das Verbrechen gegen die Menschlichkeit, Auszug aus der Nouvelle Revue de Droit International Privé 2, 1946* (Baden-Baden, 1947): 51; IMT Doc. F 775.

29 Henri Monneray, ed., *La persécution des juifs en France et dans les autres pays de l’ouest, présentée par la France à Nuremberg* (Paris, 1947): 18f.

Commission on Human Rights. Thus arguments favoring the creation of an independent forum to address crimes against humanity had been advanced as early as 1947. Cassin also argued that the Tribunal's reluctance to emphasize "crimes against humanity" as a separate indictment ran counter to the intentions of the authors of the London Statute. However, this contention applies only to the French delegation, which had entered the negotiations on the formation of the IMT quite late.

On July 16, 1945, a few weeks before the adoption of the London Statute, the French delegation proposed a concise definition of the crime that was at the center of the negotiations. In addition to a highly restrictive definition of a "war of aggression" and war crimes as commonly understood, the French proposal also included an additional category of crime, "the policy of atrocities and persecutions against civilian populations," which made no reference to war.³⁰ A proposal submitted by the Soviet Union one week later also mentioned punishing "atrocities" committed against civilian populations, but explicitly in conjunction with war crimes.³¹ The British delegate David Maxwell Fyfe (later the deputy prosecutor for Britain at the IMT), rejected this limitation.³² Jackson in turn countered this argument:

The way Germany treats its inhabitants, or any other country treats its inhabitants, is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities.³³

These remarks, which were made in closed deliberations, constitute an extremely restrictive interpretation of existing international law and traditional principles of sovereignty, which had only just been called into question by the UN charter. Jackson's remarks here reveal none of the poignancy with which he called upon civilization as the highest judge only a few months later in Nuremberg.³⁴ On July 25, the Soviet Union also proposed linking the "atrocities" to the Axis powers' war of aggression, as did a revised draft proposed by the US on the same day.³⁵ In the days which followed, additional drafts established a stronger link between crimes committed against civilian populations and the conspiracy to launch a war of aggression. On July 31, the US delegation submitted a revised draft that was the first to employ the concept of "crimes against humanity" to refer to crimes committed outside of wartime. Instead of explicitly linking crimes against humanity to preparations for the war of aggression, the revised draft for the first time employed the paradoxical formulation of "crime within the jurisdiction of the Tribunal," and included the troublesome comma.³⁶

The history of the revisions made to the charter of the Nuremberg Trials thus provides little support for Cassin's claim that the Tribunal's "cautious" interpretation of crimes against humanity ran counter to the intentions of the authors of the London Statute. To the contrary, the final version of Article 6 (c) was in some aspects

30 Reprinted in Jackson (1949): 293.

31 *Ibid.*, 327.

32 *Ibid.*, 329.

33 *Ibid.*, 331. The same discussion provides a suggestion of the possible rationale behind Jackson's restrictive stance: "We have some regrettable circumstances at times in our own country in which minorities are unfairly treated." He then continued with his argument that even the concentration camps were only a matter of international law because they supported Germany's preparations for and execution of the war; see *Ibid.*, 333.

34 After his opening statement, Jackson appears to have gradually lost interest in the issue of crimes against humanity. In one of his speeches on the IMT held in fall 1949 before the Canadian bar association, Jackson reviewed the key legal issues in the IMT proceedings, but made no mention of the charge of crimes against humanity. See Robert H. Jackson, "Nuremberg in Retrospect: Legal Answer to International Lawlessness," originally in *ABA Journal, The Charter and Judgment of the Nürnberg Tribunal: History and Analysis* Vol. 35 (1949): 813, reprinted in Mettraux, 354-371. After the war, Henry Stimson, who served as Secretary of War during the Second World War, wrote: "The charge of crimes against humanity has not aroused much comment in this country, perhaps because this part of the indictment was not of central concern to the American prosecutor." See Henry L. Stimson "The Nuremberg Trial, Landmark in Law," in *International Affairs* 25:2 (Jan. 1947): 179-189, reprinted in Mettraux, 617-625, esp. 618.

35 Reprinted in Jackson (1949): 373, 374.

36 "Revision of Definition of 'Crimes,' Submitted by American Delegation, July 31, 1945," reprinted in Jackson (1949): 395.

more progressive than the majority of arguments made during the internal debate. During these debates, positivist legal arguments were made opposing the invocation of higher legal principles. In addition, different interpretations of the existing international treaties and principles complicated the proceedings.

The Western Powers and Debates in International Law and Politics

As news of the Holocaust and Nazi Germany’s other horrendous crimes emerged, it became clear that existing concepts of the law of war and of wars of aggression were inadequate to capture the nature of these events. Winston Churchill spoke of a “crime without a name,” and Raphael Lemkin coined the term “genocide” to refer to the planned extermination of entire national, ethnic and religious groups. When the Allies began to debate the establishment of an international tribunal to address the crimes committed by the Axis powers, these ideas played a role in their early deliberations, even though the priority remained the punishment of “war criminals.”

The definition of what was later called “crimes against humanity” could also draw upon existing concepts in international law. Already in 1915, France, Great Britain and Russia had formally warned the Turkish government that they would hold officials responsible who had participated in “crimes contre l’humanité et la civilisation” against the Armenian population of the Ottoman empire, who were Turkish nationals.³⁷ The famous “Martens Clause” of the Fourth Hague Convention of 1907 served as a precedent for this warning. In June 1945, Robert H. Jackson also invoked this clause in an interim report for President Truman regarding the preliminary work for the tribunal. In listing the planned charges, Jackson noted that:

(b) Atrocities and offenses, including atrocities and persecutions on racial or religious grounds, committed since 1933. This is only to recognize the principles of criminal law as they are generally observed in civilized states. These principles have been assimilated as a part of International Law at least since 1907. The Fourth Hague Convention provided that inhabitants and belligerents shall remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.³⁸

Already at the end of the First World War, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, which was installed in the Paris Peace Conference, cited this provision of the Hague Convention to support their call for an international court to adjudicate crimes committed by Germany that violated these “laws of humanity” and “dictates of public conscience.”³⁹

In Jackson’s estimation, the Hague Convention related to more than just acts committed during wartime. The concept of “atrocities,” “laws of humanity,” “public conscience,” and “principles of criminal law as they are generally observed in civilized states” were as yet imprecise, but they came to serve as the legal basis for the new charge of “crimes against humanity.” Jackson favored a broad interpretation of these foundational concepts that justified the prosecution of Nazi crimes. Because these crimes passed “in magnitude and savagery any limits of what is tolerable by modern civilization,” their prosecution would serve the larger interests of justice, as Jackson noted in his opening comments at Nuremberg later that fall.⁴⁰

37 Quoted in United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, 1948): 35.

38 “Report to the President by Mr. Justice Jackson, June 6, 1945,” in Jackson (1949): 50f.

39 Quoted in Lawrence Douglas, *The Memory of Judgment* (New Haven and London, 2001): 45.

40 International Military Tribunal Nuremberg, vol. II, 127.

Jackson's interpretation was largely echoed by the US government. In January 1945, the US Attorney General (Francis Biddle, who later served as a judge at Nuremberg), the Secretary of State, and the Secretary of War prepared a memorandum on the plans to prosecute "Nazi war criminals" for President Roosevelt that stated:

The criminality of the German leaders and their associates does not consist solely of individual outrages, but represents the result of a systematic and planned reign of terror within Germany, in the satellite Axis countries, and in the occupied countries of Europe. This conduct goes back at least as far as 1933, when Hitler was first appointed Chancellor of the Reich. It has been marked by mass murders, imprisonments, expulsions and deportations of populations; the starvation, torture and inhuman treatment of civilians; the wholesale looting of public and private property on a scale unparalleled in history; and, after initiation of "total" war, its prosecution with utter and ruthless disregard for the laws and customs of war.⁴¹

However, striking a more cautious note, the memorandum also noted that:

These pre-war atrocities are neither "war crimes" in the technical sense, nor offenses against international law; and the extent to which they may have been in violation of German law, as changed by the Nazis, is doubtful. Nevertheless, the declared policy of the United Nations is that these crimes, too, shall be punished; and the interests of postwar security and a necessary rehabilitation of the German peoples, as well as the demands of justice, require that this be done.⁴²

These misgivings regarding the lack of legal basis for the prosecution of domestic crimes by an international court were advanced most strongly by Great Britain. A British memorandum to the United States dated June 19, 1944 thus stated:

... the War Crimes Commission should confine itself to collecting evidence of atrocities of this nature, e.g. those against Jews, only when perpetrated in occupied countries. It is felt that a clear distinction exists between offences in regard to which the United Nations have jurisdiction under International Law, i.e. war crimes, and those in regard to which they have not. Atrocities committed on racial, political or religious grounds in enemy territory fell within the latter category. The United Nations should, therefore, in the opinion of His Majesty's Government in the United Kingdom, not themselves assume any formal obligation in regard to the punishment of those responsible for such atrocities. Any attempt on their part to do so or to attempt to enforce specific provisions for the prosecution of offenders by enemy authorities would give rise to serious difficulties of practice and principle. ... The United Nations should not assume any formal commitment to ensure the trial of those responsible for such atrocities...⁴³

However, like Jackson, British prosecutor Hartley Shawcross also cited higher legal principles in order to justify the prosecution of crimes against humanity, regardless of their status as wartime acts. In his statement for the prosecution, Shawcross argued:

So also in regard to Crimes against Humanity. The rights of humanitarian intervention on behalf of the rights of man, trampled upon by a state in a manner shocking the sense of mankind, has long been considered to form part of the recognized law of nations. Here too, the Charter merely develops a pre-existing principle. If murder, rapine, and robbery are indictable under the ordinary municipal laws of our countries, shall those who differ from the common criminal only by the extent and systematic

41 "Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945," in Jackson (1949): 4ff.

42 "The declared policy of the United Nations" refers to the alliance of states united to oppose the Axis powers since 1942. *Ibid.*, 5f.

43 Reprinted in Bradley F. Smith, *The American Road to Nuremberg* (Stanford, 1982): 16f.

nature of their offenses escape accusation?⁴⁴

However, in the War Crimes Commission, which began collecting material for a future prosecution of the crimes committed by the Axis powers on behalf of the United Nations in 1943, Britain had argued that the Commission should not collect material regarding crimes committed on German soil, which encompassed those crimes that would later be defined as crimes against humanity.⁴⁵

Nonetheless, the majority of the Commission believed that it was unacceptable to prosecute Nazi crimes like those committed against Jews in the occupied territories as war crimes while allowing the very same acts to remain unpunished when committed against Jews within Germany due to a mere legal technicality. As a result, the Commission decided that “narrow legalisms were to be disregarded and the field of the violations of the laws of war extended so as to meet the requirements of justice. Accordingly, along with the notion of war crimes *stricto sensu*, there evolved the concept of war crimes in a wider, non-technical sense, as a common denominator devised so as to include crimes against humanity”⁴⁶ The American delegate explained that persecution on racial or religious grounds constituted a “crime against humanity” that the United Nations had to prosecute as a war crime. In contrast with this rather confused view, his proposal for the definition of crimes against humanity emphasized their separateness from acts committed during war in what was an unusually unequivocal statement for the time, explaining that:

... the reason for which he had designated such offences as “crimes against humanity” did not lie in the fact that they were unknown to criminal codes under other names, but in that they were *crimes against the foundations of civilisation, irrespective of place and time*, and irrespective of the question as to whether they did or did not represent violations of the laws and customs of war.⁴⁷

“Crimes against Humanity” in the Nuremberg Subsequent Trials

Given this background of legal controversy, the International Military Tribunal ultimately elected to invoke the already cited restrictive interpretation of Article 6 (c) in its verdicts, which most likely was also an attempt to counter the accusation that the Tribunal was violating the principle of “*nulla poena sine lege*” (no penalty without law). In contrast to the London Statute, the Control Council Law No. 10 of December 1945, which established the basis for the prosecution of specific categories of offenders in the Subsequent Nuremberg Trials, did not establish a direct connection between crimes against humanity and the other points of the indictment.⁴⁸ Nonetheless, the presiding judges initially continued to maintain the restrictive interpretation advanced during the main war crimes trial, for example in the Flick trial and in the Ministries trial. This changed in the Judges’ Trial and the Einsatzgruppen Trial. In the latter trial, the court expressly argued that “this law is not limited to offenses committed during war.”⁴⁹ The court also explicitly addressed the theoretical objection that offenses that did not affect any other states could not be the subject of international law:

Crimes against humanity are acts committed in the course of wholesale and systematic violation of life and liberty. It is to be observed that insofar as international jurisdiction is concerned the concept

44 International Military Tribunal at Nuremberg, *Trial of The Major War Criminals before the International Military Tribunal Nuremberg, 14 November 1945 - 1 October 1946*, vol. III, (Nuremberg, 1947): 92.

45 United Nations War Crimes Commission, 140.

46 *Ibid.*, 174.

47 *Ibid.*, emphasis mine.

48 The Control Council was the highest governing body of the four occupation powers, and its laws were signed by the four powers. While the trials that took place in Nuremberg on the basis of Control Council Law No. 10 were carried out under the US occupation authorities, the Control Council Law No. 10 provided the trials with an international foundation.

49 Taylor (1949): 225.

of crimes against humanity does not apply to offenses for which the criminal code of any well-ordered State makes adequate provision. They can only come within the purview of this basic code of humanity because the State involved, owing to indifference, impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals.⁵⁰

In the Judges' Trial, the court went so far as to maintain that the autonomy of crimes against humanity was now a universally held truth:

... it can no longer be said that violations of the laws and customs of war are the only offenses recognized by common international law. The force of circumstance, the grim fact of worldwide interdependence, and the moral pressure of public opinion have resulted in international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law.⁵¹

When Telford Taylor quoted these remarks in his 1949 report on the Nuremberg Trials for the US Department of Defense, he made it clear that he agreed with this point of view. Taylor acknowledged that the IMT judges' decision not to prosecute crimes against humanity as a separate international crime had been based on a subjective interpretation of the London Statute. The legacy of Nuremberg regarding the war of aggression and war crimes, Taylor concluded, would have little influence on peacetime law:

The concept of "crimes against humanity," however, if it becomes an established part of international penal law – as it seems to be doing – will be of the greatest practical importance in peacetime. Indeed, it may prove to be a most important safeguard against future wars, inasmuch as large-scale domestic atrocities caused by racial or religious issues always constitute a serious threat to peace.⁵²

Taylor explicitly referred to the Convention on Genocide recently adopted by the United Nations, which had established genocide as a crime against humanity independent of wartime acts.

Both Cassin and Lemkin, as well as many of their contemporaries, expressed disappointment over this reticence. Not long after the completion of the trials, Henri Donnedieu de Vabres, who served as a judge at the Tribunal, noted: "This question may have been the one that has embarrassed the International Military Tribunal the most, and without much benefit to be drawn from it, we believe."⁵³ He added a comment that was astonishingly candid for a Tribunal judge: "The category of crimes against humanity which had entered the Tribunal's jurisdiction through a small statutory door, evaporated in the judgment. Nowhere in the judgment can findings of inhumane acts be found which would be independent of the circumstances of the war."⁵⁴

Developments in the UN International Law Commission

Efforts immediately got underway to remedy the failures of the International Military Tribunal. A few days after the end of the Trial of the Major War Criminals at Nuremberg, jurists from 29 countries gathered in Paris to issue a definition of crimes against humanity independent of a wartime context. The French Mouvement national judiciaire hosted the congress, and its president René Cassin indirectly criticized the Nuremberg verdicts in the following words:

Anyone who exterminates or persecutes an individual or a group on the basis of their nationality,

⁵⁰ *Ibid.*, 225; this wording also anticipates in remarkable fashion the principle of complementarity that is the foundation of the Rome Statute of the International Criminal Court today.

⁵¹ *Ibid.*, 225f.

⁵² *Ibid.*, 226.

⁵³ Donnedieu de Vabres (2008): 228.

⁵⁴ *Ibid.*, 242.

race, or their opinions has committed a crime against humanity and will be punished accordingly.⁵⁵ However, the newly founded International Law Commission (ILC) initially devoted surprisingly little attention to these issues. On Dec. 11, 1946, the UN General Assembly passed Resolution 95 (1) on the “Affirmation of Principles of International Law recognized by the Charter of the Nürnberg Tribunal.” The resolution also directed the Committee on the Codification of International Law to treat the formulation of the principles of the Nuremberg Charter in international law “as a matter of primary importance.” In May 1949, as the institutional structure of the UN became more formalized, this task was transferred to the ILC. The first internal draft issued by the Commission returned to the IMT London Statute for its definition of crimes against humanity. The insertion of the word “where” after the famous comma of the above-mentioned protocol of Oct. 6, 1945 emphasized even more the binding of “crimes against humanity” to war crimes and crimes against the peace:

5. The following acts constitute crimes against humanity, namely: murder, extermination, enslavement, deportation and other inhumane acts done against the civilian population before or during a war, or persecution on political, racial or religious grounds, where such acts are done or such persecution is conducted in execution of or in connexion with any crime against peace or any war crime, notwithstanding that the municipal law applicable may not have been violated.⁵⁶

This 1949 formulation was a marked reversal in the debate. The later drafts of the ILC continued in this vein, which is especially surprising because only a year before the UN had unanimously ratified the Genocide Convention, which explicitly refused to link the definition of genocide to any peacetime or wartime conditions. As the World Jewish Congress noted in a petition to the International Law Commission, the ILC formulation established an inexplicable distinction between the qualification of genocide and crimes against humanity.⁵⁷ In June 1949, the Greek international law expert Jean Spiropoulos, in his function as Rapporteur, submitted a summary of the discussion to the Commission.⁵⁸ This text included an extensive analysis of the various provisions of the London Statute and the Nuremberg verdicts. In his definition of crimes against humanity, Spiropoulos preserved the connection to war crimes and crimes against the peace. His formulation was ratified by the ILC on July 29, 1950:

Principle VI (c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.⁵⁹

The final version thus still has the famous comma.⁶⁰ The inclusion of the comma was not rooted in legal argu-

55 “Résolution finale du Congrès à Paris du Mouvement national judiciaire, 24 octobre 1946,” cited in Laurent Barcelo, “Aux origines de la cour pénale internationale: le projet français de chambre criminelle internationale (hiver 1946 - printemps 1947),” in *Guerres mondiales et conflits contemporains* 2:222 (2006): 103-109, see esp. 104.

56 International Law Commission, “Formulation of the principles recognized in the Nürnberg Tribunal and in the Judgment of the Tribunal - Draft proposed by the Sub-Committee on the formulation of the Nürnberg principles,” UN Doc. A/CN.4/W.6, reprinted in *Yearbook of the International Law Commission* (1949): 183, fn. 9.

57 World Jewish Congress, *Memorandum Concerning the Formulation of the Nuremberg Principles, Submitted to the Second Session of the U.N. International Law Commission* (New York, 1959): 6.

58 Jean Spiropoulos, “Formulation of the Nürnberg Principles,” UN Doc. A/CN.4/22, reprinted in *Yearbook of the International Law Commission*, vol. 2 (1950): 189.

59 International Law Commission, “Text of the Nürnberg Principles Adopted by the International Law Commission,” Doc. A/CN.4/L.2, reprinted in *Yearbook of the International Law Commission*, vol. 2 (1950), 374 ff.

60 The wording of the principle could even be regarded as more restrictive than that of the London Statute, because the ILC deleted the phrase “before or during the war” from the text. However, in their commentary they made clear that they intended to link the concept of crimes against humanity not to the time in which it was committed, but like the IMT wished to link it to war crimes and crimes against the peace. The phrase “before or during the war” was deleted because it referred specifically to the Second World War, and thus was not appropriate for principles that were intended to apply to the future as well; see *Ibid.*, Par. 123.

ments. When the International Law Commission settled on this formulation, it also considered a detailed memorandum from the Romanian jurist Vespasian Pella, who was one of the most renowned representatives of the French penal law school in the Association Internationale de Droit Pénal. In this memorandum, Pella defined crimes against humanity as follows:

Crimes against humanity, that is the extermination or persecution of a population or an element of a population on the basis of race, nationality, religion, political convictions or other similar criteria, carried out by the following means: murder, torture, inhumane treatment (including medical experimentation), grave assaults on physical integrity or health, as well as deportation and illegal arrest.⁶¹

Drawing on a formulation of the Association Internationale de Droit Pénal, Pella stated unambiguously at the start of his remarks that crimes against humanity were not dependent on conditions of war. His definition combines elements of the definition of genocide and additional acts, like torture and the suppression of freedom of speech and opinion. This similarity to the concept of genocide had its origins in a distinction between crimes against humanity and ordinary crimes that differentiated between offenses against individuals and offenses against entire groups of people, and ultimately against humanity itself:

What makes these acts crimes against humanity is the fact that they are directed *by their very nature against the human race*, which comprises a variety of races, nationalities and religions and which professes many different philosophical, social and political ideas. Because crimes against humanity are directed against the common rights of a specific group of individuals (races, nationalities, religions, etc.), they target the individual not in isolation, but rather as a member of a community.⁶²

Pella compiled a great deal of evidence to demonstrate that his views were shared by many authorities in the field as well as many important official documents.⁶³ However, the ILC did not adopt his position, at least not with respect to dissolution of the link with wartime conditions.

Already in 1947, the French international law expert Donnedieu de Vabres commented that international law had advanced to an unanticipated extent in the short time since the IMT. More recent legal opinions were diametrically opposed to the verdicts of the IMT. In this new perspective, crimes against humanity represented the overarching category, and war crimes were but one manifestation. The international community had to protect the fundamental human rights against possible violations. The international community “will fulfill this mission in time of peace and in time of war: and war crimes are nothing other than crimes against humanity adapted to the circumstances particular to hostilities.”⁶⁴ In this conception, Nuremberg represented only a brief stage in the development of international law.⁶⁵

The particularly modern understanding of international law on the part of one of the IMT judges, which was shared by many other important legal theorists of the time, throws the ILC’s rather outdated understanding into stark relief. Four years had passed since the Nuremberg Trials. However, the ILC only recapitulated the IMT’s conceptualization of the Nuremberg Principles and failed to take advantage of the opportunity to

61 Vespasian Pella, “Memorandum Concerning a Draft Code of Offences against the Peace and Security of Mankind,” presented by the Secretariat (UN Doc. A/CN.4/39), Nov. 24, 1950, in *Annuaire de la Commission du droit international* 2 (1950): 278-362, see esp. 346.

62 *Ibid.* 348.

63 One such authority was a French prosecutor at the IMT, Jacques Herzog; another was one of the architects of the London Statute, David Maxwell-Fyfe, who agreed with the definition of crimes against humanity proffered by the ILC, with the exception of the link to wartime conditions; see also *Ibid.*, 347, fn. 333. The US judge of the IMT Francis Biddle held a different point of view, arguing that crimes against humanity were a “somewhat nebulous concept” that should be reduced in scope to be largely synonymous with war crimes. Apart from war crimes, Biddle argued, the points of the indictment were “hardly subject to the incidence of international law.” See Francis Biddle, “The Nurnberg Trial,” in *Virginia Law Review* 33:679 (1947): 694.

64 Donnedieu de Vabres (2008), 238.

65 Henri Donnedieu de Vabres, *Le procès de Nuremberg* (Paris, 1948): 91.

solidify their theoretical foundation in light of new developments in international law, the UN Charter, the Genocide Convention and its own work. Although many states were satisfied with this outcome, many jurists and legal scholars were not.

Of the four powers that had presided over the trials at Nuremberg, only France was critical of the continued inclusion of wartime conditions in the definition of crimes against humanity:

... there is no justification for preserving this link. Prosecuting crimes against humanity is just as important during peacetime as during wartime. In both cases, it is a response to the same demands of universal human conscience.⁶⁶

The French government also suggested incorporating the offenses described in the Genocide Convention under the definition of “*Crimes contre l’humanité ou de lèse-humanité*.”⁶⁷ Finally, as with the Geneva Convention, the French government also argued in favor of incorporating other offences against “human integrity and dignity,” including torture, medical experimentation, and other cruel, degrading or discriminatory acts.⁶⁸ Rather than remaining content with general descriptions such as “crimes against civilization,” “atrocities” and “barbaric acts,” the French proposal included a precise catalogue of crimes, in a manner that would later be echoed by the Rome Statute of the International Criminal Court. However, the French proposal was not adopted by the Great Powers.

The Nuremberg Principles were important because they ascribed personal criminal liability even to state officials at the highest level, retroactively criminalized grave violations of international law and expressly refused to acknowledge orders from superiors as an exculpatory factor. In this respect, the Nuremberg Principles had an impact on the development of international law. In contrast, their definition of crimes against humanity contributed little to eliminating the brutal crimes that would come to characterize the decades following the world war, namely the mass persecution and murder of large groups of humans, often in their own countries and during peacetime.

The Emancipation of “Crimes against Humanity”

After completing its work on the Nuremberg Principles, the ILC was assigned the task of developing a proposal for an international criminal code and an international criminal court to preside over the prosecution of these crimes. As its title suggested, the “Draft code of crimes against the peace and security of mankind” had its origins in the IMT and the UN Charter, which had established the Security Council as the UN’s central policy-making organ.⁶⁹ However, the first draft of the international criminal code that was issued by the Commission in 1954 finally decoupled crimes against humanity from wartime conditions. In a rejection of the logic of the Nuremberg Statute, Article 2 of the draft code listed a number of “offenses against the peace and security of mankind” that were accorded equal standing. Following a list of offenses related to wartime acts of aggression, the tenth offense was the crime of genocide, with wording reminiscent of the Genocide Convention while not referring to it explicitly. This was followed by an eleventh offense:

(11) Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the

66 International Law Commission, “Observations of Governments of Member States relating to the formulation of the Nürnberg principles prepared by the International Law Commission,” UN Doc. A/CN.4/45/Add.2, reprinted in *Yearbook of the International Law Commission*, vol. 2 (1951): 109.

67 The French government also repeated its suggestion that groups persecuted on the basis of their (political) opinions should also be included, which was not passed.

68 *Ibid.*

69 Reprinted in Jeffrey Morton, *The International Law Commission of the United Nations* (Columbia, S.C., 2000): 38ff.

authorities of a state or by private individuals acting at the instigation or with the toleration of such authorities.

This draft, for the first time, defined crimes against humanity as a separate and distinct international crime, with a compilation of “inhuman acts” and motives. In a reminder of the crimes committed by the SA and other unofficial organizations of Nazi Germany, it emphasized that even private individuals acting on behalf of the state could be charged as perpetrators.

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which was passed on Nov. 26, 1968 and took effect in 1970, also defined crimes against humanity as independent of wartime conditions. Article 1 of the Convention stated there was no statutory limitation on “crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nurnberg, of 8 August 1945 and confirmed by Resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations.”⁷⁰ However, the convention was ratified by only 52 states, and of the four IMT powers, only the Soviet Union was a signatory. As a result, its effect on international law remained limited.⁷¹

In 1973, the UN General Assembly passed the International Convention on the Suppression and Punishment of the Act of Apartheid, which unequivocally defined apartheid as a crime against humanity. The convention was preceded by various similar resolutions. The Apartheid Convention expanded the definition of crimes against humanity to include another offense that was clearly unrelated to wartime conditions. Apartheid subsequently came to be defined as a crime against humanity in numerous additional international treaties, ultimately including the treaty that established the International Criminal Court.

In the meantime, work on the draft by the ILC stalled. Although the Commission was instructed to resume its work on the draft in 1981, the UN failed to ratify an international penal code for war crimes and crimes against humanity. Nevertheless, the ILC did make progress on defining the concept of crimes against humanity. In 1985, Doudou Thiam, the Senegalese jurist and diplomat who had been appointed Special Rapporteur for the draft of the international penal code to the Commission, noted, “However, this relative autonomy [of the concept of crimes against humanity, n.a.] has now become absolute. Today, crimes against humanity can be committed not only within the context of an armed conflict, but also independently of any such conflict.”⁷² The draft text presented by Doudou Thiam reflected the developments in international law since the Nuremberg Trials. The category of crimes against humanity in the draft thus included four offenses: genocide (defined in almost the same way as in the 1948 Convention); the crime of apartheid (as defined by the 1973 Convention); crimes against humanity, following some of the post-Nuremberg wordings (“Inhuman acts which include, but are not limited to, murder, extermination, enslavement, deportation or persecutions, committed against elements of a population on social, political, racial, religious or cultural grounds”); and even offenses against the environment (“Any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment”); these environment offenses were not incorporated into the

70 United Nations, “Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,” accessed on Jan. 31, 2010 from <http://www2.ohchr.org/english/law/warcrimes.htm>.

71 A 1974 European convention on the same topic elicited even less agreement, and was ratified by only a few Council of Europe Member States. This convention included only war crimes and genocide in the crimes that were not subject to a statute of limitation. In contrast to the internationally established distinction between genocide and crimes of humanity, Art. 1 of the convention equated the two crimes by listing “the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide” as among the crimes not subject to any statute of limitations. See Council of Europe, *European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes*, Strasbourg, 25.1.1974 (Strasbourg, 1999).

72 Doudou Thiam, “Fourth Report on the Draft Code of Offences against the Peace and Security of Mankind,” UN Doc. A/CN.4/398 and Corr. 1-3, reprinted in *Yearbook of the International Law Commission*, vol. 2:1 (1986): 53ff.

subsequent Rome Statute of the International Criminal Court.⁷³

In the early 1990s, in a surprising move, the Security Council established two criminal courts. In 1993, it established the International Criminal Tribunal for the Former Yugoslavia (ICTY), and in 1994, the International Criminal Tribunal for Rwanda (ICTR). The statutes for the two criminal courts included both genocide and crimes against humanity (Art. 4, ICTY and Art. 2, ICTR). Article 5 of the ICTY Statute, which was ratified by Security Council Resolution 827 on May 25, 1993, was worded as follows:

Article 5

Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.⁷⁴

Although the statute was designed to address the specific situation of Yugoslavia, it is nonetheless surprising that it once again makes specific mention of the conditions of wartime, a reversal even more striking than the 1954 draft by the International Law Commission.

The draft of the ICTR statute, which was developed one year later, no longer included this stipulation, most likely because it was clear that the April 1994 genocide in Rwanda was not a wartime act. Instead, the ICTR statute of November 1994 stipulated that the offense of “crimes against humanity” had to constitute a “widespread or systematic” attack:

Article 3: Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;
- (f) Torture;
- (g) Rape;
- (h) Persecutions on political, racial and religious grounds;

⁷³ *Ibid.*, 86.

⁷⁴ United Nations, “Updated Statute for the International Criminal Tribunal for the Former Yugoslavia,” original version adopted by the Security Council in May 1993, accessed on Jan. 31, 2010 from <http://www1.umn.edu/humanrts/icty/statute.html>.

(i) Other inhumane acts.⁷⁵

Nearly half a century after the London Statute that had established the IMT, the Rwanda statute therefore became the first instance in which crimes against humanity were defined as an independent offense unrelated to a wartime or peacetime context within the statute of an international court.

In 1996, the ILC finally presented its ultimate draft of the international penal code, seven years after the UN General Assembly, prompted by an initiative from Trinidad and Tobago, had called for it. The draft code contained a definition of crimes against humanity that was similar to the statute of the Rwanda court:

Article 18. Crimes against humanity

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:

- (a) Murder;
- (b) Extermination;
- (c) Torture;
- (d) Enslavement;
- (e) Persecution on political, racial, religious or ethnic grounds;
- (f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
- (g) Arbitrary deportation or forcible transfer of population;
- (h) Arbitrary imprisonment;
- (i) Forced disappearance of persons;
- (j) Rape, enforced prostitution and other forms of sexual abuse;
- (k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.⁷⁶

Again, the draft also stipulated that an offense is only a crime against humanity if committed “in a systematic manner or on a large scale.” In addition, the Commission stipulated that the crime had to be committed by government authorities or an organized group. The latter category could also encompass non-state perpetrators, such as guerilla organizations. The acts listed in the draft demonstrate how the definition of crimes against humanity had expanded since Nuremberg. In its commentary to the draft, the Commission explicitly acknowledged that while it had based its definition of crimes against humanity on the Nuremberg Principles, international law had progressed far enough to decouple these crimes from conditions of war.⁷⁷ The Commission specifically cited Control Council Act No. 10 and the statutes of the ad hoc Yugoslavia and Rwanda courts. In particular, it cited the ICTY verdict in the Tadić trial, which stated that “It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict.”⁷⁸ The Rome Statute of the International Criminal Court, which was ratified in 1998, is closely aligned with this legal precedent. Instead of “systematic manner” and “large scale,” the Rome Statute refers

⁷⁵ United Nations, *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994*, accessed on Jan. 31, 2010 from <http://www.ictcr.org/ENGLISH/Resolutions/955e.htm>.

⁷⁶ UN International Law Commission, “Draft Code of Crimes against the Peace and Security of Mankind,” UN Doc. A/48/10, reprinted in *Yearbook of the International Law Commission* (1996): 15-56.

⁷⁷ *Ibid.*, 48.

⁷⁸ *Ibid.*

to “widespread or systematic” attack, a formulation that had already attained common usage in a number of other similar texts. Furthermore, the Rome Statute stipulated that this “widespread or systematic attack” had to be committed “against the civilian population,” a phrasing that again echoes the Nuremberg terminology. However, the Rome Statute now clearly assumes that the acts in question do not need to be associated with armed conflict.

The order of the offenses in the Rome Statute also highlights the shift in emphasis that had occurred in the five decades since the World War. The first crimes listed under Art. 5 of the Rome Statute are genocide and crimes against humanity, then war crimes, and finally the crime of aggression which, however, has not yet been defined.

With the Rome Statute, international law had finally acknowledged the central question first raised by the British prosecution at Nuremberg: “If murder, rapine, and robbery are indictable under the ordinary municipal laws of our countries, shall those who differ from the common criminal only by the extent and systematic nature of their offenses escape accusation?”⁷⁹ At Nuremberg, the British prosecutor ultimately concluded:

In all our countries when perhaps in the heat of passion or for other motives which impair restraint some individual is killed, the murder becomes a sensation, our compassion is aroused, nor do we rest until the criminal is punished and the rule of law is vindicated. Shall we do less when not one but on the lowest computation 12 million men, women, and children, are done to death? ... murder does not cease to be murder merely because the victims are multiplied ten-million-fold. Crimes do not cease to be criminal because they have a political motive.⁸⁰

Or, in an even more concise formulation that Raphael Lemkin wrote in a letter to the New York Times shortly after the close of the trials:

It seems inconsistent with our concepts of civilization that selling a drug to an individual is a matter of worldly concern, while gassing millions of human beings might be a problem of internal concern.⁸¹

⁷⁹ International Military Tribunal Nuremberg, vol. III, 92.

⁸⁰ International Military Tribunal Nuremberg, vol. XIX, 433 and 467.

⁸¹ Raphael Lemkin, “Letter to the Editor, New York Times, Nov. 8, 1946,” quoted in Samantha Power, *A Problem from Hell*, (New York, 2000): 48.