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The Great Power Origins of Human Rights

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NOTE

THE GREAT POWER ORIGINS OF HUMAN RIGHTS

*Seth Mohney**

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INTRODUCTION

For years, historians depicted the history of human rights as the inexorable triumph of universal norms.¹ This account underestimates both the historical and contemporary uncertainty surrounding many international human rights. As even casual observers must note, the tale of human rights progress is *not* littered with beneficent heads of state persuaded to pursue progress by the moral charge of universal norms. Instead, this history's primary scenes feature struggles among great powers, peoples, and movements advancing diverse interests. Recognizing the complexity of human rights history, a new generation of historians² has emphasized that human rights progress is not preordained, but rather requires the alignment of powerful actors' self-interests with human rights goals.³

Building off insights gleaned from these new revisionist histories, this Note provides a more accurate account of human rights evolution during the period from World War I to the signing of the Universal Declaration of Human Rights. Though there were important events in human rights history before and after this era, the foundation of contemporary human rights law was built during this thirty-year period. Properly understanding the interests and actors that shaped this foundation will assist in predicting and influencing the future growth of human rights law.

This Note proceeds as follows. Part I begins by describing how both *historicism* and *legal realism* assist in developing new, more accurate, accounts of human rights history. Part II then synthesizes material from new historical works to provide a more accurate depiction of human rights development in the period under consideration. Finally, Part III explores contemporaneous accounts of the Universal Declaration of Human Rights' passage to demonstrate the importance of referencing primary sources.

I. REALISM VERSUS IDEALISM: THE INSIGHTS HISTORICISM AND LEGAL REALISM PROVIDE INTO HUMAN RIGHTS HISTORY

For decades, the dominant historical narrative portrayed the rise of human rights as preordained. Even historians who appreciated human rights' non-Western influences "naively romanticized" the past and "present[ed] [it] only as a nostalgic storehouse of incipient, benevolent ideas awaiting their almost inevitable self-realization in present-day human

1. Given that "the idea of fundamental rights—'human' or 'natural'—has been deeply contested since the birth of modernity in Europe in the 17th century," it is surprising that today many individuals overlook human rights' complicated roots and continual struggle for relevance. Steven Greer, *Being "Realistic" About Human Rights*, 60 N. IR. LEGAL Q. 147, 148 (2009).

2. See, e.g., ELIZABETH BORGWARDT, *A NEW DEAL FOR THE WORLD* (2005); SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010); Mark Mazower, *The Strange Triumph of Human Rights, 1933–1950*, 47 HIST. J. 379 (2004).

3. On occasions, however, efforts by powerful actors to quell human rights progress actually backfired in the long run. See *infra* p. 46–47.

rights activism.”⁴ Paul Gordon Lauren, for instance, accurately identifies the many cultural, philosophical, and religious roots of human rights, but nevertheless depicts these roots as dormant progenitors of later human rights progress. Lauren states, “[d]espite all the formidable odds and forces aligned against them, these visions could not be extinguished and those visionaries who saw them refused to be silenced. Upheavals in the eighteenth century and successes in the nineteenth century gave them hope. Horrors of the twentieth century gave them determination.”⁵

In *Inventing Human Rights: A History*, Lynn Hunt describes human rights as “self-evident.”⁶ Hunt alleges that the “self-evident” character of human rights leads to the following paradox: “[I]f equality of rights is so self-evident, then why did this assertion have to [be] made and why was it only made in specific times and places?”⁷ Hunt fails to recognize that the paradox derives from a faulty premise, namely that human rights are self-evident in the first place. Only after looking beyond this premise is it possible to understand why human rights history consists of divergent views and disparate results. Hunt presents a Whig history—“a historical narrative that reveals a clear evolutionary path towards progress.”⁸ Whig histories may provide an attractive narrative to contemporary human rights activists who see their efforts as part of an age-old struggle to define and protect human rights.⁹ However, such accounts are antithetical to the general historian’s mission of narrating “a given historical moment by putting himself in the context of that moment.”¹⁰

Historian Marc Bloch’s theory concerning the “*idol of origins*” explains the persistent attractiveness of Whig histories to scholars like Hunt.¹¹ In the *Last Utopia: Human Rights in History*, Samuel Moyn describes Bloch’s theory as follows:

4. William J. Novak, *Legal Realism and Human Rights*, 37 *HIST. EUR. IDEAS* 168, 170 (2011).

5. PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN 2* (2d ed. 2003). Lauren offers an impressive introductory history on human rights development that details the role of Great Power politics throughout this history. However, countless quotes, such as the one in the above text, depict human rights as universal truths waiting to take root in the proper climate. If we take such language on its face, then Lauren views Great Power conflict and realpolitik as a mere *obstacle* for these universal truths to overcome, rather than an *independent force* that shapes the actual meaning and understanding of human rights.

6. LYNN HUNT, *INVENTING HUMAN RIGHTS* 214 (2007).

7. *Id.* at 19.

8. See Justin Zaremby, *On the Uses and Disadvantages of History for Human Rights Law: Reading Samuel Moyn’s The Last Utopia: Human Rights in History*, 15 *YALE H.R. & DEV. L.J.* 155, 155 (2012). This term gained prominence following historian Herbert Butterfield’s use of the term to describe romanticized visions of English constitutional history. See *id.* at 159.

9. See *id.* at 170.

10. *Id.*

11. MOYN, *supra* note 2, at 41–42

It is tempting to assume that the trickle of melted snow in the mountains is the source of all the water in a great downstream flood, when, in fact, the flood depends on new sources where the river swells. They may be unseen and underground; and they come from somewhere else. History, Bloch concluded, is not about tracing antecedents. Even what continuity there is depends on novelty, and persistence of old things is due to new causes as time passes.¹²

Only by searching for these novel causes—the tributaries of the metaphorical river of history—can scholars provide nuanced understandings of historical movements. Historicism and legal realism each provide insights that combat the *idol of origins* temptation inherent in Whig histories like Hunt's and Lauren's.

For instance, in regards to the evolution of human rights, Professor William Novak notes that “historicism emphasizes historical particularity and specificity—that the best way to understand the emergence, evolution, and meaning of human rights is to understand in detail the way such rights are articulated and used at particular times, in particular situations, for particular purposes.”¹³ The historicist believes any accurate human rights history not only identifies, but *engages* with the massive influences that have shaped this history, including colonialism, realpolitik, capitalism, and nationalism.

Legal realism's skepticism towards moral or religious legal rationales accords with many insights of historicism. For instance, Oliver Wendell Holmes—chief champion of the legal realist movement—“attacked the notion of law (and rights) as divinely inspired, as moral imperative, as formally deductive logic, or as scientific principle.”¹⁴ In place of first principles rooted in nature or the divine, legal realists proposed consequentialist analyses of legal rules and standards. This pragmatic¹⁵ approach jettisoned unresolvable metaphysical debates for cost-benefit analyses utilized in the burgeoning social science field.

12. *Id.*

13. Novak, *supra* note 4, at 170.

14. *Id.* at 172. This Note's primary influence is the traditional legal realist movement that infiltrated American legal institutions in the early and mid-twentieth century. The realist international relations theory is a distinct doctrine, but it also has, albeit to a lesser degree, influenced scholars' understanding of human rights development. Jack Goldsmith and Eric Posner understand realism in the context of international law to imply that “international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power.” JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3 (2005).

15. Scholars have attributed the rise of the legal realist movement largely to the pragmatist philosophical tradition. See Novak, *supra* note 4 (citing B. KUKLICK, *THE RISE OF AMERICAN PHILOSOPHY, 1860–1930* (1970); J. T. KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870–1920* (1988); L. MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* (2001)).

How do legal realist principles provide a more nuanced understanding of human rights development? The tenets of legal realism oppose “the notion that there exists ‘out there’ some correct, apolitical, and non-coercive private social order to which human beings naturally and spontaneously aspire, frustrated only by the incessant corruptions of power spawned by the interventions of politics and state.”¹⁶ Thus, legal realists oppose historical accounts of human rights progress that replace searching inquiries into the people, events, and forces that shaped such progress for romanticized Whig histories.¹⁷ Together, historicism and legal realism provide a framework to better understand the evolution, and occasionally devolution, of human rights.

Recently, scholars have taken guidance from historicism and legal realism to better understand the development of human rights. Samuel Moyn, Elizabeth Borgwardt, and Mark Mazower are three leading authors in this movement. All three skillfully use historicist insights to provide more realistic historical analyses.

In *The Last Utopia: Human Rights in History*, for instance, Moyn criticizes the trend of “recasting world history as raw material for the progressive ascent of international human rights.”¹⁸ This trend, Moyn aptly notes, explains why historians “have rarely conceded that earlier history left open diverse paths into the future, rather than paving a single road toward current ways of thinking and acting.”¹⁹ The result has been an almost unanimous “celebratory attitude” among contemporary historians “toward[s] the emergence and progress of human rights.”²⁰

Similarly, Elizabeth Borgwardt, in *A New Deal for the World*, “explores the struggles of negotiators to design and explain their global plans for economic, political, and legal systems,” focusing “particularly on the transition to what is now sometimes called the modern human rights regime.”²¹ Like Moyn, Borgwardt’s work explores how the “strategic landscape” of international relations shaped the path and ultimate form of human rights throughout history.²²

Mark Mazower, in *Governing the World*, offers another iconoclastic interpretation, this time in regards to international geopolitical cooperation. Inquiring into “why first the British, at the height of their world power, and then the Americans should have invested time and political

16. Novak, *supra* note 4, at 173.

17. Mark Mazower criticizes Whig interpretations of human rights history as follows: “It does no service to the cause of human rights to disguise the political struggles and conflicts of interest that accompanied their emergence in the international arena. On the contrary, a better understanding of that story, their relationship to prior rights regimes, and their dependence on the international balance of power may help us recognize their true weight and worth.” Mazower, *supra* note 2, at 397.

18. MOYN, *supra* note 2, at 5.

19. *Id.*

20. *Id.*

21. BORGWARDT, *supra* note 2, at 10–11.

22. *Id.* at 11.

capital in building up international institutions at all,” Mazower provides a historicist inquiry into a question most historians explain “as the gradual triumph of a virtuous sense of global community.”²³ Mazower stresses that the British following the Great War and later the Americans in the wake of WWII had “good reasons of their own to accept the compromises inherent in an internationalist policy.”²⁴ The sections below draw substantially from these three authors in detailing the forces *shaping* and *defining* the path of human rights development.

II. GREAT POWER ORIGINS OF HUMAN RIGHTS

A. *The Inability to Secure Lasting Peace in the Wake of World War I*

The end of WWI provided the United States its first opportunity to influence human rights on a truly global scale. The various Hague and Geneva conventions of the late nineteenth and early twentieth century established basic warfare guidelines, but did not aim to ameliorate the conditions that incubated conflict.²⁵ President Woodrow Wilson responded to WWI’s carnage by drafting the framework of an international organization based on liberal, free market, and human rights principles.²⁶ Opposed to power “determined by the sword,”²⁷ the idealist Wilson believed that establishing an “equality of rights” among nations—both large and small—would create a “common strength” to prevent another world war.²⁸

However, the international entity emerging from the Treaty of Versailles lacked the array of legal instruments proposed by various American interest groups.²⁹ Mazower describes the League of Nations as including an exceptionally weak executive relegated to carrying out mundane administrative tasks; a two-house legislature consisting of a Great Power-dominated upper house that operated under unanimity and a lower house

23. MARK MAZOWER, *GOVERNING THE WORLD: THE HISTORY OF AN IDEA* xv (2012).

24. *Id.* at xvi.

25. See generally JAMES BROWN SCOTT, *THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907* (1915); GARY D. SOLIS & FRED L. BORCH, *GENEVA CONVENTIONS 6–10* (2010).

26. At the end of WWI, the Bolshevik movement and its underlying communist ideology presented an alternative option for international order. However, “despite early near-successes in Hungary, Germany, and elsewhere, efforts to expand the socialist revolution westward failed, and as Joseph Stalin (1879-1953) consolidated his rule, the dream of international socialist rights yielded in the Soviet Union to a repressive bureaucratic state.” MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS* 177 (2008).

27. *Id.*

28. *Id.* at 178.

29. The League to Enforce Peace, headed by William Howard Taft, “wanted all ‘justiciable’ disputes to be submitted to an international court by league members (and all other disputes to be submitted to a panel of arbitrators), who would sign up to fight any state that declared war before making such a submission.” MAZOWER, *supra* note 23, at 121. Taft was not the only member of the presidential fraternity to enter the debate. Theodore Roosevelt advocated the establishment of a World League for the Peace of Righteousness, equipped with an “international police force” to enforce the rule of law. *Id.* at 120.

lacking any law making capabilities; and an international court— the Permanent Court of International Justice— made ineffectual by the League’s limited enforcement mechanisms.³⁰

Despite the international organization’s relative meekness by today’s standards, U.S. public opinion doomed the League’s Senate ratification. To politicians and citizens of the period, the League represented an unprecedented entanglement of U.S. and European interests. Given the modern understanding of the League’s institutional ineptitude, it is surprising to hear Idaho Senator William E. Borah’s denunciation of the League as “a scheme of world control based on force . . . [where] [t]he maxim of liberty will soon give way to the rule of blood and iron.”³¹ Borah’s rhetoric reflected Congress’s fear of permanent commitment to international cooperation. As Mazower contends, “the negotiations in Paris had revealed that even as powerful and charismatic a figure as Wilson was obliged to compromise once the maps came out and the bargaining began.”³² This insight buttressed the “old arguments for remaining aloof”³³ and ultimately led the Senate to reject U.S. League membership.

Cognizant of his domestic failure, Wilson sought to leave his mark on international cooperation by enshrining religious and racial equality in the League’s charter. Wilson and British representative Robert Cecil initially planned on including a general guarantee “of equality of treatment for ‘all racial or national minorities’ and of freedom of religious expression for all beliefs ‘whose practices are not inconsistent with public order or public morals.’”³⁴ However, the majority of U.S. and British representatives opposed ensuring racial equality, fearful that “imprecise and wide-ranging definitions might encourage discontented subjects within their own and other jurisdictions to seek to appeal to the League over the authority of the state—the examples of potential appellants often cited were African-Americans and the Irish.”³⁵

With self-interest eliminating U.S. and British support, Japanese delegate Baron Makino was alone in proposing a racial equality provision. This proposal garnered majority support at the commission level only to reach its anticipated demise at the hands of the U.S. and UK delegations in the drafting committee.³⁶ After this rejection, Wilson recognized the

30. *See id.* at 136.

31. *Id.* at 138–39.

32. *Id.* at 140.

33. *Id.* at 139.

34. ALAN SHARP, CONSEQUENCES OF PEACE: THE VERSAILLES SETTLEMENT: AFTERMATH AND LEGACY 1919-2010 137 (2011).

35. MAZOWER, *supra* note 23, at 137. Decades later, debates surrounding the Universal Declaration of Human Rights’ potential binding character provide one example of Mark Twain’s quote that “history does not repeat itself, but it often rhymes.” Ian Cowie, *History does not Repeat Itself, but is Often Rhymes, as Mark Twain Noted*, THE TELEGRAPH (Mar. 20, 2009), <http://www.telegraph.co.uk/finance/personalfinance/comment/iancowie/5018093/History-does-not-repeat-itself-but-it-often-rhymes-as-Mark-Twain-noted.html>.

36. Jan Herman Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 HUM. RTS. Q. 447, 449 (1992).

hypocrisy of advancing a proposal concerning religious freedom and thus tabled the issue.³⁷

Provisions affirming universal racial and religious equality did not exhaust the efforts to advance international cooperation and peace at the Conference. The most successful effort was the development of the minority treaty system.³⁸ The Wilsonian principle of self-determination prompted the Great Powers to incorporate new Eastern European states into the international system.³⁹ For these new states, international recognition, or admission to the League of Nations, came at the cost of ensuring the protection of minority rights.⁴⁰ Treaties and declarations with Austria, Bulgaria, Hungary, Turkey, Czechoslovakia, Greece, Poland, Romania, Yugoslavia, Albania, Estonia, Finland, Latvia, and Lithuania contained *minority clauses* of various forms.⁴¹

Minority clauses represented an unprecedented intrusion of international law into national sovereignty.⁴² In *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, Jan Herman Burgers describes the three obligations imposed by the *minority clauses* and enforced by the League of Nations:

Firstly, it guaranteed full and complete protection of life and liberty to all *inhabitants* of the country or region concerned, without distinction of birth, nationality, language, race or religion. Secondly, it guaranteed that all *nationals* would be equal before the law and would enjoy the same civil and political rights, without distinction as to race, language or religion. Thirdly, it provided for a series of special guarantees for *nationals belonging to minorities*, for instance concerning the use of their language and the right to establish social and religious institutions.⁴³

These lofty guarantees appear to indicate an unprecedented concern for minority rights on behalf of the Great Powers.

37. *Id.*

38. This was not the first time European powers dealt with the protection of minority rights. In the 19th century, before the Great Powers would fully recognize Greece, Bulgaria, Serbia, Montenegro, and Romania they “demanded that [they] give a formal undertaking to comply with certain principles of governance (a ‘standard of civilization’ in the contemporary phrase), in particular that it would guarantee religious toleration and undertake not to exclude individuals from public office or civic rights on religious grounds.” As these demands demonstrate, “the protection of the civic rights of minority religious groups was something imposed on the small states of Eastern Europe when the great powers recognized their independence and agreed to major changes in their territorial boundaries.” Sharp, *supra* note 32, at 135.

39. Mazower, *supra* note 2, at 382.

40. *Id.*

41. Burgers, *supra* note 35, at 449–50.

42. *Id.* at 450.

43. *Id.*

Though the Great Powers were concerned about minority rights, this concern was—at least in part—fueled by self-interest. As Mazower notes, the threat that “new states could well contribute to destabilizing the region by the harsh handling of their minorities”⁴⁴ frightened the war weary European powers. Minority treaties allayed this fear by legally committing new states to protecting minority rights and establishing a remedial framework within the League to handle complaints. The decision to restrict the treaties to Europe—the hotbed of conflict during WWI—verifies the Great Powers’ regional stability concerns and undermines any contention the clauses merely reflected universal human rights aspirations.⁴⁵

With this in mind, it is unsurprising that the Great Powers were unwilling to extend minority protection to their own jurisdictions. This irony was not lost on the fledgling eastern European states. In *The Versailles Settlement: Aftermath and Legacy 1919-2010*, Alan Sharp details objections voiced by Romania, Czechoslovakia, and Yugoslavia that the “minority system” “abrogated state sovereignty[,] implied the inferiority of East European states,” and reeked of hypocrisy.⁴⁶ Wilson failed to push for logical consistency either by universalizing the minority system or by removing its conditions altogether. To Wilson, “nothing . . . [was] more likely to disturb the peace of the world than the treatment which might in certain circumstances be meted out to minorities.”⁴⁷ This belief led him to favor a minority system limited by Great Power politics over jettisoning such a system altogether.

Much as isolationism defeated the U.S.’s League membership, European powers’ unwillingness to enforce treaty obligations crippled the minority system.⁴⁸ Initially, only League member states could raise concerns regarding minority treaty violations.⁴⁹ The Great Powers’ hesitancy to police the treatment of minorities in other jurisdictions, along with states’ obvious aversion to raising claims against their own domestic treatment of minorities, produced a dearth of claims.⁵⁰

44. Mazower, *supra* note 2, at 382. Although the Versailles Settlement produced new states formed around various ethnic and national identities, it “still left 30,000,000 people in states in which they were not part of the dominant nationality.” ALAN SHARP, *THE VERSAILLES SETTLEMENT: PEACEMAKING IN PARIS, 1919-1955* (1991). In a statement before the Senate, President Wilson revealed his prior ignorance of the sheer number of minority groups spread across Europe: “When I have utterance to those words (‘that all nations had a right to self-determination’), I said them without knowledge that nationalities existed, which are coming to us day after day . . . You do not know and cannot appreciate the anxieties that I have experienced as the result of many millions of people having their hopes raised by what I have said.” *Id.* at 156.

45. See Mazower, *supra* note 2, at 382.

46. SHARP, *supra* note 33, at 140.

47. *Id.*

48. See Mazower, *supra* note 2, at 382–83.

49. See SHARP, *supra* note 33, at 143.

50. See *id.*

Accordingly, the treaty system was amended in 1920 to grant minority groups the right to petition the League directly.⁵¹ On certain occasions, however, states threatened domestic groups raising such claims with treason.⁵² In *The History of Human Rights*, Micheline Ishay identifies the ultimate irony of the minority treaty system: “Invoking Wilson’s notion of national unity and territorial sovereignty for homogeneous ethnic groups, Germany used the presence of three million Germans within Czechoslovakia’s borders as justification for its occupation of the Sudetenland.”⁵³

B. *World War II: A Second Chance in the Aftermath of Destruction*

With the League of Nations unwilling and unable to quell Germany’s expansionist visions, Europe descended into another world war. As WWII raged in Europe, President Franklin Delano Roosevelt considered a plan for post-war world order. Roosevelt learned from Wilson’s failure that “negotiating positions tended to harden quickly after an armistice, and nations soon turned inward once victory was assured, in a natural eagerness to focus on long-neglected domestic priorities.”⁵⁴ With this insight in mind, Roosevelt embarked for his first wartime meeting with Winston Churchill in the middle of the Atlantic Ocean.

1. The Atlantic Charter: Lofty Goals for the Post-War World

Roosevelt and Churchill’s August 1941 meeting produced one of the most influential, non-binding human rights documents in history. Although some scholars believe the conspicuous absence of the term *human rights* from the document’s text bars its classification as a human rights instrument,⁵⁵ this view ignores the document’s real world impact.

Churchill’s and Roosevelt’s intentions aside, the document served as an inspiration for oppressed peoples throughout the world. In his autobiography, Nelson Mandela notes, “The Atlantic Charter of 1941, signed by Roosevelt and Churchill, reaffirmed faith in the dignity of each human being and propagated a host of democratic principles. Some in the West saw the Charter as empty promises, but not those of us in Africa.”⁵⁶ The principles enshrined in the Atlantic Charter—most importantly the right to self-determination and “the assurance that all the men in all lands may live out their lives in freedom from fear and want”⁵⁷—also rallied the orig-

51. *See id.*

52. *See id.*

53. ISHAY, *supra* note 26, at 189.

54. BORGWARDT, *supra* note 2, at 14.

55. MOYN, *supra* note 2, at 89 (arguing that “going so far to label the Atlantic Charter a ‘human rights instrument,’ setting the terms for all the generosity that followed, ignores that it did not include the phrase ‘human rights’ – the consecration of which in the 1940s dropped the concept of self-determination that the charter did, in fact, feature”).

56. NELSON MANDELA, *LONG WALK TO FREEDOM* 83–84 (1st ed. 1994).

57. This language in the Atlantic Charter represents a monumental shift from the minority treaties. Instead of focusing on collective minority rights, the Atlantic Charter applies to all men. Despite the Charter’s gendered language, it is likely Roosevelt and Churchill

inal United Nations⁵⁸ in their fight against the Axis Powers by juxtaposing the warring sides' distinct moral stances.⁵⁹

While Roosevelt and Churchill agreed on the charter's overarching structure, both leaders possessed interests that posed difficulties for the drafting process. Churchill's commitment to protecting Britain's favorable trade relations with Commonwealth countries led to the qualification, and ultimate vitiation, of Roosevelt's free trade provision.⁶⁰ The final text stated: "[The parties] will endeavor, with *due respect for their existing obligations*, to further the enjoyment of all states, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity"⁶¹ (emphasis added). Roosevelt was particularly concerned with protecting himself from isolationist ire and thus forbid the inclusion of establishing an "effective international organization" as one of the Charter's goals.⁶² Though Roosevelt and Churchill slightly altered the Charter's structure to align with their interests, the isolation of the Atlantic Ocean shielded both leaders from the difficult political question of specifying what individuals fell within the Charter's exact contours.

In the months and years following the Charter's proclamation,⁶³ both leaders—and the nations they represented—were forced to publicly engage in the discussion they willfully avoided on the hulls of the *Prince of Wales—the British battleship stationed in the Atlantic*.⁶⁴ Mandela's globalist vision was at odds with Churchill's belief that the document was an

intended the Charter to apply to women, subject to contemporary domestic inequalities. Joel E. Oestreich explains this evolution as follows: "[The] lesson of WWII was that emphasizing minorities and highlighting their differences through special protections encouraged groups to define themselves in opposition to others [and] Nazi racial doctrines appeared to be the inevitable result of such a course." He therefore finds Roosevelt and Churchill's shift in rhetoric unsurprising. Joel E. Oestreich, *Liberal Theory and Minority Group Rights*, 21 *HUM. RTS. Q.* 108, 113 (1999).

58. President Roosevelt's term "United Nations" – not to be confused with the international organization established following WWII bearing the same name – replaced the relatively mundane term "Associated Powers" in 1941. See MAZOWER, *supra* note 23, at 197.

59. See *id.* at 198.

60. See BORGWARDT, *supra* note 2, at 25–28.

61. *The Atlantic Charter*, N. Atlantic Treaty Org. (Oct. 1, 2009), http://www.nato.int/cps/en/natolive/official_texts_16912.htm.

62. See BORGWARDT, *supra* note 2, at 27 (noting that "the president's unwillingness to take a principled stand in favor of what are generally assumed to be his innate internationalist impulses might well have been due entirely to the virulence of the isolationist reaction to his recently approved Lend-Lease bill . . . Senator Wheeler had memorably asserted that active support for Britain . . . was 'the New Deal's Triple-A foreign policy; it would plow under every fourth American boy.'")

63. The Atlantic Charter was originally released through telegram on August 14, 1941. See *id.* at 4.

64. It may seem unproductive to define the contours of a proclamation lacking legal authority. This understanding, however, ignores the millions of individuals who believed the Atlantic Charter embodied sound moral principles and fails to address the role of customary international law. Article 38 of the Permanent Court of International Justice, the League of Nation's judicial organ, included international custom as a form of international law. If the

“ephemeral press release intended for European ears only, intended to shore up Britain’s sagging morale and the hopes of the invaded countries in Europe.”⁶⁵

Indeed, the narrowness of Churchill’s vision—and the extent to which it explicitly rejected Mandela’s globalism—was highlighted by an unusually public disagreement at the highest levels of British politics. Delivering a speech to Nigerian students in London, Clement Atlee, Churchill’s Deputy Prime Minister, anticipated Mandela’s universalist vision, stating, “[y]esterday I was privileged to announce [the] declaration of principle by the President of the United States and the Prime Minister of this country. You will find these principles will apply, I believe, to all peoples of the world.”⁶⁶ Atlee’s sojourn into the universalist sphere prompted Churchill to deliver a speech in the House of Commons affirming the Charter’s limited scope.⁶⁷

In contrast to Churchill, Roosevelt initially appeared willing to endorse a universalist vision for the Charter. Without the concerns of an empire informing his politics, Roosevelt was free to state, “[w]e of the United Nations [i.e., Allied Powers] are agreed on certain broad principles in the kind of peace we seek. The Atlantic Charter applies not only to the parts of the world that border the Atlantic but to the whole world.”⁶⁸ The Dumbarton Oaks Conference provided Roosevelt a chance to validate this lofty rhetoric through action.

2. Dumbarton Oaks: Great Power Politics and Human Rights

The *elite* character of the states participating in the Dumbarton Oaks Conference allowed keen international observers to predict the conference’s results for human rights. Representatives from the United States, Britain, the Soviet Union, and China met for seven weeks in 1944,⁶⁹ but “as the Big Three [that is the United States, Britain, and the Soviet Union] developed their proposals, no diplomat so much as mentioned human rights in the run-up to the critical planning meetings that began in late August.”⁷⁰ As the reference to the Big Three implies, China failed to secure a room in the Great Power fraternity. Although formally included in the Conference, the Big Three excluded Chinese representatives from the Conference’s primary discussion round.⁷¹

“general principles” expressed in the Atlantic Charter were accepted by other nations, then they arguably could form a source of international law. *See Id.* at 41.

65. *Id.* at 34.

66. *Id.*

67. *Id.*

68. *Id.* at 36.

69. LAUREN, *supra* note 5, at 160–61.

70. MOYN, *supra* note 2, at 56.

71. *See id.* Angered at being left out of preliminary negotiations at Dumbarton Oaks, the Chinese leaked the main preparatory documents to the *New York Times*. *See id.*

With China out of the picture, at least initially, the onus was on one of the Big Three to advance human rights. Gladwyn Jebb, the diplomat spearheading British planning for post-war international order, failed to include any mention of human rights in his first draft detailing a post-war international organization,⁷² making it unlikely Britain would lead the crusade at the Conference. Given the treatment of individuals throughout the British Empire, the British were wary that “such a provision might facilitate meddling by the new international body in the affairs of the empire.”⁷³ The Soviets possessed a similar fear—this one more acute given the barbarity of Stalin’s Gulag system.⁷⁴

With the British and Soviets out, the Americans were human rights’ final hope. Consistent with his interpretation of the Atlantic Charter, Roosevelt supported some reference to human rights.⁷⁵ The political clout of isolationists in Washington, however, weighed heavily on Roosevelt’s mind. Mark Mazower depicts Roosevelt as caught between competing forces, stating:

The administration felt caught between the Scylla of isolationists, anxious to preserve the constitution of the US from outside intervention, and the Charybdis of internationalists who were inspired by Roosevelt’s idealistic rhetoric and believed the administration should take seriously its mission of building a freer world.⁷⁶

To buttress their case, isolationists emphasized domestic concerns that arguably militated in favor of protecting domestic sovereignty from outside intervention. Chief among these concerns was the continued oppression and discrimination of the United States’ African American population.⁷⁷

With these competing interests in mind, the American delegation proposed a human rights provision reading:

The International Organization should refrain from intervention in the internal affairs of any state, it being the responsibility of each state to see that conditions prevailing within its jurisdiction do not endanger international peace and security and, to this end, to respect the human rights and fundamental freedoms of all its people and to govern in accordance with the principles of humanity and justice.⁷⁸

This clever drafting provided rhetorical support for human rights, while affirming states’ plenary power within their borders. Even this draft provi-

72. See Mazower, *supra* note 2, at 391.

73. *Id.*

74. See LAUREN, *supra* note 5, at 163.

75. See Mazower, *supra* note 2, at 391.

76. *Id.* at 391–92.

77. See LAUREN, *supra* note 5, at 162.

78. Mazower, *supra* note 2, at 392.

sion proved unpalatable to the Soviets and British, however, who “feared that a general statement about human rights and fundamental freedoms in the section on general principles for the United Nations would open a Pandora’s box [sic] and release dangerous forces that would seriously threaten their sovereignty and power.”⁷⁹

By the time the Chinese joined deliberations, the Big Three had decided that human rights concerns would play a minor role at the conference. Unwilling to accept the United States’ relatively innocuous human rights provision, the British and Soviets immediately rejected Chinese proposals to make the new organization “universal in character” and committed to the “principle of equality of all states and races.”⁸⁰ The Big Three agreed to bury human rights “deep within the text”⁸¹ by confining them to economic and social cooperation.

The Conference’s limited membership, and the early relegation of human rights to an afterthought, indicated the Great Powers would dominate any international structure. Moyn notes that “the real dispute at the conference, and indeed later, revolved around the Security Council, its voting formula, and the veto.”⁸² The Conference produced an initial framework consisting of a dominant Security Council occupied by Great Power representatives and a much weaker General Assembly.⁸³ Although the Conference failed to produce specific rules governing the veto power – an issue Stalin, Churchill, and Roosevelt would settle at Yalta⁸⁴, British diplomat Charles Webster noted, “later embellishments did not touch the essential points” decided at Dumbarton Oaks.⁸⁵

The Dumbarton Oaks Conference left small nations, international interest groups, and many domestic constituencies unhappy. The “very height of expectations” leading up to the Conference “made the fall so precipitous when they failed to materialize.”⁸⁶ With human rights practically omitted from the pages of the Dumbarton Oaks agreements, interna-

79. LAUREN, *supra* note 5, at 163.

80. *Id.* at 161–62.

81. *Id.* at 163.

82. MOYN, *supra* note 2, at 57.

83. LAUREN, *supra* note 5, at 164–65.

84. *See* MOYN, *supra* note 2, at 57.

85. *Id.* at 57.

86. LAUREN, *supra* note 5, at 167. However, not all individuals shared this view. Carlos Romulo, chief delegate of the Philippines to the United Nations Conference, appeared satisfied with the decisions at Dumbarton Oaks, stating, “[t]he outline of the [United Nations] Charter as drafted at Dumbarton Oaks was more or less an echo of those four principles of the Atlantic Charter. The essence of the Atlantic Charter was in the draft. . . .” CARLOS P. ROMULO, *FORTY YEARS: A THIRD WORLD SOLDIER AT THE UN* 7 (1986). Protestant theologian Reinhold Niebuhr expressed skepticism that including human rights into the agreements without an adequate enforcement power would nevertheless promote human rights progress. He stated, “Nor would the Dumbarton Oaks agreements be substantially improved by the insertion of some international bill of rights which has no relevance, and would have no efficacy, in a world alliance of states.” Ralph Barton Perry, *Working Basis Seen*, N.Y. TIMES, Jan. 7, 1945.

tionalists excitedly awaited an opportunity to share their views at the United Nations' conference.

C. *San Francisco: Another Chance to Secure Human Rights Progress*

1. Preparing for San Francisco at the Chapultepec Conference

After reading the Dumbarton Oaks proposals, delegates from less powerful nations understood securing Great Power concessions would be something akin to pulling teeth. Nevertheless, they were committed to embedding human rights in the structure of the international organization.

In the months preceding and throughout the San Francisco Conference that produced the United Nations Charter, Latin American states were human rights' leading torchbearers. Dismayed by the United States' failure to include Latin American states in the discussions at Dumbarton Oaks, representatives of twenty Latin American nations met at the Chapultepec Castle in Mexico City and dissected the Dumbarton Oaks proposals.⁸⁷ Delegates submitted over one hundred and fifty draft resolutions addressing Great Power dominance, economic and social problems, and human rights, among other issues.⁸⁸ The delegates devoted specific attention to the last of these concerns.⁸⁹ In particular, "one of the resolutions [they] adopted dealt specifically with the international protection of fundamental human rights. The resolution called for an international declaration that would define those rights and the corresponding duties."⁹⁰ Many Latin American delegates at the Chapultepec Conference later represented their states in San Francisco and saw their mission as implementing the principles of the Chapultepec Conference.⁹¹

2. Non-governmental Organization Participation

The legion of small states at the San Francisco Conference garnered additional support from forty-two non-governmental organizations.⁹² In an "unprecedented" move, the State Department invited these groups "ostensibly to serve as consultants but also to help with publicizing and advocating for the charter among their home constituencies after the conference was over."⁹³ The wide array of groups, including the American Legion, the American Bar Association, the Rotary Club, and the NAACP, represented interests canvassing the majority of the American electorate.⁹⁴ Despite concern among some NGO leaders that their presence was mere "window dressing," in the aggregate, the NGOs took their responsi-

87. See LAUREN, *supra* note 5, at 170.

88. See *id.*

89. See Burgers, *supra* NOTE 36, at 475.

90. *Id.*

91. *Id.* at 476.

92. See BORGWARDT, *supra* note 2, at 189.

93. *Id.*

94. See *id.*

bilities seriously and were able to successfully advance human rights discourse at the Conference.⁹⁵

3. The Conference's Proceedings

Following the excitement of the San Francisco Conference's opening ceremony,⁹⁶ state delegates split into smaller committees to discuss delegated topics.⁹⁷ To protect the broad framework detailed at Dumbarton Oaks and affirmed at Yalta, the Great Powers maintained close supervision of committee meetings and scheduled nightly consultation meetings.⁹⁸ Cooperation in committee meetings allowed the Great Powers to protect their interests. Alex Cadogan, member of the British delegation, described his general experience in committee as follows:

I generally sit next to the American . . . and we conspire together to try to whack obstructionists on the head . . . I tell him he's our heavy artillery and I am the sniper. It works quite well and we wiped the floor with a Mexican last night: I think we must have shut him up for a week or so⁹⁹

In regards to the ultimate structural foundations of the United Nations, these committee meetings served as little more than sounding boards to appease *the international community's* desire for discussion.¹⁰⁰

Despite extensive cooperation among the Great Powers in obstructing the voices of the *lesser powers*, there were still considerable disagreements between the U.S., Soviets and British. In areas of disagreement, such as regional defense, the definition of true democracy, and the meaning of international human rights,¹⁰¹ input during committee meetings was influential.

As the Chapultepec Conference portended, the last of these enumerated topics dominated many less powerful countries' concerns. These

95. *Id.* at 190.

96. Paul Gordon Lauren describes the opening ceremony as follows:

The opening speeches of the United Nations Conference on International Organization delivered in the elegant setting of the San Francisco Opera House during April 1945 conveyed both a spirit of extraordinary euphoria and a sense of responsibility. Flushed with military victories against their adversaries and excited about participating in what they knew would be one of the century's most historic events, several hundred representatives and their staffs could hardly contain their enthusiasm.

LAUREN, *supra* note 5, at 177.

97. *See id.* at 178.

98. *See id.* at 179.

99. ALEXANDER CADOGAN, *THE DIARIES OF SIR ALEXANDER CADOGAN 742* (David Dilks ed., 1971).

100. LAUREN, *supra* note 5, at 187 (noting that "in many ways the Charter closely resembled the Dumbarton Oaks proposals").

101. *See id.* at 179.

countries, with the support of NGOs, proposed human rights amendments to the official charter.¹⁰² Egypt, Mexico, France, Guatemala, Paraguay, India, New Zealand, Norway, Lebanon, Cuba, and South Africa all believed a fundamental purpose of the United Nations should be promoting human rights and submitted amendments to this effect.¹⁰³

When possible, NGOs also tried to exert influence on the Great Powers. On one occasion, for instance, U.S. NGOs demanded a meeting with Secretary of State Stettinius. During this meeting, Judge Joseph Proskauer recalls rising from his seat and saying to Secretary Stettinius:

If you make a fight for these human rights proposals and win, there will be glory for all. If you make a fight for it and lose, we will back you up to the limit. If you fail to make a fight for it, you will have lost the support of American public opinion – and justly lost it.¹⁰⁴

The meeting's transcript, however, lacks any indication of an emotional tone and reveals a relatively short discussion.¹⁰⁵ Stettinius's preexisting commitment to the human rights provisions addressed at the meeting buttresses the transcript's portrayal of an unexceptional meeting devoid of memorable rhetoric.¹⁰⁶

4. The Conference's Result: The United Nations Charter

Despite the Great Powers' ingrained positions, the charter to emerge from San Francisco possessed modest improvements from the Dumbarton Oaks proposals. The Charter's preamble lists among the organization's aims achieving "international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."¹⁰⁷ Furthermore, three of the organization's principle organs—the General Assembly, the Security Council, and the Economic and Social Council (ECOSOC)—possessed abilities to influence human rights.

The Charter elevated ECOSOC—a body with authority to assess human rights concerns—from the lowly position it occupied in earlier proposals to one of the principal organs of the United Nations. As a principal organ, ECOSOC could perform studies, organize conferences and conventions, and, most importantly, create human rights commissions.¹⁰⁸ Similarly, the General Assembly could discuss nearly any topic at its sessions,

102. *See id.* at 181.

103. *See id.*

104. ROGER NORMAND & SARAH ZAIDI, HUMAN RIGHTS AT THE UN: THE POLITICAL HISTORY OF UNIVERSAL JUSTICE 130 (2008).

105. *See* BORGWARDT, *supra* note 2, at 190.

106. *See id.*

107. U.N. Charter art. 1, para. 3.

108. *See* LAUREN, *supra* note 5, at 189.

an improvement from earlier proposals limiting acceptable discussion topics, and it possessed the ability to conduct studies and issue recommendations regarding human rights promotion.¹⁰⁹ The Security Council was responsible for determining “the existence of any threat to the peace” and could determine the necessary actions to “maintain or restore international peace and security.”¹¹⁰

The Charter also addressed the rights of indigenous people by creating the Trusteeship System “for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements.”¹¹¹ A principal purpose of the Trusteeship System was to “promote the . . . advancement of the inhabitants of the trust territories” and encourage their progress toward “self-government or independence.”¹¹²

In light of these improvements, why does Samuel Moyn maintain that “San Francisco largely repeated Dumbarton, rather than unsettling it?”¹¹³ Moyn recognizes that the Great Powers were able to include rhetorical support for human rights in the Charter, while simultaneously undermining the organization’s human rights guarantees by curtailing enforcement powers and drafting an almost impenetrable domestic jurisdiction provision.¹¹⁴ Generally limited to the power to discuss, the General Assembly’s and ECOSOC’s enhanced powers possessed limited real world effect.

Paul Gordon Lauren describes the negotiating process leading to these empty responsibilities as follows:

Several representatives, especially those of the Great Powers, indicated a willingness to include words and statements of principle about human rights, but not provisions for practical or effective means of enforcing them. Any proposals from other governments that the United Nations be required to actually and actively “safeguard,” “protect,” “preserve,” “guarantee,” “implement,” “assure,” or “enforce” human rights died an unceremonious death in committee. Instead, the only verbs that could gain acceptance were relatively innocuous ones such as “should facilitate,” “may discuss,” “initiate studies,” “consider,” “make recommendations,” “reaffirm,” “assist,” “encourage,” and “promote.”¹¹⁵

109. *See id.* at 188.

110. U.N. Charter art. 39.

111. U.N. Charter art. 75.

112. U.N. Charter art. 76.

113. MOYN, *supra* note 2, at 62.

114. *See* LAUREN, *supra* note 5, at 191–93.

115. *Id.* at 191. This analysis should not imply that rhetorical support for human rights encouraged no progress absent adequate enforcement power. As Mark Mazower states,

[S]ufficient ambiguity was built into the UN’s approach to allow a new emphasis on human rights to emerge during the Cold War. . . . [NGOs] found that the provisions contained in the Charter permitted them to highlight issues of human rights internationally in a way that had no precedent. . . . This state of affairs also offered an incentive to international lawyers to develop theories of law, which rationalized

With the General Assembly and ECOSOC devoid of any practical power, the Security Council retained the preeminent position it had occupied since the Dumbarton Oaks proposals. Given the Security Council's unanimity requirement, this was an institutional structure all the Great Powers could support.

The Trusteeship System's effectiveness was similarly impeded by an array of limiting principles. The colonial powers breathed a sigh of relief when the system's jurisdiction extended only to "territories now held under mandate; territories which may be detached from enemy states as a result of the Second World War; and territories voluntarily placed under the system by states responsible for their administration."¹¹⁶ With colonial powers unlikely to place a territory under the System's surveillance, oversight effectively extended only to former mandates of the League of Nations and territories established in the wake of WWII. This was an unsatisfactory solution to the millions of Asian and African peoples still under colonial control.

The Great Powers, however, were not done with what Elizabeth Borgwardt, in *A New Deal for the World: America's Vision for Human Rights*, describes as "qualifications, exceptions, and omissions [to] offset many of the changes promoting human rights."¹¹⁷ Still fearful the UN's limited capabilities could facilitate domestic intermeddling, the Great Powers required insertion of a domestic jurisdiction provision. Analogizing a domestic jurisdiction provision in the Charter to the principles of American federalism, John Foster Dulles promoted the concept as "a basic principle of the organization."¹¹⁸ This concept helped ensure Senate ratification by appeasing isolationists and reassured Soviets that the state's human rights abuses would remain a domestic concern.¹¹⁹ The final domestic jurisdiction provision reads: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require Members to submit such matters to settlement."¹²⁰ The Security Council's possession of ultimate authority regarding Charter interpretation implied that all decisions concerning what constituted domestic jurisdiction required Great Power unanimity.

activist interpretations of the Charter, the Declaration, and many of the UN's subsequent pronouncements.

Mazower, *supra* note 2, at 397.

116. U.N. Charter art. 77, para. 1.

117. BORGWARDT, *supra* note 2, at 191.

118. *Id.* at 192.

119. *See id.* at 191–92.

120. U.N. Charter art. 2, para. 7.

D. *The Nuremburg Trials: Victor's Justice and Domestic Sovereignty's Resistance to Human Rights*

1. Germany's Post-War Development Plan

War's end forced the victors to confront the difficult question of how to deal with the vanquished.¹²¹ Deciding the status of Nazi war criminals was an integral component of Roosevelt's plan for the post-war world, a plan he had considered extensively in the hopes of avoiding President Wilson's failures. As of September 1944, Roosevelt preferred summarily executing all properly identified war criminals in order to avoid the complexities of a legal proceeding,¹²² although he eventually changed his mind, paving the way for the Nuremburg Charter and Trials.

In Washington, top administration officials developed competing post-war reconstruction plans for Germany. Treasury Secretary Henry Morgenthau, Jr.'s plan garnered support from both Roosevelt and Churchill in September 1944.¹²³ The harshest of the proposed plans, the Morgenthau Plan called for "social and educational 'reform of the German character,' complemented by complete disarmament, deportations of Nazi officials to help rebuild countries they had devastated, and the partition of industrial areas of the country into internationalized zones so they could no longer serve as 'the caldron of wars.'"¹²⁴ As for the top layer of Nazi war criminals, firing squads would execute them upon capture and identification.¹²⁵ While Morgenthau's plan largely aligned with public opinion in autumn 1944,¹²⁶ some in Roosevelt's administration recognized the plan's hypocrisy in light of the Atlantic Charter.

Henry Stimson, Secretary of War, adamantly opposed the Morgenthau Plan. In a letter to Roosevelt, Stimson directly invoked the Atlantic Charter's lofty rhetoric in stating, "[t]he proposed treatment of Germany would, if successful, deliberately deprive many millions of people of the

121. Victory in Japan presented questions similar to those faced by the Allied powers in Europe. This note only analyzes the Nuremburg Trials for two primary reasons: (1) due to its later occurrence, the Tokyo International Military Tribunal's legal foundation and the arguments underlying this foundation were nearly identical to those of Nuremburg; and (2) largely because of factor (1), the Nuremburg Charter continues to serve as the primary document legitimizing war crime trials, with the Tokyo IMT serving a subsidiary justificatory role, if any at all. For a discussion of the unique legacies of the Tokyo IMT, see NEIL BOISTER & ROBERT CRYER, *THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL* 301–27 (2008); see also YUMA TOTANI, *THE TOKYO WAR CRIMES TRIAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II* 218–45 (2008). In this chapter, the author discusses the dissenting opinion of Justice Radhabinod Pal, the Indian representative on the Tokyo IMT. Pal's dissent provides a scathing critique of the Tokyo IMT's majority opinion and further develops arguments questioning the tribunal's jurisdiction and highlighting the *ex post facto* character of the charges.

122. See BORGWARDT, *supra* note 2, at 207.

123. See *id.*

124. *Id.*

125. See *id.*

126. See *id.* at 208–09.

right to freedom from want and freedom from fear.”¹²⁷ Because the Atlantic Charter failed to distinguish between victors and vanquished, German citizens were entitled to these freedoms.¹²⁸ Instead of evoking revenge against the German people, Stimson’s plan aimed to restore German law, order, and efficiency.¹²⁹

Stimson’s more benevolent plan, however, initially failed to align with public opinion. Any reconstruction plan that placed Germany in an equal or potentially better position than other devastated European nations understandably evoked public ire. In contrast, the Morgenthau Plan roughly aligned with the stance of 66 percent of Americans who wanted either to destroy Germany as a political entity or continue supervision and control of the state.¹³⁰ Of those Americans unaccounted for, only twelve percent sought to rehabilitate Germany.¹³¹ This minority position rose in prominence once the American press received news of the Morgenthau Plan’s draconian details. The plan’s oppressive character led one commentator to describe it as “the product of a feverish mind from which all sense of reality had fled.”¹³²

Morgenthau, and the Roosevelt Administration in general, failed to consider one important group’s reaction to any post-war reconstruction plan: the German people. The *Washington Post* noted that Josef Goebbels, Nazi propaganda minister, used the Morgenthau Plan to encourage greater German resistance.¹³³ Once American citizens established a connection between the Morgenthau Plan’s oppressive design and enhanced German resistance detailed in American periodicals, political opinion on Capitol Hill shifted against the plan.¹³⁴ With a presidential election in the near future, the political winds of Washington swayed President Roosevelt to shift his support to Stimson’s plan.¹³⁵

The plan ultimately adopted for Germany’s post-war treatment was a synthesis of the State and War Department approaches. Economically the plan followed the State Department’s advice to resurrect Germany into an

127. *Id.* at 208.

128. *See id.*

129. *See id.* (describing Stimson’s plan as a “short-term version of the equally conciliatory State Department approach”).

130. *Id.* at 209.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* Analyzing Roosevelt’s initial correspondences discussing the post-war plan for Germany highlight the shift triggered by public opinion. In a letter sent to Secretary of War Stimson, Roosevelt stated, “It is of the utmost importance that every person in Germany should realize that this time Germany is a defeated nation. I do not want them to starve to death, but, as an example, if they need food to keep body and soul together beyond what they have, they should be fed three times a day with soup from Army soup kitchens. . . . The German people as a whole nation has been engaged in a lawless conspiracy against the deficiencies of modern civilization.” CORDELL HULL, *THE MEMOIRS OF CORDELL HULL*, VOL. II 1602-03 (1948)

economically productive and democratic society. In addition to squaring with the Atlantic Charter's principles, the development of Germany's economy would, it was hoped, create a strong ally to quell the communist threat from the East.¹³⁶

But in the areas of administration, politics, and law, it was the War Department's proposals that won out.¹³⁷ In regards to war criminals, the War Department's plan sanctioned three potential approaches: (1) dealing with them by executive fiat which entailed summarily executing them or imprisoning them; (2) granting them amnesty; or (3) putting them on trial.¹³⁸ With both options (1) and (2) untenable—the former presenting a sharp contradiction of the Atlantic Charter and the latter politically unfeasible given the scale of Nazi atrocities—the Allied powers brought the top Nazis to trial.

2. The Nuremberg Charter & Trials

Leading international jurists met in London in the summer of 1945 to develop a legal framework for the Nuremberg trials. The ultimate product of this meeting—the Nuremberg Charter—provided the tribunal with jurisdiction over crimes against peace, war crimes, and crimes against humanity.¹³⁹

The jurists debated the potential *ex post facto* nature of all the charges. Crimes against peace principally concerned waging *aggressive war*, a charge the drafters believed even legal positivists would support given the Kellogg-Briand Pact's explicit ban of this action.¹⁴⁰ Jurists pointed to the Hague Conventions to justify the inclusion of the remaining charges (i.e., war crimes and crimes against humanity).¹⁴¹ Because several WWII participant states failed to sign the conventions,¹⁴² the jurists utilized the developing concept of customary international law to extend the conventions to non-signees.

This extension required two steps. First, the jurists applied the Martens clause—named after Russian scholar Feodor Martens—contained in the Hague Conventions of 1899 and 1907. This clause stated:

136. *Id.* at 211.

137. *Id.*

138. *Id.*

139. The Nuremberg Charter was endorsed by the United Nations General Assembly just weeks after the sentences were carried out. Today the document is universally recognized as customary international law and provides legal imprimatur to war crimes trials such as the International Criminal Tribunal for Yugoslavia. See NORBERT EHRENFREUND, *THE NUREMBERG LEGACY: HOW THE NAZI WAR CRIMES TRIALS CHANGED THE COURSE OF HISTORY* 123–25 (2007). For an in-depth analysis of the Nuremberg Charter's legal legacy and continued vitality see KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* 369–97 (2011).

140. BORGWARDT, *supra* note 2, at 225.

141. *Id.* at 227.

142. *Id.*

Until a more complete code of the laws of war has been issued, the High Contracting parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and rule of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.¹⁴³

The jurists argued that war crimes and crimes against humanity, although explicitly absent from the Hague Conventions, had reached the category of “usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.”¹⁴⁴ Therefore, both crimes were implicitly prohibited by the Hague Conventions.

To extend the implicit prohibitions in the Hague Conventions to non-signees, the jurists had to rely on the developing legal doctrine of customary international law.¹⁴⁵ This doctrine, eventually enshrined in the Statute of the International Court of Justice, granted legal effect to “international custom, as evidence of a general practice accepted as law,”¹⁴⁶ regardless of a state’s explicit consent. The Hague Conventions’ near universality led the jurists to view any principles enshrined in these treaties as international custom. This two-step justification assured the jurists that all crimes listed in the Nuremburg Charter avoided the *ex post facto* conundrum.¹⁴⁷

Determining the tribunal’s jurisdiction was only the first of many hurdles the Allied powers confronted during the Nuremburg process. In addition to the persistence of the *ex post facto* charge,¹⁴⁸ the “victor’s justice” allegation plagued the tribunal, as noted by Norbert Ehrenfreund in *The*

143. Hague Conventions on the Laws and Customs of War (1899 & 1907), in BORGWARDT, *supra* note 2 at 226.

144. *Id.*

145. The Statute of the Permanent Court of International Justice contained one of the first articulations of customary international law. Article 38 of the statute stated that one source of law the League of Nations’ judicial branch could consider was “the general principles of law recognized by civilized nations.” Statute of the Permanent Court of International Court of Justice art. 38, Dec. 13, 1920.

146. Statute of the International Court of Justice art. 38.

147. Viewed through a modern lens, the jurists’ reasoning solely relies on the doctrine of customary international law. However, customary international law’s novelty at the time encouraged the jurists to reference the Marten’s clause as a concrete example of customary international law’s influence on binding international conventions. For a reflection on the *ex post facto* problem in the immediate aftermath of the Nuremburg Trials see Henry L. Stimson, *The Nuremberg Trial: Landmark in Law*, FOREIGN AFFAIRS, Jan. 1947, <http://www.foreignaffairs.com/articles/70556/henry-l-stimson/the-nuremberg-trial-landmark-in-law>.

148. The illegitimacy of *ex post facto* charges formed the root of many German defense counsel arguments. For example, the German defense counsel relied on the *si omnes* clause in the Hague Convention (1907) to refute the prosecution’s use of customary international law. The relevant clause stated that the convention only applies to contracting parties, and “then only if all belligerents are parties to the Convention.” Because many WWII combatants had not signed the Convention, the defense counsel argued the Convention was inapplicable. BORGWARDT, *supra* note 2, at 227.

Nuremberg Legacy.¹⁴⁹ The Soviets involvement in the tribunal only buttressed this criticism. How could the tribunal charge the Nazis with waging aggressive war when the Soviets—represented by a judge on the tribunal—had invaded both Poland and Finland during WWII?¹⁵⁰ The post-Nuremberg confirmation that the Soviets committed the slaughter of Polish officers in Katyn Forest, a charge the Nazis faced at Nuremberg, bolstered claims of hypocrisy.¹⁵¹

The tribunal's inconsistencies, and arguable hypocrisies, did not fall solely on the Soviets' shoulders. In a deposition to the German defense team, a U.S. admiral confirmed the Germans' submarine warfare strategies—a component of the indictment against some defendants—was identical to the Americans'.¹⁵² To justify this obvious double-standard, the prosecution argued that “simply because some robbers went unpunished did not mean that stealing wasn't a crime.”¹⁵³ Supreme Court Justice Robert H. Jackson, lead prosecutor at Nuremberg, recognized that “the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.”¹⁵⁴ While true in a prospective sense, Jackson's statement fails to address the freedom of Allied war criminals who altogether avoided the chalice for their past misdeeds.

Embarrassed by some of their own domestic human rights abuses, the Allied powers—especially the U.S.—made sure the prosecution team drew a tight connection between crimes against humanity and either crimes against peace or war crimes. Robert Jackson articulated this connection by stating, “[t]he reason that this program of extermination of

149. Justice Jackson himself was well aware of this criticism and, at least in private, recognized the argument's credence. Upon Judge Biddle's refusal to allow the prosecution team to handle the administrative functions at Nuremberg, Justice Jackson responded that “this was not an ordinary trial and some of the traditional rules of impartiality and independence of the tribunal had already been swept aside when the Russian General Nikitchenko switched from the role of negotiator-prosecutor at London to become a judge at Nuremberg.” EHRENFREUND, *supra* note 139, at 82.

150. BORGWARDT, *supra* note 2, at 230.

151. *Id.*

152. *Id.* at 231.

153. *Id.*

154. *Id.* Justice Jackson's *ex parte* contacts with the tribunal's judges, however, tainted the trial record of a judicial procedure already suffering from foundational infirmities. On multiple occasions, Jackson voiced disapproval directly to American Judge Francis Biddle, whom Jackson believed was “deliberately trying to thwart him.” While the American Bar Association's Canons of Professional Ethics were not directly applicable to the trial, Nuremberg was an Anglo-American endeavor in its judicial character and Jackson's intention to abide by the traditional rules governing American judicial practice was “evidenced by the fact that before the trial he advised the judges not to hold sessions with only prosecutors present.” This implies that Justice Jackson's actions violated a sacrosanct principle of American legal practice, namely that “a lawyer should not communicate or argue privately with the Judge as to the merits of a pending case, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special consideration or favor.” EHRENFREUND, *supra* note 139, at 76–78.

Jews and destruction of the rights of minorities becomes an international concern is this: it was part of a plan for making illegal war.”¹⁵⁵ This meant that if the Nazis had not committed crimes against peace or war crimes (i.e., Germany had not invaded any other country), then the international community had no right to consider state-sanctioned oppression of people within Germany. The tribunal accepted this logic, which restricted the prosecution team to crimes against humanity stemming from the period after the invasion of Poland, the specified starting date for crimes against peace and war crimes.¹⁵⁶ Borgwardt identifies the comfort this legal creation provided to officials in Washington who realized that “there was no principle available that could capture the crimes at Kristallnacht in Germany and yet spare from legal scrutiny the lynching of thousands of African-Americans in the American South.”¹⁵⁷

While the Nuremberg Tribunal ultimately succeeded in disposing of top Nazi war criminals, it left many questions unanswered. Novel legal argumentation may have justified the Nuremberg Charter’s applicability to Nazi Officers, but it failed to explain why Allied war criminals were not held accountable for their crimes. Requiring crimes against peace or war crimes as an essential element of a successful crimes against humanity charge created a convenient domestic sovereignty shield for Allied powers.¹⁵⁸ However, this requirement produced incredulity when considered in conjunction with the Nuremberg Charter’s explicit language that “whether or not in violation of domestic law of the country where perpetrated”¹⁵⁹ the tribunal had authority to find guilt for crimes against humanity.

155. BORGWARDT, *supra* note 2, at 229.

156. *Id.*

157. *Id.* at 229–30.

158. Realist concerns help explain why the principles underlying the Nuremberg Charter failed to germinate in the decades immediately following WWII. As Norbert Ehrenfreund states,

For decades following WWII, military leaders were rarely held accountable for their aggressions. Because of their political power they could instigate war and commit crimes against humanity, and if later held to account, could then retreat to live undisturbed lives in places like Panama, South America and the south of France. Or, as in the case of Africa, continue their brutal ways in a culture of impunity. Interest in the Nuremberg trial declined. In the late 1960s and with the escalation of the Vietnam War, the law and concepts established at Nuremberg took a new significance . . . [However,] those questions soon subsided and no trials were held or even seriously considered.”

EHRENFREUND, *supra* note 139, at 125–26.

The dominating thesis of Samuel Moyn’s book, *The Last Utopia: Human Rights in History*, offers one explanation for why human rights, after a long period of dormancy, began to rise in prominence throughout the 1970s. See MOYN, *supra* note 2, at 138. This rise was arguably hallmarked by the establishment of war crimes tribunals for the atrocities committed in Yugoslavia, Rwanda, and Sierra Leone. For a general discussion of these tribunals, and their roots in the Nuremberg Charter, see EHRENFREUND, *supra* note 139, at 153–63.

159. Nuremberg Charter art. 6.

3. The Universal Declaration of Human Rights

Only a few months after the Nuremberg Trials began, the United Nations began the process of developing a document to protect international human rights, many of which were brutally violated throughout WWII. At the General Assembly's first session in 1946, human rights were one of a plethora of topics competing for attention.¹⁶⁰ The contentious political, social, and religious concerns surrounding the drafting of a *universal* declaration prompted the General Assembly to delegate the issue to ECOSOC. In response, ECOSOC established the Commission on Human Rights.¹⁶¹

In creating the Commission, ECOSOC sought to strengthen the notion of universality by requiring diverse membership. China, the United States, Lebanon, France, the Philippines, Panama, Britain, and Uruguay include only a handful of the states possessing representatives.¹⁶² This geographic diversity produced philosophical and religious diversity, which inevitably led to impassioned debates concerning the source of human rights, the degree of responsibility states have to protect human rights, and the role of collective rights, among other topics.¹⁶³

These debates validated what most astute observers anticipated: constructing the definitional contours of human rights was the primary obstacle confronting the Commission.¹⁶⁴ Creating a concrete definition of the term *human rights* is difficult for a single individual. The Commission's composition forced its leaders to balance diverse and, on occasion, nearly irreconcilable beliefs and customs to create a *universal* definition of human rights, an exponentially more difficult task.¹⁶⁵

Understanding the importance of its mission and recognizing the obstacles posed by diverse philosophical and religious traditions, the Commission solicited insights from preeminent philosophers throughout the world.¹⁶⁶ The questionnaire distributed to philosophers noted that "the world of man is at a critical stage in its political, social, and economic evolution" and stressed that "a common formulation of the rights of man" was necessary "as an inspiration and as a guide to practice."¹⁶⁷

160. Other topics considered during the first session included genocide, gender equality, and freedom of information. LAUREN, *supra* note 5, at 207–08.

161. *Id.* at 209–10.

162. *Id.* at 212–13.

163. *Id.* at 214

164. *Id.*

165. Cultural relativism continues to impede the effective articulation and implementation of human rights. In the campaigns against female genital mutilation in Africa and *sharia* law in the Muslim world, human rights activists consistently confront cultural relativists who oppose their efforts as modern day imperialism. For one of many proposals on reconciling universal human rights with cultural relativism see Diana Ayton-Shenker, *The Challenge of Human Rights and Cultural Diversity*, U.N. DPI/1627/HR (March 1995), available at <http://www.un.org/rights/dpi1627e.htm>.

166. The UNESCO philosophers' committee was responsible for sending out the questionnaire on behalf of the Human Rights Commission. ISHAY, *supra* note 26, at 219.

167. UNESCO, *Memorandum on Human Rights*, 6, Document Phil/1/1947, (Mar. 27, 1947).

After receiving seventy responses, ECOSOC created the special Committee on the Philosophic Principles of the Rights of Man to determine if sufficient agreement across cultural and religious traditions existed to form a universal declaration.¹⁶⁸ The committee determined “common convictions” existed across the world, but, unsurprisingly, recognized the task of converting these principles into a politically feasible declaration would be exceptionally difficult.¹⁶⁹

The Commission soon had to worry about balancing more than competing philosophical and religious traditions. Cold War tensions quickly supplanted the bonds forged in military victory and precipitated politically contentious Commission debates.¹⁷⁰ The Soviet and U.S. camps had competing visions on what form of rights should constitute the backbone of the declaration. Consistent with their socialist principles, the Soviets prioritized social and economic rights.¹⁷¹ The United States preferred a declaration focused on civil and political rights akin to their own Bill of Rights.¹⁷²

President Truman’s containment proclamation directed at Soviet expansion injected Commission discussions with vitriol and prompted accusations from both sides.¹⁷³ The United States highlighted the Soviets’ oppression of dissidents, censorship of opposition, and persecution of religion.¹⁷⁴ In return, the Soviets alleged that the United States failed to protect its citizens’ basic economic and social rights.¹⁷⁵ By detailing the United States’ treatment of African Americans, the Soviets depicted the United States as a hypocritical hegemon unwilling to protect the civil and political rights—the rights the country supposedly held dear—of its African American citizens.¹⁷⁶

While embarrassing, these allegations encouraged both countries to finally agree on one issue, namely the unenforceability of whatever document emerged from the Commission.¹⁷⁷ Micheline Irshay notes the Rus-

168. LAUREN, *supra* note 5, at 216.

169. *Id.* at 217.

170. *Id.* at 219–20.

171. Some contemporary scholars believe social and economic rights are anathema to “American individualism,” and find it surprising that the United States eventually accepted a declaration containing references to such rights. This overlooks President Roosevelt’s use of the word *social rights* to describe some of the New Deal’s protections in his 1944 State of the Union address and the focus on the “common good that had been the framework for the government’s role in combating economic instability at the New Deal’s apex.” Considered in the context of the New Deal, the inclusion of economic and social rights in the declaration appears consistent rather than incompatible with American tradition. MOYN, *supra* note 2, at 63–64.

172. ISHAY, *supra* note 26, at 221.

173. LAUREN, *supra* note 5, at 219.

174. *Id.* at 220.

175. *Id.*

176. *Id.* For a detailed analysis of civil rights in the Cold War see MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS* (2011).

177. After passage of the Universal Declaration, the Human Rights Committee worked towards developing a binding human rights convention. This process was also fraught with

sians possessed “minority status in the overall composition of the United Nations in 1948” and therefore insisted “that the state should be left as the primary authority for securing human rights.”¹⁷⁸ Even though United States’ influence dominated the United Nations in 1948, the country was still hesitant to expose domestic mistreatment of African Americans to international intervention. Eleanor Roosevelt, the United States’ primary representative on the Commission, was instructed to stay focused on a nonbinding declaration and keep all discussion regarding binding commitments to a “tentative level [that doesn’t] involve any commitments by this Government.”¹⁷⁹

As human rights petitions from oppressed peoples throughout the world flooded the Commission, additional governments began to oppose adopting a binding human rights document.¹⁸⁰ Even if a government avoided embarrassing publicity thus far, its representatives realized that the Commission’s acceptance of petitions exposed the government’s domestic and colonial practices to international oversight.¹⁸¹ Paul Gordon Lauren notes that governments preempted this scary thought by instructing their Commission representatives to publicly articulate the Commission’s inability to consider or respond to individual complaints.¹⁸²

discord, leading the Committee to bifurcate the process and develop two separate conventions, one protecting civil & political rights and the other securing social & economic rights. Completing the first draft convention only became possible once the Soviets stopped attending the Commission in early 1950. The Soviet’s withdrawal permitted progress, but as Samuel Moyn notes, it also “cemented irrelevance at another, as human rights were revealed as useless in vaulting the distance between the contending ideologies of the world at the time.” MOYN, *supra* note 2, at 69.

178. ISHAY, *supra* note 26, at 221.

179. U.S. National Archives, RG 84, Box 103, File “IO: ECOSOC, Human Rights 1946-49,” instructions from Durward Sandifer to Eleanor Roosevelt, Feb. 5, 1947 [hereinafter *ECOSOC Human Rights Instructions*]. According to Paul Gordon Lauren, Mrs. Roosevelt viewed this instruction as “most unwelcome.” LAUREN, *supra* note 5, at 223. In contrast, Jason Berger describes Mrs. Roosevelt’s support for a non-binding declaration as both personal and political. See JASON BERGER, *A NEW DEAL FOR THE WORLD: ELEANOR ROOSEVELT AND AMERICAN FOREIGN POLICY* 68 (1981). To substantiate Mrs. Roosevelt’s personal commitment to a non-binding declaration, Berger draws from the statements of one of Mrs. Roosevelt’s confidants who recalled,

In [Mrs. Roosevelt’s] view the world was waiting, as she said, ‘for the Commission on Human Rights to do something’ and that to start by the drafting of a treaty with its technical language and then to await its being brought into force by ratification, would halt progress in the field of human rights. She spoke out, in those early days, that the world expected, and needed, a guide to the direction that these ‘fundamental human rights,’ referred to in the Charter of the United Nations, should take. . . . A Declaration, she pointed out, would not require ratification, it could be approved first by the Economic and Social Council and then adopted by the General Assembly, and thus be a great document with the seal of approval stamped thereon by the Members of the United Nations Organization, a document incorporating the ideals and aspirations of human beings the world over. Marjorie M. Whiteman, *Mrs. Franklin D. Roosevelt and the Human Rights Commission*, 62 AM. J. INT’L L. 918, 919 (1968).

180. LAUREN, *supra* note 5, at 218.

181. *Id.*

182. *Id.*

These public statements did not stop oppressed peoples from sending petitions. Many petitioners doubted the Commission's ability to continue its high-minded intellectual endeavor while ignoring a plethora of petitions exposing abuses throughout the world.¹⁸³ W.E.B. DuBois's petition condemning United States' treatment of African Americans was particularly successful at garnering worldwide attention.¹⁸⁴ The National Association for the Advancement of Colored People (NAACP) understood that the United Nations' response to African American suffering would forecast the organization's response to colonial oppression. As an NAACP publication presciently stated:

The eyes and ears of the chancelleries of the world will be focused and attuned to this petition. For depending upon what stand the United Nations takes in this appeal will determine in part, the policy to be followed and the measures to be adopted by the colonial powers in their future relations with their wards, and the procedures to be put into practice by countries who practice some form of discrimination. While on the part of submerged and underprivileged groups, it is likely to inspire and stimulate them to carry their cases directly to the world body in the hope of redress.¹⁸⁵

The "submerged and unprivileged groups" soon learned that the United Nations continued to respect domestic sovereignty, ultimately confirming the Commission's "declaration of impotence."¹⁸⁶

Two years after the Commission's first meeting, the General Assembly ratified what Borgwardt describes as the "toothless"¹⁸⁷ Universal Declaration of Human Rights—a reference to its non-binding and purely aspirational character. Of the organization's fifty-eight member states, fifty ratified the declaration, with the remaining states abstaining.¹⁸⁸ Despite the declaration's inclusion of economic and social rights—ultimately backed by the reluctant Americans¹⁸⁹—the USSR abstained from voting, "worried that this document, predominantly 'individualist' in its selected

183. *Id.*

184. *Id.* at 218–19.

185. *Id.* at 219 (quoting W.E.B. Du Bois, *Statement of Dr. W.E.B. Du Bois to the Representatives of the Human Rights Commission*, located at Library of Congress, Manuscript Division, W.E.B. Du Bois Papers, Reel 60, frames 708–09).

186. HOWARD TOLLEY, JR., *THE U.N. COMMISSION ON HUMAN RIGHTS* 16 (1987).

187. BORGWARDT, *supra* note 2, at 264 (noting that the Universal Declaration of Human Rights was "toothless in the way the Declaration of Independence is toothless – unenforceable in any court of law but having a moral, cultural, and even political grip that resisted attempts by the great powers, especially the United States and the USSR, to wriggle free.").

188. Byelorussia, Czechoslovakia, Poland, Saudi Arabia, South Africa, Ukraine, the Soviet Union, and Yugoslavia abstained.

189. President Truman initially opposed the inclusion of economic and social rights in the declaration until Eleanor Roosevelt convinced Truman such principles were consistent with her husband's New Deal and *four freedoms*. ISHAY, *supra* note 26, at 222.

category of rights, would challenge the sanctity of domestic jurisdiction guaranteed by the legally binding UN charter.”¹⁹⁰

III. THE IMPORTANCE OF PRIMARY SOURCES: THE CASE OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Referencing primary sources¹⁹¹ helps avoid the “great downstream flood” view of human rights history and identifies “new sources where the river swells.”¹⁹² The authors of primary sources benefit from a greater familiarity with the interests and individuals of the period. This familiarity often leads to more detailed and accurate accounts of events. In providing contemporaneous accounts, authors are more likely to avoid the romanticized depictions common among historians.¹⁹³

Primary sources analyzing the Universal Declaration of Human Rights’ passage highlight the document’s major limitation—its nonbinding character. Professor H. Lauterpacht stated:

The practical unanimity of the Members of the United Nations in stressing the importance of the Declaration was accompanied by an equally general repudiation of the idea that the Declaration imposed upon them a legal obligation to respect the human rights and fundamental freedoms which it proclaimed.¹⁹⁴

Josef L. Kunz stressed that the United Nations “cannot protect [human rights], it cannot take action, apart from the case that the violation of human rights constitutes a danger to peace.”¹⁹⁵ Instead, the United Nations can only “‘promote and encourage,’ ‘assist in the realization,’ ‘make recommendations,’ ‘promote universal respect and observance’ of human rights.”¹⁹⁶

190. LAUREN, *supra* note 5, at 223. For a discussion of how to use realist international law theory to advance idealist human rights goals see Laura S. Johnson, *Prescriptive Realism and the Limits of International Human Rights Law*, 10 *VERA LEX* 7 (2009). Johnson observes that squaring human rights promotion with a state’s self-interest occasionally requires coercive forces. She cites both sanctions and humanitarian intervention as two tools to alter state’s incentives. *Id.* at 18–20.

191. While the term “primary source” has multiple definitions, I highlight the importance of (1) *sources analyzing events that are published or produced in the immediate aftermath of the events they analyze* and (2) *direct statements from historical figures from the time period*. In regards to the second type of primary source, Elizabeth Borgwardt provided a great compendium of references to certain primary sources this author was unable to access directly. See BORGWARDT, *supra* note 2.

192. MOYN, *supra* note 2, at 41–42.

193. See, e.g., FRED DAVIS, *YEARNING FOR YESTERDAY: A SOCIOLOGY OF NOSTALGIA* (1979).

194. H. Lauterpacht, *The Universal Declaration of Human Rights*, 25 *BRIT. Y.B. INT’L L.* 354, 356 (1948).

195. Josef L. Kunz, *The United Nations Declaration of Human Rights*, 43 *AM. J. INT’L L.* 316, 318 (1949).

196. *Id.*

Lauterpacht rejected arguments that the Declaration possessed any indirect legal effect. Principal among these arguments were that the Declaration contained an authoritative interpretation of the human rights and fundamental freedoms contained in the United Nations Charter and that upon its passage the Declaration was already a reflection of customary international law.¹⁹⁷ To dismiss the former argument, Lauterpacht reasoned that the belief a “document is not legally binding and that it embodies, nevertheless, an authoritative interpretation of [the] legally binding [United Nations Charter] is to make a statement the first part of which contradicts the second.”¹⁹⁸ To repudiate the latter, Lauterpacht stressed that “various delegates. . . repeatedly denied that they were about to accept a legal obligation to adapt their national legislation to the high aspirations of the Declaration.”¹⁹⁹ Instead of immediately becoming customary international law upon its passage, “[t]he Declaration gives expression to what, in the fullness of time, ought to become principles of law generally recognized and acted upon by state Members of the United Nations.”²⁰⁰

Authors from the period also questioned the Declaration’s moral authority. Lauterpacht believed a declaration’s legal and moral authority were two sides of the same coin, stating:

The moral authority and influence of an international pronouncement of this nature must be in direct proportion to the degree of sacrifice of sovereignty of state which it involves. . . The [moral] authority is a function of the degree to which states commit themselves to an irrevocable recognition of these rights by a will and agency other than and superior to their own.²⁰¹

Kunz noted that the “crisis of Western-European culture” led to a “new renaissance of natural law,” but he still believed any supposed natural rights “stand and fall with positive law guaranteeing them and giving an effective remedy against their violation in independent and impartial courts.”²⁰²

The Declaration’s nonbinding character and dubious moral authority—both qualities highlighted by scholars from the 1940s—are irreconcilable with Lynn Hunt’s belief that the document “crystallized 150 years of struggle for rights.”²⁰³ While the Declaration’s infirmities did not “deprive

197. Lauterpacht, *supra* note 194, at 366.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 371–72.

202. Kunz, *supra* note 195, at 319.

203. HUNT, *supra* note 6, at 205. To be fair to Hunt, she mentions that the Declaration “had no mechanism for enforcement,” *id.* at 204, that “human rights are still easier to endorse than enforce,” *id.* at 208, and that “[t]he Universal Declaration initiated the process [of advancing human rights] rather than representing its culmination.” *Id.* at 207. However, her characterization of the Declaration’s passage as a crystallizing moment is wholly inconsistent with the above limitations. Crystallization of rights requires more than transcribing them

[the Declaration] altogether of significance or potential effect,”²⁰⁴ they did caution “patience,” as John P. Humphrey noted.²⁰⁵ Specific instructions to Eleanor Roosevelt to stay away from binding commitments during negotiations at the Commission on Human Rights indicate that human rights were far from crystallized upon the Declaration’s passage.²⁰⁶ Only in the following decades did the document develop into customary international law.²⁰⁷ An account of the Declaration’s passage as a crystallization event offers a tempting Whig history²⁰⁸ that unfairly diminishes the importance of subsequent developments actually producing a list of enforceable rights.

But this analysis of the Universal Declaration of Human Rights is not anomalous. Analyzing other prominent events in the history of human rights produces similar accounts and statements in tension with common perceptions regarding the events they concern. Illustrative examples include Winston Churchill’s quick rebuke of Clement Atlee’s depiction of the Atlantic Charter as a universal proclamation;²⁰⁹ comments from Great Power delegates at the San Francisco Conference characterizing any debate regarding the United Nations’ ultimate structure as inconsequential;²¹⁰ and President Roosevelt’s initial stances towards the post-war reconstruction of Germany²¹¹ and summary execution of leading German war criminals.²¹² This is unsurprising. Often, the portrayal of an important historical event in both academia and the general public evolves to produce a consistent understanding of the event and its placement within larger historical movements. Human beings preference for consistency makes such depictions attractive.

However, subscribing to these understandings without referencing primary sources can be dangerous. Primary sources allow scholars to understand the true significance of an event at the time it occurred and highlight contemporary opposition forces. With this information, scholars can search for the factors explaining the divergence between the event’s initial significance and its modern characterization.

onto a document lacking any effective enforcement mechanism. Hunt’s characterization encourages readers to (1) ignore the subsequent events that actually provided the Declaration’s listed rights international law’s imprimatur and (2) adopt an “idol or origins” view of the Declaration rather than analyzing the distinct forces (e.g., superpower politics in the wake of WWII) at work during negotiations that shaped the Declaration’s final content. *See supra* p. 4–5.

204. Lauterpacht, *supra* note 194, at 376.

205. John P. Humphrey, *The Universal Declaration of Human Rights*, 4 INT’L J. 351, 361.

206. *ECOSOC Human Rights Instructions*, *supra* note 179.

207. *See* discussion *infra*. p. 860.

208. Zaremby, *supra* note 8, at 159.

209. *See* BORGWARDT, *supra* note 2, at 34.

210. *See* CADOGAN, *supra* note 99, at 742.

211. *See* Hull, *supra* note 135, at 1602-03.

212. *See* BORGWARDT, *supra* note 2, at 207.

CONCLUSION

Between President Wilson's unprecedented proposal for an international organization at Versailles and the United Nations' approval of the Universal Declaration of Human Rights, the world saw substantial progress in the realm of human rights. To Paul Gordon Lauren this progress reflects that human rights "visions could not be extinguished."²¹³ The experiences of fledgling Eastern European countries at Versailles, Chinese delegates at Dumbarton Oaks, NGOs and representatives from developing states at San Francisco, and petitioners to the Commission of Human Rights tell a much different story. In all of these examples, realpolitik extinguished lofty human rights visions. Intense political struggles and substantial human rights shortfalls demonstrate that if there is anything human rights are clearly not, it is "self-evident."²¹⁴

Historicism and legal realism provide insights cautioning against any vision of human rights as self-evident. The Whig history of self-evidence provides a simplistic and attractive historical narrative. This history, however, eschews historical nuance—an element essential to an accurate understanding of human rights history—for a romanticized depiction.

Human rights visionaries and their lofty principles play a role in human rights history, but this role was shaped by many factors, including colonialism, realpolitik, capitalism, and nationalism. Human rights visionaries often encountered equally passionate statesmen or politicians restricted by pragmatic concerns. For example, Winston Churchill's fear of becoming the first prime minister to "preside over the liquidation of the British Empire"²¹⁵ partially explains the inconsistency between Churchill's depiction of the Atlantic Charter as an "ephemeral press release"²¹⁶ and Nelson Mandela's universal interpretation. In rare instances, human rights visions and political interests align, as was the case with the passage of the minority treaties. But even in this case, the inapplicability of minority treaties to western European powers reveals the stains of realpolitik. Principles drawn from both historicism and legal realism encourage detailing, rather than concealing, these stains.

Competition between a multitude of actors and interests produced many unexpected developments throughout human rights history. The Universal Declaration of Human Rights' evolution into customary international law is a prime example. Primary sources highlight the powerful

213. LAUREN, *supra* note 5, at 2 (2003). Lauren offers an impressive introductory history on human rights development that extensively details the role of Great Power politics throughout this history. However, countless quotes, such as the one in the above text, depict human rights as universal truths just waiting to take root in the proper climate. If we take such language on its face, then Lauren views Great Power conflict and realpolitik as a mere *obstacle* for these universal truths to overcome, rather than an *independent force* that shapes the actual meaning and understanding of human rights.

214. HUNT, *supra* note 6, at 214.

215. Prime Minister Winston Churchill, Speech at the Mansion House (Nov. 10, 1942) available at <http://www.ibiblio.org/pha/policy/1942/421110b.html>.

216. BORGMARDT, *supra* note 2, at 34.

forces constraining the Declaration's content and restricting it to non-binding status. Despite this unpromising start, in subsequent years the majority of states protected the Declaration's enumerated rights. The rights enshrined in the Declaration reflected "the general principles of law recognized by civilized nations"²¹⁷ and therefore, were deemed customary international law. Referencing contemporaneous accounts of the Declaration's passage highlights the document's major infirmities. With knowledge of these weaknesses, modern historians are forced to explain how the document evolved into a vital component of customary international law.

Contemplation of human rights history reveals that progress at unexpected times or through unanticipated forces, if not the norm, is quite common.²¹⁸ The political process necessary to craft the Universal Declaration of Human Rights underscores that human rights are *not* indelible truths waiting to germinate in society through the efforts of enlightened leaders. Instead, human rights are cast in a political oven and evolve through the influence of diverse, and on occasion unlikely, forces.

217. *See id.* at 146.

218. *E.g.*, Samuel Moyn argues that human rights concerns and progress remained relatively dormant following the passage of the Universal Human Rights Declaration until the 1970s. As decolonization expanded in the 1950s and 60s, peoples still subject to the yoke of colonization began to conflate human rights and self-determination. Both UN covenants on human rights, which were drafted during this era, affirm the right to self-determination, a right conspicuously absent from the Declaration. The hardening of the Cold War and the decolonization movement redirected, or recommitted, the world's focus to the nation-state as the primary international concern after the brief post-war interlude focusing on individuals. However, by the 1970s, the rate of decolonization slowed and Cold War fatigue produced a disgruntled world populace, leading human rights (i.e., the human rights enshrined in the Declaration as opposed to the rights espoused by the decolonization movement) to become an attractive alternative. MOYN, *supra* note 2, at 62. Moyn highlights the inapplicability of more traditional theories explaining the growth of customary international law to human rights law by arguing such theories "of the customary growth of norms [do] very little to explain the startling move of human rights from the periphery to the center of the discipline – since it took place almost overnight. If 'evolution' there was, it occurred on a kind of catastrophe model, in which change happens in nonlinear moments of unforeseeable mutation: a model that does not fit well with usual theories of customary progress in the law." *Id.* at 207. *But see* Caroline Anderson, Book Note, *Human Rights: A Reckoning*, 53 HARV. INT'L L.J. 549, 552–57 (2012) (reviewing MOYN, *supra* note 2) (arguing fundamental weaknesses in Moyn's argument stem from his failure to provide a concrete definition of human rights and, connected to this failure, an insufficient explanation of why self-determination and group rights are distinguishable from human rights rather than considered in the human rights ambit).