

HUMAN RIGHTS AND HISTORY

A CHALLENGE FOR EDUCATION

edited by Rainer Huhle



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CONTENTS

- 4 Foreword (*Martin Salm*)
- 6 Introduction: The Complex Relationship of Historical Learning and Human Rights (*Rainer Huhle*)
- 11 A Duty to Humanity – Stéphane Hessel (*Interview with Rainer Huhle*)
- 19 Human Rights and Their History from a European Perspective (*Morten Kjaerum*)

THE DAWN OF HUMAN RIGHTS

- 25 The Universal Declaration and the Conscience of Humanity (*Johannes Morsink*)
- 37 “Jewish Rights are Human Rights”: Jewish Contributions and Controversies in the International Establishment of Human Rights after 1945 (*Rainer Huhle*)
- 50 From the Holocaust to the Genocide Convention: A Human Rights Learning Process (*William Schabas*)
- 62 Coming to Terms with “Crimes against Humanity”: Nuremberg and Beyond (*Rainer Huhle*)

RESPONSES TO THE EXPERIENCE OF INJUSTICE: SELECTED EXAMPLES

- 82 The Prohibition on Discrimination: A Founding Principle of Human Rights (*Heiner Bielefeldt*)
- 90 Freedom of Expression as a Human Right: The Role of Hate Speech in the Public Sphere (*Otto Böhm*)
- 99 Freedom of Expression as a Cornerstone Human Right (*Agnès Callamard*)
- 107 The Right to Asylum in West Germany: Refugee Policies in the Federal Republic of Germany, 1949–1975 (*Patrice G. Poutrus*)
- 114 From Abolition to Eradication: Slavery in the Twenty-First Century (*Aidan McQuade*)
- 125 Compensation for Nazi Slave Labor: The Context of Human Rights (*Günter Saathoff*)

HUMAN RIGHTS EDUCATION AS THE OUTCOME OF HUMAN RIGHTS MOVEMENTS

- 130 “The Law is Our Only Language”: Soviet Dissidents and Human Rights (*Uta Gerlant*)
- 142 The Helsinki Final Act and the Civil and Human Rights Movement in the Soviet Union (*Ernst Wawra*)
- 155 Human Rights Education between Norms and Practice: Reflections on the Colombian and Latin American Experience (*Flor Alba Romero*)

HISTORY AND HUMAN RIGHTS EDUCATION

- 166 The Role of History in Education against Discrimination (*Monique Eckmann*)
- 175 The Role of Historical and Political Education in Contemporary Human Rights Education (*Albert Scherr*)
- 180 Memory Work and Human Rights Education in an Immigrant Society (*Hasko Zimmer*)
- 189 History as Resource: Human Rights Education as Historical and Political Education (*Karl-Peter Fritzsche*)
- 192 Index of Authors

FOREWORD

When we met in November 2008 for the international conference “Rights that make us Human Beings,” we gathered at a historic location: the courtroom of the Nuremberg District Court, which was the setting for the Nuremberg Trials from 1945 to 1949.

Stéphane Hessel’s appearance there remains especially vivid in my memory. Hessel is a survivor of the Buchenwald concentration camp and French diplomat who participated in the drafting of the Universal Declaration of Human Rights. At this historic location, Hessel spoke about the challenges we face today. He passionately called on young people to work for a solution to an increasingly urgent problem, namely the scarcity of resources and climate change, and especially for a solution to global poverty.

In so doing, he touched on the overarching challenge that shaped the conference: to conceive of the human rights formulated in 1948 as a direct response to war and genocide and as the product of history, and to relate them to contemporary threats to human dignity. One of our central interests in this respect is human rights education, which always entails two things: conveying knowledge and respect for human rights. The link between knowledge and attitudes is important because knowledge alone cannot produce action to protect human rights, just as an opinion without knowledge cannot ground arguments or produce useful action over the long term.

The Foundation “Remembrance, Responsibility and Future” stands for the acceptance of responsibility for past injustices and, against this background, for resisting the threat of new injustices. This relationship between historical awareness and current engagement remains fragile. Awareness of the historical genesis of human rights is part of the understanding of these rights, yet we also know that human rights have a universal validity independent of their original context. By the same token, a human rights perspective on historical injustice helps us move beyond ideology or other prejudices, but commemoration and mourning also require a space that is not necessarily oriented towards current engagement.

One of the central concerns of this volume is to situate the United Nations Charter of Human Rights and its provisions within their historical context. The Foundation “Remembrance, Responsibility and Future” embodies the desire to link our efforts to facilitate understanding between peoples to the historical experience of injustice, and to realize this project by promoting human rights education that takes historical contexts into account. If we learn about rights in their proper historical context, we are better equipped to understand injustice in the present day, and we come to understand the need to struggle against violations of human rights, to demonstrate civic courage, and to draw sustenance from our successes. We also learn that our engagement for human rights is an open-ended struggle, with a history of achievement and ongoing challenges.

This volume is the outcome of papers given at the 2008 conference in Nuremberg, and of our subsequent discussions and reflections. I extend my sincere gratitude to the editor Rainer Huhle, the individual authors, the translator Patricia Szobar and our program manager Christa Meyer.

Martin Salm

Chairman of the Foundation “Remembrance, Responsibility and Future”

Rainer Huhle

INTRODUCTION: THE COMPLEX RELATIONSHIP OF HISTORICAL LEARNING AND HUMAN RIGHTS

On December 10, 2008, the 60th anniversary of the Universal Declaration of Human Rights (UDHR) was celebrated around the world. The anniversary occasioned many publications, conferences and other events that addressed the development and significance of the Declaration and the enforcement of the human rights that it envisions. Once again, it became clear that people throughout the world regard the Declaration, with its straightforward prose that has been translated into countless languages, as a binding statement of their human rights.

The Foundation “Remembrance, Responsibility and Future” and the Nuremberg Human Rights Center used the anniversary as an impetus to explore a very special aspect of the Universal Declaration, namely its significance for human rights education. In particular, we addressed the tension between concrete experiences of injustice, as they are reflected in the history of the development of the Declaration, and the pursuit of universal, normative human rights that are temporally and spatially decontextualized. This tension stems from the UDHR’s status as a historical and temporally bound document that is imbued with both universal and contemporary meaning. Drafted at a time when the recognition of human rights was a direct response to the crimes of Nazi Germany, the Declaration provided universal answers to concrete experiences of injustice that remain valid today.

The 1948 Universal Declaration therefore forms an important link between human rights education and historical learning. Against the background of historical experiences of different nations and cultures – for example the crimes committed in and by Nazi Germany, the genocide of the Jews, and the history of the Communist dictatorships of Central and Eastern Europe – we see how human rights can be created, recognized, understood and later implemented as a universal answer to concrete injustice. At the same time, human rights embody the ideals and actions of all those who tried to protect the dignity and rights of humans even in periods of injustice.

Although the Nazi era is unique in its radical denial of certain humans as subjects and its organized mass murder, the historical response to Nazism in the form of human rights remains valid today. Even today, people in nations across the world respond to injustices they have experienced by invoking their inalienable rights, which are guaranteed by the UDHR, by universal and regional human rights treaties, and in the basic rights enumerated in national constitutions. Here too, individuals struggle courageously against violence, oppression and exploitation under the banner of human rights.

The tension between uniquely dramatic experiences and the effort to achieve a universal human rights response was the central theme of the conference organized by the Foundation “Remembrance, Responsibility and Future” and the Nuremberg Human Rights Center in Nuremberg in November 2008.¹ This volume contains papers presented and discussed at the conference, as well as additional chapters by other authors. The volume is the continuation of a compelling debate that has inaugurated a new sphere of action for the organizations represented at the conference.

After the horrific experience of the crimes of National Socialism, the scope of which gradually became apparent after the end of the war, a broad universal consensus developed – beginning at the United Nations conference convened in April 1945 in San Francisco – on the need to implement three steps:

- furthering the normative development of human rights, initially reflected above all in the UN Charter and the UDHR, as a response to the trauma of the “barbarous acts” committed under National Socialism (as cited in the preamble to the UDHR), and other contemporary historical experiences of injustice;
- capturing the specific crime of the Holocaust under a new universal definition of genocide, as it was subsequently formulated in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which was the first international agreement for the protection of human rights;
- the elaboration of international criminal law and establishment of corresponding international criminal courts to adjudicate such human rights violations in the future. The Nuremberg Trials form the basis for a universal criminal court procedure.

The contributions in the first section of this volume elucidate these processes. **Stéphane Hessel** embodies like few others of his generation the step from the experience of suffering under National Socialism to constructive and forward-looking solutions. Born in Germany and raised in France, Hessel joined the French Resistance and survived three Nazi concentration camps. After the war, he joined the French diplomatic service, where he continued to work on behalf of human rights, international cooperation and international social justice. His words of encouragement profoundly affected the Nuremberg conference participants. An interview with Stéphane Hessel opens this volume.

In the first section of this volume, **Johannes Morsink** not only shows how profoundly the crimes of National Socialism affected participants in this debate, who came to the conference from across the globe, but also argues that this trauma represented a necessary precondition for an agreement on the formulation of human rights. According to Morsink, the universal human capacity to feel repulsed by injustice is a necessary precondition for the articulation of human rights. **Rainer Huhle** investigates the question whether we can detect specifically Jewish positions in the codification of human rights after 1945 in light of the unprecedented crime of the Holocaust. His conclusion, which is surprising only at first glance, is that the many Jewish contributions to the debate on the establishment of a new human rights order after 1945 occurred within and not outside the broader currents of the time and enriched the discussion in many different ways. **William Schabas** examines the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which was adopted by the United Nations General Assembly at the same time as the Universal Declaration, and its “founding father” Raphael Lemkin, to describe the complex and often contradictory path from specific historical experiences to the development of a universally valid norm for the crime of genocide. One of the many issues that had to be solved at the time was the conceptual distinction between genocide and crimes against humanity or war crimes. The International Military Tribunal at Nuremberg was not prepared to name and prosecute Nazi crimes according to a sustainable human rights perspective. Instead, the Allies clung to the

¹ See also the conference report at <http://www.konferenz-nuernberg08.de/?lang=en>.

established norms of the laws of war, in spite of the fact that the charge of “crimes against humanity” would no longer have required an association with war. William Schabas’ analysis of the concept of genocide and Rainer Huhle’s discussion of crimes against humanity both explore how these most serious crimes came to be defined despite numerous obstacles outside the context of war. This definition paved the way towards a universal international criminal law for crimes against humanity, which was ultimately anchored in the International Criminal Court.

In the second section of this volume, the authors examine specific human rights and how their formulation was shaped by different historical experiences and legal traditions. The basis for the development of human rights is the prohibition on discrimination that is so forcefully articulated in the Universal Declaration. Its first two articles postulate the same rights for all humans, while the remaining articles delineate rights for “all” or for “everyone.” **Heiner Bielefeldt** elucidates the historical contours and contemporary challenges of the prohibition on discrimination as the fundamental principle of human rights. The prohibition was understood as the most basic human right – in contrast to the extreme racial discrimination of Nazi Germany – because it is the fundamental precondition for all other human rights. At the same time, the elaboration of this prohibition is especially complex because discrimination has always and continues to take on new forms. For example, agreements that are reached today regarding discrimination on the basis of disability or sexual orientation demonstrate that the learning process did not end in 1948. Rather they show that the experiences of affected groups can continually expand and concretize the prohibition against discrimination. Indeed, it could be argued that the formulation of every human right, particularly after 1945, derived from concrete experiences of injustice. The contributions in this volume consider only three of many possible examples.

The right to the free expression of opinion is one of the classic freedoms that took shape early in the history of human rights in the West. In the wake of the National Socialist repression of all oppositional expression (and in the wake of Stalinist repression), the UDHR redefined freedom of expression with particular emphasis. The concise formulation of Article 19 of the UDHR masks the many heated debates that took place both inside and outside the Commission on Human Rights in the postwar years. The experience of National Socialism not only suggested the lesson that freedom of expression was a fundamental right for the preservation of democracy, but also that it might be necessary to prevent the expression of pro-fascist opinions. This tension, which is also reflected in Articles 19 and 29 of the UDHR, characterizes the elaboration of the right of freedom of opinion and information even today, and has been expressed in a multiple ways within different legal contexts and cultures. **Agnès Callamard** and **Otto Böhm** examine the scope and limits of freedom of expression from two different perspectives. Although the emphasis of their essays is different, they arrive at complementary conclusions.

When human rights were elaborated after the war, nations across the world were experiencing a refugee crisis. Millions of these refugees were not only homeless, but stateless. The dramatic events surrounding the victims of National Socialism, who were unable to obtain refuge abroad, were still vivid in international memory. This resulted in the formulation of a completely new human right, the “right to asylum.” Upon closer examination, the right to asylum as defined in Article 14 of the UDHR is quite modest in scope, entailing only the “right to seek and to enjoy in other countries asylum from persecution.” Even in 1948, no state was prepared to accept an outright obligation to admit political refugees to its territory. An additional difficulty is that no legal body existed that could have monitored such an international law. By its very nature, the right to asylum had to be formulated as a national right. This is what happened in Germany, the country that had been the starting point for the global refugee crisis. In Germany, the Basic Law of 1949 included the article “Persons persecuted

on political grounds shall have the right of asylum.”² In his essay, **Patrice G. Poutrus** details the rather meager practical effect this clear-cut provision had even during the early years of the West German state, well before Article 16 of the Basic Law was amended and adapted to the developments of realpolitik. For its part, the 1951 Geneva Convention Relating to the Status of Refugees referred explicitly only to refugees from the Second World War and made no provisions for future refugees, which further highlights the limitations of the human rights lessons that were drawn from the barbaric history of fascism and the war.

The oldest still active human rights movement is the movement for the abolition of slavery and the slave trade. **Aidan McQuade**, director of the organization Anti-Slavery International, shows that the history of slavery did not end with abolition. To the contrary, he argues that the distressing diversity of new forms of slavery in the 21st century is an “open secret of the globalizing political economy.” In the anti-slavery movement, learning from history above all encompasses the ability to recognize how the forcible exploitation of humans for an immense variety of purposes continues to assume new forms. Under National Socialism, slavery reached a horrific highpoint in the brutal forced labor of millions of people. For many years, however, the former forced laborers received scant international attention. The Foundation “Remembrance, Responsibility and Future” is the belated culmination of years of struggle on behalf of surviving forced laborers and their representatives to shed light on their experiences and suffering and receive at least symbolic compensation. In his essay, **Günter Saathoff**, a member of the board of directors of the Foundation, examines the history of this belated learning process that was driven by the Federal Republic of Germany together with international organizations. Saathoff also illuminates the legal and political limits of these efforts.

If the formulation of human rights always derives from specific historical experiences of injustice, who are the agents of this learning process? The incipient global human rights movement after the Second World War was multifaceted and heterogeneous in its composition. Many different civic groups crafted the human rights agenda and tried to realize its goals, but as Johannes Morsink shows, human rights also deeply penetrated the spheres of politics and diplomacy. After a long period of stagnation, human rights agreements were revived in many different regions during the 1970s as a result of popular movements against repressive regimes. This volume considers two important points of focus for these new human rights movements. **Uta Gerlant** and **Ernst Wawra** both consider the Helsinki movement in Central and Eastern Europe, which was inspired by the Final Act of the Conference on Security and Cooperation in Europe. The result of years of diplomatic negotiations, the Final Act was initially accorded little significance. The groups that referenced the Final Act as the basis for elaborating concrete human rights demands also demonstrate that human rights rhetoric carries a cost. Indeed, the rhetoric may be taken quite seriously, as the governments of Eastern Bloc nations eventually discovered.

The same holds true for Latin America, which was dominated by violent military dictatorships during the 1970s. After General Augusto Pinochet’s 1973 coup d’état in Chile, a human rights movement began to develop across the continent that for the first time struggled to realize the human rights principles enshrined in UN agreements and inter-American human rights declarations and agreements. As in Central and Eastern Europe, an intensive learning process took place within the Latin American human rights movement regarding the potential for human rights action against political repression. This learning process also led to an intensive teaching process, as **Flor Alba Romero** demonstrates with the example of Colombia. Across much of Latin America, human rights education was seen as a weapon against the regimes that routinely violated human

² Press and Information Office of the Federal Republic of Germany, Basic Law of the Federal Republic of Germany, promulgated by the Parliamentary Council on May 23, 1949.

rights. Although human rights education had been on the United Nations agenda since 1948, its global revival and the enrichment of its methodologies and concepts has emerged largely from this new impetus from Latin America. Thus, both the formulation of human rights norms and human rights education stem from concrete experiences of injustice. These experiences require actors – individuals, groups and movements – to articulate them.

The final section of this volume raises the issue of the role of historical experience and historical education in human rights education. The individuals and organizations involved in the historical development of the modern concept of human rights after 1945 always understood that development as a learning process. Examining this postwar learning process helps us better understand the relationship between concepts of history and concepts of human rights, and the relationship between historical learning and human rights education today. The history of the promulgation of the Universal Declaration and the history of national experiences of injustice are particularly fruitful entry points for historically grounded human rights education, as well as for historical education that incorporates issues of human rights.

In the opening essay of this section, **Monique Eckmann** analyzes historically grounded human rights education by focusing on the central element of the Universal Declaration, the right to be protected from discrimination. Eckmann considers both historically grounded and ahistorical models of anti-discrimination education (especially Holocaust education) to argue for an approach that bridges historical and contemporary experiences of discrimination and, as a result, bridges personal experience and experiences shared with other individuals and groups. **Hasko Zimmer** explores the challenges posed by human rights education for societies that are increasingly shaped by immigration, particularly among their younger generation. In Germany, these challenges are felt especially acutely in human rights education on the topics of National Socialism and the Holocaust. In the process, Zimmer warns against the tendency of majority groups to dominate the framing and interpretation of historical and human rights education. According to Zimmer, the inherent diversity of the experiences of human rights violations serves as the impetus for new articulations of human rights. Recognizing this diversity of experience thus allows us to understand human rights as the outcome of a process of struggle, both in the past and today. **Albert Scherr** also emphasizes the usefulness of historical relationships – with an emphasis on “relationships” in the plural – to effective human rights education. If we wish to avoid teaching human rights as ahistorical dogma, our educational efforts must incorporate the complex and often contradictory history of the social movements that helped shape human rights across the centuries as they paved the way for the overarching consensus achieved in the 1948 Universal Declaration. Incorporating this complex history is essential to creating an effective human rights engagement that avoids moralizing arguments. In the final contribution, **K. Peter Fritzsche** takes up many of the arguments presented by the authors of this volume to propose ten concise theses for historically grounded human rights education as the foundation for further discussion and debate among theorists and practitioners in the field.

In light of these historical examples of concepts of human rights education in social movements and the findings of the Nuremberg conference on topics ranging from the prohibition against discrimination and torture to the freedom of religion, political participation, expression, and information, we must ultimately examine the relevance of our knowledge of historical experiences of injustice and the development of human rights in response to these experiences for contemporary educational work. The question remains what lessons this history provides for the complex relationship of human rights education and the active struggle to enforce human rights.

INTERVIEW WITH STÉPHANE HESSEL

The son of writer Franz Hessel, Stéphane Hessel was born in Berlin in 1917. In 1924, he and his parents moved to Paris. He became a French citizen in 1937, and began studying philosophy at the École Normale Supérieure. After joining Charles de Gaulle's Free French Forces, Hessel went to London in 1941 and returned to France as an agent. In July 1944, he was arrested by the Gestapo, tortured and deported to Buchenwald. Hessel was able to escape execution by exchanging identities with a comrade who perished in the camp and was later transferred to the Rottleberode and Dora concentration camps. When the Dora camp was evacuated in advance of the approaching Allied troops, Hessel finally succeeded in escaping from the transport train. Immediately after the end of the Second World War, Hessel joined the French diplomatic service, where his career included postings to the United Nations and to several North African nations. Rainer Huhle interviewed Stéphane Hessel at his home in March 2009. The interview was conducted in German. The footnotes are by Rainer Huhle.

Rainer Huhle: In your book, you wrote that you became a diplomat as a result of your experience of the concentration camp. I found that quite surprising, since it's hard to imagine Buchenwald and Dora as the motivation for a diplomatic career. Could you elaborate on this a bit?

Stéphane Hessel: Two different factors played a role. On the one hand, many different nations were represented at Buchenwald. People from all over Europe were interned there, and we had a sense that together we needed to achieve something larger than that terrible concentration camp. There were also Germans at Buchenwald, and in fact the first inmates at Buchenwald were German. In the camps, it seemed that when we succeeded in speaking with each other – which wasn't always easy – we discovered that we all shared the same experience, the experience of suddenly being swept away by the horrifying wave of Nazi terror. So the concentration camp prompted my earliest identification with an international perspective. That was where I first assumed an international outlook, and the camps were responsible for awakening my interest in diplomacy. On the other hand, I lived through one of the longest wars. I enlisted in the French army in 1939, and I wasn't at liberty again until May 1945 – six years later. After that long experience of war, I decided to abandon scholarship, to leave the École Normale and philosophy, and instead work on something I found personally meaningful, something in an international field. "Diplomat" is of course a complex term. In a sense, a diplomat strives

to remain aloof from direct action. But on the other hand, after that terrible war, it seemed to me that refusing to take part in international relations would mean remaining on the sidelines. As Frenchmen, we are naturally interested in what is happening in France, but we also need to remain engaged with what is happening outside our own country. So even then, as a former concentration camp inmate, I believed that Europe and the rest of the world were important as well.

RH: Did you experience Buchenwald as a sort of international microcosm?

SH: I arrived in Buchenwald with the “Group of 36.” We were thirty-six altogether, and sadly thirty-one of us were executed and hanged. We were from Belgium, France and England, and there was also one American and one Irishman, so it was very international. The same is true of my rescuers: Eugen Kogon, a true German, and Balachowski, a Frenchman of Polish extraction. Buchenwald was not quite the Café du Dôme of 1939, but it was a gathering of immense diversity. I was also incredibly fortunate to be able to speak good German, which made it possible for me to speak with the SS man who arrested me when I escaped. I was able to persuade him to transfer me to a punishment commando rather than having me hanged. That was my first opportunity to speak with someone, to speak with an enemy and try to change his mind. When I was arrested in Paris, I also had the sense that I might be able to negotiate with the people who had arrested me, as I had already learned to negotiate and I spoke English as well as German and French. I was also fortunate in that I didn’t give up my friends after my arrest, which also entailed a kind of diplomacy. So what was it that I as a young man faced, during my years of arrest and imprisonment in a concentration camp? As a young man, I perceived myself as someone with comrades, with whom I could share my experiences, but also someone with enemies, with whom I had to come to terms in some fashion.

RH: I see what you mean, and in fact it did strike me that you must have been a skilled diplomat in the concentration camp, since you twice succeeded in negotiating to save your own life. In later years, when you were at the United Nations, you were known to say that your greatest and most important challenge was your work with the Commission on Human Rights. Was the term “human rights” ever mentioned at Buchenwald or Dora? Did you and your fellow inmates have any sense that you were not only being subjected to horrific brutality, but that your human rights were also being violated? You are French, and human rights have always played a greater role in French national identity than elsewhere. Were you already aware of the concept of human rights in the camps, or did that come later?

SH: No – in hindsight, of course we realized that our human rights were grossly violated in the camps. But I can’t recall ever discussing the fact that our human rights were being violated at the time. It’s possible we did so, but unlikely. Our enemies were the Nazis – fascism and National Socialism. We talked about democracy and National Socialism.

RH: That’s why it’s interesting that you so quickly turned to the issue of human rights. In Germany and in much of France and the rest of the world, the lesson appeared simple: anti-fascism. But you were quick to recognize the international context, and from that you took up the question of human rights. Did you meet Mr. Laugier by chance, or had you already envisioned taking that path?¹

SH: That was sheer chance, or rather a happy coincidence. I should mention that my father-in-law, Mirkine-Guetzevitch, was a lawyer and a Russian expert on the French revolution. (I had already known my wife for

1 Henri Laugier (1888-1973) was a physician and academic who founded the Centre national de recherche scientifique (CNRS) in 1939. In cooperation with de Gaulle’s government-in-exile, Laugier tried to save French researchers from the Nazis and established the foundation for the reorganization of French science after the war. In 1946, Laugier became Deputy Secretary-General of the UN. He was involved in founding the WHO, UNESCO and UNICEF and also contributed to drafting the Universal Declaration of Human Rights.

two years when we married in 1939.)² My father-in-law and I often debated whether Robespierre or Danton was more important to the Revolution. So I was already fairly familiar with the concept. Laugier, who became my employer, was a friend of my father-in-law. In this sense, the French Revolution and the 1789 Declaration of the Rights of Man played a significant role in our relationship. I also greatly admired Franklin Roosevelt, and even before the end of the war, I had heard of the Four Freedoms of the Atlantic Charter, which marked the emergence of human rights.³ Establishing the United Nations was important to me, and of course the fact that the UN was founded on the declaration of human rights was of great interest to me as well. Then in 1946, my father-in-law was put in charge of the *Annuaire de droits de l'homme*, and was responsible for selecting and editing the texts. The UN Charter mentioned the term human rights, and when I arrived in New York, I knew I wanted to be involved with human rights. The fact that it was Laugier who employed me, and Laugier who directed his team in their collaboration with the drafters of human rights – this was a coincidence, but a happy one.

RH: To begin with, the UN met in a suburb of New York, at Lake Success on Long Island...

SH: Yes, in a basement factory. That was a strange feeling for me, because I had only just left another basement factory, at the Rottleberode concentration camp, and both of these factories were used for military aircraft production.⁴

RH: The Nuremberg Trials had begun by the time you started working there. Did you follow the trials from Lake Success?

SH: Of course. The trials were immensely important. The project of reconstruction, the invaluable effort of founding the UN, the UNRRA, which rebuilt the European and Asian states, and the Nuremberg trials – these were the key issues of the time.⁵ We followed them very closely, and we had friends in Nuremberg. My wife's uncle Léon Poliakov, for example, attended the trials in Nuremberg with Edgar Faure.⁶ So we were aware of the trials, and naturally we followed them from afar.

RH: One of the reasons I'm interested in this question is because it often seems there were two separate and distinct worlds: one world centered around Nuremberg and other places where criminal prosecutions took place, and a second world centered around the United Nations, populated by individuals who were engaged in more forward-looking and constructive human rights and international work. I would even say there was competition between the two worlds. Raphael Lemkin, for example, disapproved of the members of the Com-

2 Boris Mirkin-Guetzevitch was a Russian lawyer. After the February Revolution, Mirkin-Guetzevitch became a representative of the Mensheviks. He was forced to flee after the October Revolution. During his exile in France, he became a famous constitutional lawyer and a founder of political science in his adopted home. He was also a fervent defender of human rights, and joined the Ligue des droits de l'homme. Mirkin-Guetzevitch was forced into exile again in 1940 and went to New York, where he became a co-founder of the International League of Human Rights. For the rest of his life he taught at several institutions in New York, including Columbia University and the New School for Social Research. Nonetheless, Mirkin-Guetzevitch continued to publish his many academic writings in French. In 1946 he began publishing the *UN Yearbook on Human Rights*.

3 In his State of the Union address in January 1941, President Roosevelt propounded the Four Freedoms (freedom of speech and expression, freedom of religion, freedom from want, freedom from fear). In August of the same year, Roosevelt and Churchill proclaimed these freedoms in the Atlantic Charter, which established a vision for the new postwar world order.

4 The camp in Rottleberode on the edge of the Harz mountains was a sub-camp of Buchenwald and Dora-Mittelbau. In Dora, inmates assembled V-2 rockets; in Rottleberode they assembled aircraft parts.

5 The United Nations Relief and Rehabilitation Administration (UNRRA) was founded during the war by the Allies for future reconstruction and support of refugees. It was subsumed into the UN after the UN was founded. All member states contributed to it on a fixed-rate basis.

6 Léon Poliakov was born in St. Petersburg in 1910 and fled to France with his parents in 1920. He studied law and later became a leading historian of anti-Semitism. His best-known work is the four-volume *History of Anti-Semitism*. He was a co-founder of the Centre de documentation juive contemporaine, which began documenting Nazi atrocities in 1943. Poliakov also served as consultant to the French delegation at the International Military Tribunal in Nuremberg. In 1951 he published the first comprehensive study on the Holocaust in France, the *Bréviaire de la haine*, compiled with reference to the material available to him in Nuremberg. Edgar Faure was a lawyer, a member of the French Resistance and a member of General de Gaulle's government in exile after he fled France. He served as French counsel for the prosecution at the Nuremberg Trials. He also served twice as French Prime Minister and as a minister in various governments.

mission on Human Rights, and believed they were stealing his thunder.⁷ And conversely, many of the people involved with the Commission on Human Rights weren't interested in what was happening at the Nuremberg Trials. What was your impression at the time?

SH: The people who drew up the Universal Declaration of Human Rights quite clearly did not want to be influenced by Nuremberg. They believed Nuremberg belonged to the past, whereas they were looking to the future. Of course there were also some personal issues at stake. Lemkin, for example, was strongly supported by my boss, Mr Laugier, and made every effort to push through the United Nations Convention on Genocide on the day before the Universal Declaration on Human Rights.

So in that sense, there were two conflicting priorities: how to come to terms with this terrible enemy we had defeated, and how to shape and create our new future. I can no longer remember how much of this might have been tied up with personal issues. At the time, it seemed to me that no one was terribly interested in that. We were glad for the Nuremberg trials, but preferred to focus on the Universal Declaration of Human Rights.

RH: In addition to the Universal Declaration of Human Rights, there were two other very important issues at the time – drafting the Human Rights Convention, and establishing a framework for human rights implementation. Of course, the criminal prosecutions were central to the issue of implementation, although it seems that Nuremberg played only a minor role in that respect. What was René Cassin's role at the time?

SH: Cassin actually played a very important role. For a start, when it came to drafting the text, Cassin was the best writer in our group. We had to decide whether to write in French or English. Lauterpacht and the other British contributors to the Universal Declaration of Human Rights favored a draft that was very different from the one envisaged by Cassin.⁸ Cassin was substantially influenced by the French Declaration of the Rights of Man of 1789 and was always urging us in that direction. He was popular with other members, especially the Latin Americans. So Cassin certainly played a key role. John Peters Humphrey was known to claim that he was the key figure in the process, rather than Cassin, and of course Humphrey was correct to an extent. The Secretariat laid the groundwork for the declaration, and when you lay the groundwork it is only natural to believe the groundwork is the most important thing. And there is a great deal of truth to this. But the difficulties we encountered in formulating the articles, the different ideas that had to be debated – these were mainly a conflict between East and West. After all, the Russians played an important role (in the Universal Declaration of Human Rights).

But to return to Cassin: first, he was a personal friend. Cassin and I were both in de Gaulle's government-in-exile in London, where he was very influential. Cassin was also a friend of my father-in-law, and that relationship was also very important to me. I collaborated with Cassin very closely, and I was always there when he was trying to push things through. But it's hard to say who was the most important person there. Eleanor Roosevelt was very important, for example. She maintained cohesion and made sure that we didn't stray too far apart, which was no easy task. In 1948, the tension between East and West was palpable, and in fact they (the Russians and the socialist states) abstained in the end.

RH: While we're on the subject of Cassin, there is one thing that troubles me somewhat, which is seldom mentioned in his biographies: I don't understand how Cassin was able to reconcile his work for human rights with

7 Raphael Lemkin was a Polish lawyer of Jewish descent. His 1944 study on the Nazis' extermination policies in Europe, *Axis Rule in Occupied Europe*, coined the term "genocide." Lemkin played a key role in achieving recognition of the crime of genocide in international law.

8 Hersch Lauterpacht (1897-1960) was born to Jewish parents from Galicia in East-Central Europe. He studied law in Lviv and then in Vienna. After emigrating to London in 1923, Lauterpacht became one of the most influential experts on constitutional and international law of his generation. In 1951, Lauterpacht was appointed to the United Nations International Law Commission and from 1954 until his death in 1960 he was a judge at the International Court of Justice. During the war, Lauterpacht helped develop British policy on war crimes. He was critical of the work done by the UN Commission on Human Rights because he believed it failed to anchor human rights adequately in binding legal norms.

French foreign policy in those years. Cassin had already been a senior civil servant in Algeria, and Algeria and Africa as a whole were the springboard for de Gaulle's return to Europe in the Second World War. De Gaulle frequently mentioned the topic of empire, and I've never found any suggestion that Cassin was disturbed by French colonialism. Cassin's name never appears in the debates on the struggle against colonialism. How is it possible to reconcile the proclamation of universal human rights, while at the same time continuing to exercise colonial rule in Vietnam, Algeria, Tunisia and sub-Saharan Africa?

SH: Cassin was a patriot and at that time the French took colonialism for granted. The French told themselves, "We are a great empire, a colonial power, and we take this very seriously. Our motives are entirely honorable, and we are bringing freedom to the unfortunate Africans." Later, of course, this would change. In the 1950s, Cassin and many of my friends pushed for decolonization. Cassin often urged the end of colonialism, particularly in the case of Algeria. During the drafting of the Universal Declaration of Human Rights, Cassin and Madame Roosevelt were able to convince the authors that the preamble should apply not only to the member states, but also to the populations of their dependent territories. In other words, it was already clear that decolonization, which was underway in India, would be the pre-eminent issue of the next half century, or at least the next twenty-five years. In this sense, Cassin was not someone who opposed decolonization. But Cassin was not the official representative of France. Like everyone else, he was just one individual within this larger group. In fact, that was one of the innovations at the time: the Secretary General personally selected the members of the Commission on Human Rights, naturally in consultation with the principal nations.⁹ There was always tension between Cassin and Alexandre Parodi, who was the French ambassador to the UN. It was Parodi's job to make sure that nothing in the declaration would create difficulties for France with its colonies. And in fact, the rights of colonial populations were formulated in a very oblique manner in order to ensure that no objections would be raised. This was an issue not only for France, but for Great Britain and the Netherlands as well.

To return to Cassin: he was a true democrat who helped found not only the national commission but also the European Court of Human Rights. He also lobbied for the Council of Europe. He was a true defender of human rights. So it was of course clear to him that many human rights were not being respected in the colonial states. But at the time, there was still no awareness that this was a major problem that should have been addressed long ago. We were full of confidence and we believed France was at home in Algeria, that France had treaties with Morocco and Tunisia, and that France had colonies. We took pride in this colonization.

RH: From today's point of view, it's very disturbing. This wonderful declaration of human rights was drafted in 1947-48, at the very same time that the powers who had contributed in such a positive fashion to its drafting were carrying out massacres in Madagascar, Indonesia and Malaysia. How could it have been possible to continue with the former, without calling a halt to the latter, as if these were two separate planes of existence? The British simply excluded their colonies from the scope of the declaration. That was quite apparent, and in a certain sense it was also honest. But in the Netherlands, for example, it was completely swept under the carpet. As far as France was concerned, it appears this contradiction was never really addressed.

SH: No. I think you're absolutely right although I'm not sure if "addressed" is the right word. Rather, I would say that the issue was perceived differently by different nations. For example, at the time many believed the French empire was in need of modernization. The methods that dated back to the 1884 Berlin Conference were obsolete, and the nations had to be brought together. France had colonies in West Africa and Central Africa,

⁹ That method of appointment was employed only in the initial phase, especially in 1946, when the core commission was comprised of only nine members. Beginning in 1947, the now 18 members of the Commission on Human Rights were appointed by their respective governments.

and France also wanted to keep giving Algeria another chance. An attempt to gradually modernize the colonial states was already underway. Pressure from the UN was ultimately decisive in bringing about decolonization in a very brief period of time, and all the colonies gained their independence in a span of less than 17 years. The UN turned up the pressure, but France, the Netherlands, Spain and Portugal continued to resist decolonization. But this did not entail denying the colonies human rights, as the British had done. Instead they hoped to do a better job tending to the colonies, and to recognize human rights there gradually.

RH: You mentioned Roosevelt and the Atlantic Charter. The Atlantic Charter ended up being something of a time bomb in the colonies. As a young man, Nelson Mandela embraced it enthusiastically, and the Charter spurred Ferhat Abbas to write his first declaration for Algeria. The Charter was quite explosive, and Churchill was rather displeased by that. In this respect, it's not surprising that human rights became finally visible at an international level. They represented a tremendous boost to the colonies' efforts to gain independence. That's why I find it all the more astonishing that so many Europeans remained so blind to the situation.

SH: I agree, although "blind" is perhaps too strong a word. I think countries such as France, the Netherlands, Portugal and so on soon realized that colonial rule had run its course. Now that the Universal Declaration of Human Rights was on the table, it was time to work towards the liberation of the colonized nations. Nevertheless, for the colonial states of the period, the conditions of this liberation, and the time-frame in which it was to be accomplished, were important political concerns. The general sense at the time was that the various options and possibilities should be explored with care, and that this would require time, and that ultimately liberation would become reality. Thus when de Gaulle gave his speech in Brazzaville in 1944 in which he said that in the future everyone would become free, this meant the end of the colonial era.¹⁰

RH: There are some historians who believe that de Gaulle had already decided to grant Algerian independence in 1958, and that de Gaulle in essence set off the Algiers coup. What do you think?

SH: I don't know whether that's in fact true, but I do believe that de Gaulle had known since Brazzaville that things were headed in that direction. But how would it be possible to ensure that our beloved France would retain special relations with her former colonies? The British maintained relations via the Commonwealth, and the Queen was the head of the Commonwealth.

RH: Returning again to France: when the Algerian War broke out, the great human rights issue in France was torture and the struggle against torture. Were you involved with this at the time through your connections with human rights organizations? And what about the other members of the Resistance, who had fought the Nazis inside and outside France (for example in London)? Did they all take part in the struggle against torture in France or were there differences of opinion?

SH: Yes, there were. I myself joined the Club of 1958, also known as the Club Jean Moulin.¹¹ I worked with them, and our first priority was the liberation of Algeria. We sent letters to the parliament saying that it was time to liberate Algeria.

RH: But you didn't sign the Manifesto of the 121?¹²

10 On January 30, 1944, de Gaulle opened the Brazzaville Conference in what is today the capital of the Democratic Republic of Congo and what was at the time the temporary seat of the French government-in-exile. At the conference, he made a number of ambiguous references to the possibility that the African states might be granted greater rights. See http://www.charles-de-gaulle.org/article.php?id_article=399, accessed on April 14, 2009 (original in French).

11 The Club Jean Moulin was named after the famous French Resistance fighter Jean Moulin, who was murdered by the Nazis. It was founded by former members of the Resistance, including Hessel, after the events of 1958 triggered a political crisis in France. Made up of leftist and liberal intellectuals and politicians, the Club was frequently very influential in France and its *Bulletin* was regularly reprinted in *Le Monde*. The Club was dissolved after the political upheavals of May 1968.

12 The *Déclaration sur le droit à l'insoumission dans la guerre d'Algérie* was signed in 1960 by 121 leading French intellectuals, including Claude Lanzmann, Simone de Beauvoir and Jean-Paul Sartre as well as other figures from the arts such as the actress Simone Signoret and composer Pierre Boulez. The call for civil disobedience alleged that the war in Algeria was not lawful. Many of the signatories lost their jobs as a result.

SH: No. For some reason I wasn't in Paris at the time. Perhaps I was already in Algeria, but at any rate I did not sign the 121. Well, I was not personally involved but of course I was always in touch with the various groups working for decolonization. I was especially interested in Algeria. I lobbied to be sent to Algeria to help establish a new relationship between a free Algeria and France. The term "decolonization" is extremely complex, and entails not only liberation but also a certain responsibility: are these nations ready to maintain their own independence? Do they need more help? If so, what kind of help and for how long? We couldn't simply say, "We're leaving now, and they'll have to set everything up themselves."

RH: These were certainly difficult political issues, but the human rights question was of course bound up primarily with the torture issue. I assume that Cassin and others were also involved. Were you in the Ligue des Droits de l'Homme?¹³

SH: Yes. I was always a member, since the end of the war. Both the Ligue and also Cassin and Teitgen were trustworthy organizations, trustworthy people.¹⁴ But we weren't satisfied. We always sensed the French government was influenced by the colonialists and it was hard to get away from that. Pierre Mendès-France was a good friend of ours and we liked the way he treated Bourguiba, for example.¹⁵ But Mendès-France did not call for immediate independence either. Instead he pushed for greater freedom and autonomy, which would lead to the ultimate goal of independence. We felt we could not simply walk away. It was a complex situation.

RH: You've written there came a time when you were very disappointed by the UN, and were then glad to be able to leave. How do you see the development of human rights work at the UN since?

SH: I still view it very favorably, and believe their work is extremely important. There is no other place apart from the UN where human rights can find their rightful place. The centrality of human rights in the UN Charter means that whatever happens, how the various institutions develop depends on the states. The institutions are run by states and states can behave badly. For example, the majority of states in the Human Rights Council at the moment are not democratic states, and they can cause difficulties, as was demonstrated by the Durban Review Conference against Racism. It's possible there will be many more conflicts. That is sad, very sad. It can also be tragic, but on the whole, progress is still being made. For one, the Council is now calling those states to account, which is very important.¹⁶ And we now have a number of international tribunals, one of which has indicted Omar al-Bashir, the first head of state to be indicted while in office.¹⁷ In other words, High Commissioner Pillay, the Human Rights Council and various non-governmental organizations are continuing to build upon the architecture of human rights.¹⁸ Much work is being done within the aegis of the UN to protect human rights, but it continues to be limited by state sovereignty. So the struggle remains a difficult one.

13 Founded in June 1898 in the wake of the Dreyfus affair, the Ligue des Droits de l'Homme is one of the oldest civic organizations for human rights.

14 Pierre-Henri Teitgen (1908–1997) was a member of the Resistance and of de Gaulle's government-in-exile and transitional government. As Minister for Justice in 1945–1946, Teitgen organized the trials of leaders of the Vichy Government. Later he made a significant contribution to drafting the European Convention on Human Rights.

15 Pierre Mendès-France (1907–1982) was a member of Léon Blum's Popular Front government in the 1930s. During the war, Mendès-France was a member of the Resistance and of de Gaulle's government-in-exile. After the war he served as a minister in de Gaulle's provisional government. A fervent anti-colonialist, when French forces were defeated by the Vietnamese Communists at Dien Bien Phu in 1954, Mendès-France formed a government to address the French withdrawal from Indochina. As a result, Mendès-France was subjected to an anti-Semitic smear campaign, with Jean-Marie Le Pen as one of its leaders. Mendès-France led talks on Tunisian independence with Habib Bourguiba, leader of the Tunisian independence movement, and over Algeria he broke with the majority of his party, who backed the war and later de Gaulle's Fifth Republic. This break spelled the end of Mendès-France's political career.

16 The Human Rights Council, created in 2006 to replace the Commission on Human Rights, introduced a process known as the Universal Periodic Review (UPR). This involves a review of the human rights records of all 192 UN member states, including the members of the Council themselves, once every four years.

17 The International Criminal Court indicted Omar Hassan Ahmed Al Bashir, President of Sudan, on March 4, 2009, and issued an arrest warrant against him on counts of war crimes and crimes against humanity committed in Darfur.

18 South African judge Navanethem Pillay first served as judge in the International Criminal Tribunal for Rwanda in Arusha and then on the International Criminal Court in The Hague. Her four-year term as High Commissioner for Human Rights began in 2008.

RH: If the Charter were a soccer match between the principle of sovereignty and the principle of human rights, we would have to say the debate resulted in a draw. The relationship between sovereignty and human rights remains unresolved in the Charter.

SH: Yes, we have both Article 2(7) and Article 55.¹⁹

RH: In fact, we're still in much the same place as before. The two articles co-exist.

SH: The two articles are still in force because they were part of the original Charter, which has never undergone real reform.

RH: If my memory serves me correctly, the original plan was to hold a conference ten years later to review the Charter and consider amendments. But this conference never took place.

SH: The conference didn't take place. Twenty years into the Charter, another attempt was made to conduct a review, but this again failed to materialize. Today we are still in the same position as 1945. But there's also a great willingness to adapt. The Security Council has the power to do more, and sometimes it exercises this power. We are making progress. Today the 192 nations include many more democratic governments than 50 years ago. The example of Amnesty International is quite interesting in this respect. Every year, Amnesty International publishes a report on abuses in individual states. Today, only a few states commit a significant number of abuses, and even those states generally do not commit extremely serious abuses. Governments and heads of state are heavily influenced by public opinion and by pressure from states that wish to promote developments within the UN.

Looking back at development of the UN, the most wonderful period was the formative years from 1945 to 1948. We were still buoyed by the battle against fascism and the hope for a new and better world. That was followed by a long period until about 1989, which was marked by the Cold War and the impasse between the two power blocs. But even during this period, there were significant advances, including the major human rights pacts. After 1989, the UN was shaped by a series of major thematic conferences, including the 1993 Human Rights Conference in Vienna and the Climate Conference in Rio, which set the course for new developments. Finally, the Bush administration marked a new ice age, which we hope has now come to an end.

¹⁹ Article 2(7) of the UN Charter proclaims the sovereignty of all its members: "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 the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." Article 55 (c) sets as a goal for the United Nations "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Morten Kjaerum

HUMAN RIGHTS AND THEIR HISTORY FROM A EUROPEAN PERSPECTIVE

Thank you for giving me the opportunity to speak today about human rights and their history from a European perspective, and about the European Union's responsibility for the protection of human rights.¹ Last weekend I read the first draft of my agency's upcoming report on child trafficking in the EU. Although we know very little about this issue, we do know that thousands of children enter the EU officially each year and are cared for in asylum centers or elsewhere. A few days later, they leave the centers without a trace. Most likely they are sold to the sex industry, sent to work in the worst jobs in European industry and farming, or perhaps exploited as domestic labor. These are not stories from the 19th century or from a novel by Charles Dickens, but the realities of twenty-first-century Europe. The protection of human dignity remains as much an issue today as it was in the past.

In my speech today I will concentrate on three key points. First, I begin by considering the history of human rights in Europe and recent developments. Second, I address some of the current human rights challenges in the European Union. And third, I provide an overview of the EU's efforts to protect and promote human rights.

The History of Human Rights in Europe

Human rights in Europe have a long history; a number of different strands within this history have shaped human rights as we know them today. The first strand that shaped our contemporary understanding of human rights is the development of democracy. The English Revolution ("Civil War") of 1640 under Oliver Cromwell, the United States Declaration of Independence of 1776, which significantly affected Europe as well, the French Revolution of 1789 and the revolutions of 1848 across Europe, all promoted increased political and civic participation. These developments helped create space for freedom of expression, freedom of assembly, freedom of association and the right to vote. The second historical development that shaped our contemporary understanding of human rights is the development of the rule of law, or what Germans call the *Rechtsstaat*. This trajectory can be said to have begun with the English Magna Carta of 1215, which for the first time granted the right to oppose unlawful imprisonment. Some centuries later, Montesquieu's theory of the political division of powers laid the groundwork for the right to a fair trial, the prohibition of torture, the abolition of slavery, and the modern insistence that each person should be respected as a legal entity in his or her own right. A third important development has been the expansion of protections for minorities. An early turning point in

¹ This chapter is based on Morten Kjaerum's address to the 2008 conference "Rights that make Us Human Beings," and has been revised for publication.

this development was the Peace of Westphalia in 1648, which granted religious freedoms and ended three decades of religious wars and minority conflicts. Minority rights also encompass the prohibition on discrimination based on race and ethnicity, including the right to seek asylum due to persecution stemming from racial prejudices and ethnic conflict. Advances in social and economic justice constitute the fourth important development. In Denmark in the late 1800s, for example, the average life expectancy was 55 years. In Copenhagen it was 35 years because of the appalling housing and health conditions. Social and economic rights include the right to housing, health and education. From the late 1700s onwards, all of these developments gradually began to inform the new constitutions of European countries.

Being here in Nuremberg, I could have opened this speech with the modern history of human rights, which starts with the tragedy and the crimes of the Second World War. The heinous atrocities and crimes committed both before and during the Second World War spurred the international community to take several important steps. The Nuremberg Trials had a massive influence on the development of international criminal law. They influenced proposals for a permanent international criminal court, which came into being 55 years later, in 2003. It was also the crimes against humanity committed in the Second World War that inspired the Universal Declaration of Human Rights of 1948, some 60 years ago. In 1950, the Council of Europe's European Convention on Human Rights was adopted and the European Court of Human Rights became a reality soon thereafter. Furthermore, the creation of the European Community was a direct response to the war; today the European Union is a crucial guarantor of fundamental rights.

The Universal Declaration of Human Rights was and remains fundamental to the protection of human rights worldwide. But what kind of force does a political declaration have? Before 1948, many countries, especially in Europe, had enshrined human rights in their national constitutions. Why did the Universal Declaration represent such a significant step forward? I see two main reasons. First, the Declaration was not merely political in nature. Its context, content, and impact were immensely powerful and unique. After the Declaration, human rights were transformed from a national concern and a matter of national law to an international concern and a matter of international law. The Universal Declaration was far more than a political statement, and most of its provisions gradually became part of international customary law.

Second, human rights were for the first time no longer predicated on a contract between a state and its citizens. After the Universal Declaration, human rights became a basic underlying principle for all persons, regardless of citizenship. The famous Article 1 states: "All human beings are born free and equal in dignity and rights."² People are born free and entitled to basic rights from the start, irrespective of the state or law. Human rights are universal.

It is interesting to look at the context of the Declaration in 1948. Work on the Declaration began after the atrocities of the war, at a time when the world was ready for tangible progress in recognizing and protecting human rights. However, it also took shape during a small window of opportunity, since the first signs of the Cold War were already overshadowing the debate. While the West focused more on political rights, the East advocated increased economic and social rights. Within this context it was fortunate that the drafting Commission decided to separate the initial political declaration from the legally binding covenants. The Declaration was endorsed in 1948 with only the Soviet Union and affiliated countries abstaining. But the two covenants that define the specific obligations of each state (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) were not ready for ratification until 20 years had passed. Since the mid-1960s, additional legally binding conventions have been elaborated

² United Nations, *Universal Declaration of Human Rights*, accessed on Nov. 2, 2009 from <http://www.un.org/en/documents/udhr/>.

that gave substance to the political statements in the Declaration.

Parallel to the legal developments, human rights were exploited as tools in the Cold War. The West used the issue to highlight violations of political rights in other countries. From the 1950s until the 1980s, human rights work, whether governmental or non-governmental, was primarily about naming and shaming human rights violations that happened from China to Chile, from South Africa to the Soviet Union, and in other countries behind the iron curtain. For decades, human rights were a part of our foreign policy in Western Europe. At the same time, human rights were hardly ever mentioned or questioned in relation to our own domestic situations.

This foreign policy approach started to change in the early 1990s, when human rights increasingly found their rightful place as an integral part of democracies throughout the world. They also started becoming the core of domestic political debates and legal developments in Western countries. A landmark event in this domestication of human rights was the World Conference on Human Rights in Vienna in 1993. Over 150 countries reaffirmed their commitment to the Universal Declaration of Human Rights and adopted an international program of action, providing guidance and inspiration on how to move ahead with the implementation of human rights within the domestic legal order.

Shortly after the Vienna conference, the first democratic election in South Africa took place, which was another milestone in the human rights process. In my previous position, my organization collaborated with the Danish police academy in training the police in South Africa. One evening over dinner, a Danish police officer suddenly raised an obvious question about why we were teaching human rights to the police in South Africa but not at home in Denmark. Shortly afterwards, human rights also became part of the curriculum in general police training in my country.

The domestication of human rights, and the increased awareness of the issue, also bolstered the drive to build independent national institutions that work on human rights. The emergence and growth of these institutions illustrate the profound depth of the new “domestication agenda.” In 1990, there were only five national human rights institutions worldwide. Today, there are more than 100. A move from 5 to 100 in only 18 years is a remarkable development. These independent bodies are entrusted to monitor human rights developments domestically and to advise governments and other state institutions. They inform the public about human rights norms and provide human rights education at all levels of the school system. In some countries, they are also empowered to deal with individual complaints about human rights violations.

Another key indicator of the domestication of human rights is that important parts of the corporate sector are now integrating human rights into their business strategies. Only 10 years ago this would have been almost unthinkable. In Europe, the inclusion of the new democracies in the Council of Europe and their subsequent accession to the European Union provided another key impetus for the domestication of human rights. After the fall of the Iron Curtain, the former Soviet-bloc nations incorporated human rights into both their laws and societies with impressive speed.

What we have witnessed in Europe in terms of integrating human rights represents a logical step in the development of democracy. Democracy without human rights is not true democracy. Democracy without freedom of expression, without participation, without the right to education or the prohibition of discrimination is at best a defective democracy. Human rights have become integral aspects of democracy.

Human Rights Concerns in the EU

It is a positive sign for our vibrant democracies that human rights have taken center stage in the political debate of the EU and in the domestic politics of EU Member States. We used to conceive the EU as an economic giant but a human rights dwarf. This has changed: eight years ago, the EU declared its own Charter of Fundamental Rights. The EU has successfully started to adopt and implement anti-discrimination legislation. In March 2007, it set up its own body to follow human rights developments and advise on human rights implementation, the European Union Agency for Fundamental Rights (FRA). The FRA is still unique in the world today.

Almost the entire range of human rights concerns is relevant for contemporary Europe. The EU Fundamental Rights Agency deals with multiple human rights issues of grave concern on a daily basis. Some of the most pressing human rights issues in Europe today include racism, xenophobia, Islamophobia and anti-Semitism. These issues exist in all parts of Europe, and we can anticipate that scape-goating may accelerate in the wake of the financial crisis. The way in which European states and societies treat asylum seekers and immigrants raises serious human rights questions. One example is the prolonged detention of asylum seekers, who have committed no crime whatsoever. Other highly disadvantaged groups are minorities like the Roma, who face major problems with housing, health, education and employment. There is also vast evidence of homophobia and of unequal treatment of people with disabilities. Work remains to be done to promote gender equality, most urgently in the areas of domestic violence and equal pay. Other issues which have thus far been neglected include the rights of the mentally ill and the rights of children. Additional issues include the protection of sensitive personal data with regard to the fight against terrorism, access to justice and the right to a fair trial. The importance of these issues should be obvious – yet too often, ignorance and complacency hinder progress in addressing them. Moreover, opposition from key groups in society makes minorities more vulnerable. In many countries, racist political discourse is no longer the sole preserve of extremist political groups, but has seeped into the mainstream political environment. These developments should be of concern to us all. They can lead to the legitimization and trivialization of racist language, which can ultimately help justify discrimination, harassment and even violent assaults on minorities.

However human rights are not always straightforward, especially where they require mediation between ostensibly conflicting perspectives. I want to discuss two recent examples: the Mohammed cartoons in Denmark and the fight against terrorism after 9/11. The Mohammed cartoons have been debated worldwide, primarily in terms of a confrontation between freedom of speech and freedom of religion. I believe that much of this debate focused on the wrong question. The issue should not have focused on freedom of speech versus freedom of religion, which are both fundamental human rights. The real debate should have centered on whether the Mohammed cartoons can be classified as hate speech, or more broadly, whether hate speech should be prohibited. These questions are notoriously difficult to answer, but our democratic societies must constantly discuss and debate them. All democracies choose to set limits to freedom of expression in order to protect the other fundamental rights of individuals, for example to protect individuals from intentional acts of hate speech that incite violence or hatred. But how do we achieve the appropriate balance between protecting people from racist speech and ensuring that freedom of expression remains a key pillar of our democracies?

My second example relates to the fight against terrorism. 9/11 opened a new chapter in the fight against terrorism and had profound consequences for our vision of human rights today. Many nations have amended or introduced security legislation that would have been unacceptable to parliaments, the media and public opinion before 2001. The delicate balance between justifiable security concerns and the protection of fun-

damental freedoms has figured prominently in parliamentary debates, scholarly discussions and reports by human rights bodies. As the historical development of human rights has shown, human rights are profound principles that must remain central in our democratic societies; yet because human rights are shaped by past experiences, they do not exist apart from a society's security concerns. Security measures must therefore inevitably operate on a human rights basis and within a human rights framework. International human rights law must carefully balance individual freedoms and security under our existing human rights conventions. Moreover, human rights law itself conveys past experience to new generations. For example, in their war in Algeria, the French learned the lesson which many before them had learned: violating human rights in a conflict merely exacerbates the conflict. With Abu Ghraib and Guantanamo, we are yet again learning that lesson. Human rights are universal. They belong to our enemies and even the most egregious offenders. These two examples, involving freedom of speech and the fight against terrorism, show that there are no easy solutions or quick fixes. The need for further debate on human rights remains pressing. Human rights continue to evolve, and we need to openly discuss their complexity.

A Vision for the Future

How can the EU protect and promote human rights? Human rights have made immense progress, but still need additional legislation and improved implementation. Europe can point to many advances in the field of human rights. The European Court of Human Rights is a beacon for the legal development of human rights throughout the world. The EU's anti-discrimination directives have had a great impact on developing national legislation and equality mechanisms. There are unquestionably best practice models that the EU can share with other parts of the world. Moreover, the EU Charter of Fundamental Rights will help advance the protection of human rights.

In general, people in the EU enjoy a high level of protection, and there is an admirable human rights basis. But there are also major gaps. Currently, in many Member States, legislation unevenly protects different groups. For example, we can sue landlords for discrimination on the basis of ethnicity or gender, but not on the basis of age, disability or sexual orientation. Disabled people are protected from discrimination in employment, but not to the same degree in education. The list continues. Human rights must be universal, and all humans must have equal rights to equal treatment – unless there are very compelling reasons for differentiating. The European Commission proposed new, more far-reaching anti-discrimination legislation in July 2008, which would help close existing gaps.

Yet even the best legislation is useless if it is not properly implemented. As part of implementation, we have to make people aware of their fundamental human rights. According to a recent Eurobarometer survey, only one third of EU citizens would know their rights if they were victims of discrimination. The survey attests to the amount of work we have ahead of us. Every airport has posters that advise passengers of their rights as passengers. The right of equality needs the same visibility – in town halls, companies, schools, even at the local post office. Government campaigns, school curricula and the media should all make human rights more visible. Politicians, lawyers and judges, the police, teachers, service deliverers and providers also need to understand human rights; they have a crucial role in ensuring the promotion and protection of human rights. The nurse in a hospital for the mentally ill is potentially an important human rights defender.

Once we have guaranteed sufficient legal protections for human rights, and people understand their human rights, we must have channels available for redressing discrimination. Therefore, the next urgent need is the development of competent bodies to assist the victims of human rights violations. EU legislation obligates

Member States to create bodies to monitor discrimination, and the UN urges States to establish national human rights institutions. Yet by the end of 2007, three Member States had not even set up anti-discrimination bodies. In many Member States, such equality bodies and human rights institutions, although existent, are somewhat invisible with regard to addressing key issues. We need national institutions and mechanisms to protect and promote human rights. They must be independent, adequately funded, and empowered to do their job effectively.

Up until now, NGOs greatly supported victims of human rights violations. Such active civil engagement and an active civil society provide crucial sustenance for human rights. Silence always nourishes oppression. Civil society provides the eyes, ears and voice to protect and promote human rights. As such, the importance of NGOs cannot be overstated. Civil society and NGOs play a key role in holding European governments, public institutions and businesses accountable. They conduct research and lobbying work, raise public awareness and give people a forum for expressing their views. They often generate useful proposals.

Civil society organizations are in the best position to assess the reality of fundamental rights implementation on the ground, not least because they are closest to the victims of violations. The Fundamental Rights Agency's official mandate is to maintain a constant dialogue with civil society organizations; the FRA has established a specific structure to facilitate this dialogue – the Fundamental Rights platform. This platform is the Agency's network for cooperation and information exchange with civil society. It is the first large European platform for different groups to work together on a wide range of fundamental rights concerns.

It is the role of the EU Fundamental Rights Agency to underpin all these points – legislation, implementation, raising awareness, supporting the creation of competent equality bodies, and dialogue with civil society. This comprehensive approach provides an important opportunity to jointly promote fundamental rights in a novel and effective way. We can support the advancement of human rights through our analytical and advisory capacity. But an important precondition for the advancement of human rights is our network of human rights experts and civil society organizations across the EU, and our relations with those who bear responsibility for human rights protection in Europe – EU institutions, Member State governments, and local authorities.

Many burning human rights questions remain on the EU agenda. They include the treatment of minorities, the rights of vulnerable groups like children or the disabled, and human rights issues that can affect all people, such as age discrimination and the protection of our personal data. We must ensure that human rights violations and discrimination have no place in our democracies. There is still a need for more and improved legislation, for raising awareness and for installing competent bodies to protect the victims of human rights violations. The declaration of the Charter of Fundamental Rights and establishment of an Agency for Fundamental Rights underscores the importance of human rights for the EU.

I would like to conclude with a quote by the “mother” of the Universal Declaration of Human Rights, Eleanor Roosevelt. Eleanor Roosevelt said, “Human rights exist to the degree that they are respected by people in relations with each other, and by governments in relations with their citizens.”³ The quote is from 1948. We must still work together to fully realize this promise, to return to the beginning of my speech, before we can ensure that children are no longer trafficked.

3 Allida Mae Black, *The Eleanor Roosevelt Papers: The Human Rights Years, 1945-1948* (Detroit, 2007): 904.

Johannes Morsink

THE UNIVERSAL DECLARATION AND THE CONSCIENCE OF HUMANITY

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

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

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

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

Universal Accessibility of Human Rights

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

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

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

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

A Direct and Immediate Reaction

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

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

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

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

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

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

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

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

9 *Ibid.*, 162.

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

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

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

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

14 *Ibid.*, 879.

15 *Ibid.*, 883.

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

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

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

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

¹⁷ UN Doc. E/CN.4/AC.3/339 (1948).

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

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

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

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

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

20 *Ibid.*, 7.

21 *Ibid.*

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

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

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

25 *Ibid.*

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

A Widely Shared Revulsion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Eight Abstentions

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

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

³⁶ *Ibid.*, Chapter 3, section 5.

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

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

38 Morsink, 1999, Chapter 1, section 4.

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

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

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

42 *Ibid.*, 39.

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

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

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

46 *Ibid.*, 23.

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

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

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

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

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

47 *Ibid.*, 19.

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

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

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

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

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

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

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

Conclusion

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

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

⁵³ *Ibid.* 37.

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

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

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

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

Rainer Huhle

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

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

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

Jewish Positions at the Founding of the United Nations

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

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

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

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

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

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

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

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

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

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

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

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

7 Proskauer, 216, emphasis in original.

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

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

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

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

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

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

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

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

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

11 Arendt 2004, 182, emphasis in original.

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

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

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

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

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

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

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

¹⁵ *Ibid.*, 65.

¹⁶ *Ibid.*, 67.

¹⁷ *Ibid.*, 74.

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

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

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

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

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

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

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

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

22 *Ibid.*, 40.

23 See also Janowsky, 51.

24 *Ibid.*, 42.

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

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

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

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

Jewish Contributions to the General Declaration on Human Rights

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

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

²⁶ Janowsky, 41.

²⁷ *Ibid.*, 55.

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

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

man rights protection.

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

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

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

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

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

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

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

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

33 Lewin, 44.

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

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

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

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

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

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

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

³⁶ Lewin, 62.

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

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

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

Towards the Implementation of Human Rights

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

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

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

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

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

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

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

42 *Ibid.*, 1.

43 *Ibid.*

44 *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

50 Bloxham, 57.

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

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

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

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

52 Power, 49.

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

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

55 Lemkin 1944, 79.

56 Power, 50.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

67 *Ibid.*, 263.

68 Proskauer 1950, 209.

William A. Schabas

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

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

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

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

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

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

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

3 King, 13-14.

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

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

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

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

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

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

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

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

8 UN Doc. A/BUR/50.

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

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

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

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

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

Human Rights, the UN and War Crimes Prosecutions

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

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

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

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

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

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

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

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

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

Crimes against Humanity and the Drafting of the 1948 Genocide Convention

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

¹⁶ UN Doc. A/810.

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

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

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

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

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

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

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

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

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

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

24 *Ibid.*

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

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

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

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

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

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

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

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

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

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

32 *Ibid.*

33 *Ibid.*, 497.

34 *Ibid.*, 496.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

45 *Ibid.*, 333; emphasis mine.

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

47 International Military Tribunal, vol. XXII, 492.

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

Closing the Impunity Gap

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

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

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

⁴⁸ *Ibid.*, 461.

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

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

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

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

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

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

52 *Ibid.*, para. 123.

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

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

55 *Ibid.*, 226.

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

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

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

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

Conclusions

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

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

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

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

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

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

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

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

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

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

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

A Comma Makes Legal History

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

1 This “revolution in international law” is described by the renowned French international law expert Albert La Pradelle, who had failed in his attempt on behalf of France to bring Germany before an international tribunal to answer for its responsibility for the First World War. See Albert La Pradelle, “Une révolution dans le droit pénal international,” in *Nouvelle revue de droit international privé*, vol. 13 (1946): 360-368.

2 As early as 1946, La Pradelle announced that the French proverb about the “false fatherland” that was actually a “true stepmother” was now out of date: “La vieille maxime qu’il n’y a pas de droit en faveur de l’individu victime des mauvais traitements de son Etat – fausse patrie, vrai marâtre – sinon sur le terrain politique, est dès maintenant frappée de caducité.” *Ibid.*, 363.

3 A record of the negotiations can be found in Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials London 1945* (Washington, 1949).

Protocol Rectifying Discrepancy in the Charter

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

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

And whereas it is desired to rectify this discrepancy:

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

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

IN WITNESS WHEREOF the Undersigned have signed the present Protocol.

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

For the Government of the United States of America

/s/ ROBERT H. JACKSON

For the Provisional Government of the French Republic

/s/ FRANÇOIS de MENTHON

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

/s/ HARTLEY SHAWCROSS

For the Government of the Union of Soviet Socialist Republics

/s/ R. RUDENKO⁴

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

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

The English version of the London Agreement originally read:

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

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

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

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

In its amended version, this was changed to read:

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

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

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

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

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

The IMT Definition of “Crime against Humanity”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 *Ibid.*, 127.

15 *Ibid.*, 118.

16 *Ibid.*, 119.

17 *Ibid.*, 155.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 de Menthon, 47.

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

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

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

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

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

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

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

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

26 Jackson (1949): 361.

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

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

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

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

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

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

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

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

30 Reprinted in Jackson (1949): 293.

31 *Ibid.*, 327.

32 *Ibid.*, 329.

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

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

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

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

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

The Western Powers and Debates in International Law and Politics

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

nature of their offenses escape accusation?⁴⁴

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

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

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

“Crimes against Humanity” in the Nuremberg Subsequent Trials

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

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

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

45 United Nations War Crimes Commission, 140.

46 *Ibid.*, 174.

47 *Ibid.*, emphasis mine.

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

49 Taylor (1949): 225.

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

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

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

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

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

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

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

Developments in the UN International Law Commission

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

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

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

⁵¹ *Ibid.*, 225f.

⁵² *Ibid.*, 226.

⁵³ Donnedieu de Vabres (2008): 228.

⁵⁴ *Ibid.*, 242.

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

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

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

Principle VI (c) Crimes against humanity:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

62 *Ibid.* 348.

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

64 Donnedieu de Vabres (2008), 238.

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

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

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

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

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

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

The Emancipation of “Crimes against Humanity”

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

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

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

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

68 *Ibid.*

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

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

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

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

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

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

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

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

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

subsequent Rome Statute of the International Criminal Court.⁷³

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

Article 5

Crimes against humanity

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

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

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

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

Article 3: Crimes against Humanity

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

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

⁷³ *Ibid.*, 86.

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

(i) Other inhumane acts.⁷⁵

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

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

Article 18. Crimes against humanity

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

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

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

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

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

⁷⁷ *Ibid.*, 48.

⁷⁸ *Ibid.*

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

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

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

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

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

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

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

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

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

RESPONSES TO THE EXPERIENCE OF INJUSTICE: SELECTED EXAMPLES

Heiner Bielefeldt

ANTI-DISCRIMINATION AND HUMAN RIGHTS

Human rights refer to the basic rights to which all humans are entitled. Human rights are thus described as “universal.” In contrast to rights that are linked to specific roles or functions in society – such as landlord or tenant, membership in associations and occupational groups, or citizenship – human rights are granted simply by virtue of one’s humanity. They cannot be acquired or given away, and they cannot be enhanced or diminished by individual accomplishments or mistakes. Even today, human rights are still sometimes called “inborn,” drawing upon a metaphor which originated in the 18th century. The very first sentence of Article 1 of the 1948 Universal Declaration of Human Rights states: “All human beings are born free and equal in dignity and rights.”¹

Since human rights are granted simply by virtue of one’s humanity, they must apply equally to all people. This egalitarianism is inextricably linked to the universal nature of human rights. The opening to the preamble of the Universal Declaration of Human Rights, the founding document of international human rights, acknowledges this link. It emphasizes both the “inherent dignity” and the “equal and inalienable rights of all members of the human family.” With only occasional and minor variations, almost all United Nations human rights conventions have adopted this concept of human dignity and the universal equality of human rights. As the preamble to the Universal Declaration suggests, human dignity is the basis for human rights. Respect for human dignity is quintessential to many spheres of ethics and law. Indeed, many of the moral and legal obligations between persons would not exist without this respect.² Above all, human dignity bolsters human rights because human rights explicitly acknowledge the dignity of all individuals and provide institutional

¹ UN General Assembly, *Universal Declaration of Human Rights*, accessed on Nov. 23, 2009 from <http://www.un.org/en/documents/udhr/>. All further references to the Universal Declaration of Human Rights are from this document.

² Heiner Bielefeldt, *Menschenwürde: Der Grund der Menschenrechte* (Berlin, 2008).

protections.

The egalitarian orientation of human rights is also based on the concept of human dignity, which construes all individuals as equally worthy of respect. The axiomatic and normative quality of the concept precludes basing respect for human dignity on criteria like individual accomplishment, social usefulness, or personal qualities like intelligence or charm. By definition, human dignity requires equal dignity for all persons. In human rights discourse, the term “dignity” is used only in the singular, which contrasts to the premodern usage, in which the term “dignity” mainly referred to inherited or acquired status, and thus was often used in the plural (in the sense of *dignitates*, meaning positions, high offices, or honors).³ Dignity now refers to the fundamental and equal respect to which every individual is entitled. It provides the very fabric for human relationships and receives institutional and legal support from human rights. The human rights that individuals receive simply because of their inherent dignity are also inherently egalitarian; human rights are equal rights by definition. All comprehensive human rights documents include an anti-discrimination provision, often in one of their first articles. These documents include the Universal Declaration of Human Rights and other UN covenants and agreements on human rights, the 1950 European Human Rights Convention, the European Union Charter of Fundamental Rights (which has not yet officially taken effect), and the basic rights section of the German Basic Law.⁴ Several of the UN conventions even include anti-discrimination in their title, such as the 1965 International Convention on the Elimination of All Forms of Racial Discrimination and the 1979 Convention on the Elimination of All Forms of Discrimination against Women.⁵

The principle of non-discrimination is therefore no ordinary human rights norm: it is one of the fundamental principles underlying human rights. In other words, all concrete human rights – for example, freedom of religion, the right to an education, the right to a fair criminal justice system, and the right to marriage and family – must be guaranteed according to the principle of non-discrimination. Otherwise these rights would not be human rights, but privileges.

Equality as Equal Freedom

The egalitarianism of human rights has periodically spurred anxiety and objections. In his 1790 *Reflections on the Revolution in France*, Edmund Burke condemned the leveling tendencies of the revolution, claiming they could only culminate in violence and loss of freedom.⁶ Conservative critiques of human rights from Hegel to Schopenhauer to Nietzsche later echoed Burke’s assessment, as have contemporary theorists arguing from a culturally pluralist perspective. These critiques depict equality as social uniformity and as the denial of individual particularity, including individual preferences, abilities, and life goals. Unsurprisingly, this critique presents equality as the enemy of personal freedom. The alleged opposition between freedom and protection against discrimination also fueled the heated debate on implementing the EU anti-discrimination guidelines in Germany.⁷

3 See the essay titled “Würde,” in *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, vol. 7, eds. Otto Brunner, Werner Conze and Reinhart Koselleck (Stuttgart, 1978): 637-677.

4 Art. 2, Universal Declaration of Human Rights; Art. 2 of the International Covenant on Civil and Political Rights and Art. 2 of the International Covenant on Economic, Social and Cultural Rights, both from 1966; Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The 12th protocol to the European Convention applies the grounds of prohibited discrimination under Art. 14 to the exercise of any legal right and to the actions of public authorities. Germany has not yet signed this protocol. See also Art. 21, European Union Charter of Fundamental Rights; Art. 3, German Basic Law.

5 On the 1979 convention on women, see Beate Schöpp-Schilling, ed., *The Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women* (New York, 2007).

6 Edmund Burke, *Reflections on the Revolution in France* (Oxford, 2009); originally published in 1790.

7 Heiner Bielefeldt and Petra Follmar, *Diskriminierungsschutz in der politischen Diskussion: Policy Paper of the Deutschen Instituts für Menschenrechte*, Berlin 2005, accessed Nov. 23, 2009 from http://www2.institut-fuer-menschenrechte.de/webcom/show_shop.php/_c-488/_lkm-618/_cat-2/_nr-34/i.html.

The principle of equality in human rights therefore only makes sense in conjunction with a *right to freedom*. This right is also derived from the concept of human dignity. The inherent dignity of human beings requires that we treat no individual as the means to an end, but as ends in themselves. Human rights recognize this requirement on an institutional and legal level by defining basic rights to self-determination.⁸ This principle of freedom and the principle of equality are both crucial to human rights; all human rights are simultaneously rights to equality *and* freedom. This freedom transcends the liberal concept of civil and political rights, although the names of these rights often signal the centrality of freedom (freedom of conscience, freedom of religion, freedom of expression, freedom of assembly, freedom of association, etc.). Freedom also applies to economic and social rights, which include the right to a livelihood and basic health care, and other fundamental freedoms from fear and want.⁹

In the context of human rights, freedom and equality are two sides of the same coin. A right to freedom that does not apply equally to all is a legal privilege rather than a universal human right. A right to equality that is not based on the principle of freedom is not truly a “right.” Equality as defined by human rights thus does not entail enforced leveling and uniformity or – in Nietzsche’s words – the “degeneration and diminution of man to a perfect herd animal” and the “bestialization of man into a dwarf animal of equal rights and claims.”¹⁰ The principle of equality actually strives for the opposite: all humans should have the freedom and opportunity to pursue their own unique life goals.¹¹ In this sense, human rights encourage the proliferation of diversity and demonstrate an inner affinity to social pluralization processes. The key factor is that the opportunity to pursue one’s “unique” life goals is not the privilege of the few, but a universal opportunity available to all.

Anti-Discrimination “By Example”

The prohibition against discrimination is the concrete expression of the principle of equality in human rights. Thus Article 2, Paragraph 1 of the Universal Declaration of Human Rights states: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” This list is not comprehensive, but defines discrimination by example. As the wording implies, the prohibition against discrimination is explicitly open to the potential changes of increases in social awareness.

The (deliberately open-ended) list of characteristics that are protected against discrimination reflects the history of social protest movements, whose struggle for equality also contributed to the elaboration of the universalism of human rights. This universalism is necessary because the universal claims of human rights have always fallen and continue to fall short, in political and social reality, as well as in historical formulations of human rights norms and conventions. For example, in the late 18th century, the abstract subject of the first human rights declarations was for the most part unquestioningly imagined as male. Beyond his gender-specific attributes, this male subject was endowed with particularistic qualities such as education, class and race. Even today, the right to marriage and family is limited in many places to heterosexual couples, to the detriment of other forms of partnership. The history of human rights has always been characterized by the fundamental contradiction between particularism and universality. Again and again, social movements have mobilized

8 See also Kant’s categorical imperative: “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.” See Immanuel Kant, *Grundlegung zur Metaphysik der Sitten* (Berlin, 1900): 429.

9 Michael Krennerich, “Soziale Rechte sind Freiheitsrechte! Plädoyer für ein einheitliches Verständnis wirtschaftlicher, sozialer und kultureller Rechte,” in *Jahrbuch Menschenrechte 2007* (Frankfurt a.M., 2006): 57-66.

10 Friedrich Nietzsche, *Jenseits von Gut und Böse*, (Stuttgart, 1976): 117.

11 Susanne Baer, “Geschlecht und Recht – zur rechtspolitischen Steuerung der Geschlechterverhältnisse,” in *Gender Mainstreaming: Konzepte, Handlungsfelder, Instrumente*, eds. Michael Meuser and Claudia Neusüß (Bonn, 2004): 71-83.

around these contradictions, extending the theoretical elaboration and material development of the universal claim of human rights. In what follows, I will provide a few contemporary and historical examples.

The titles of some of the most important human rights declarations demonstrate that the subject of 18th century democratic revolutions was generally understood to be male. Thomas Paine's *Rights of Man* and the French *Déclaration des droits de l'Homme* are emblematic in this respect. Olympe de Gouges was probably the first author to point out the linguistic ambiguity of the French declaration. Only two years after the 1789 *Déclaration des droits de l'Homme*, de Gouges published the *Declaration of the Rights of Woman and Female Citizen*, which states in its first article that "Woman is born free and lives equal to man in her rights."¹² Although it echoed the title and wording of the famed 1789 declaration, this first statement of the human rights of women was no mere addendum to the "male version." De Gouges' treatise did not advocate special rights for women, but equal rights between the sexes: "The purpose of any political association is the conservation of the natural and imprescriptible rights of woman and man."¹³ These natural rights and the natural union of man and woman were in turn the foundation of sovereignty and the state: "The law must be the expression of the general will; all female and male citizens must contribute either personally or through their representatives to its formation; it must be the same for all: male and female citizens, being equal in the eyes of the law, must be equally admitted to all honors, positions, and public employment according to their capacity and without other distinctions besides those of their virtues and talents."¹⁴ In arguing against the deliberate or unconscious equation of humanity with "man," Olympe de Gouges made an argument in favor of universalism over particularism. Her declaration of human rights for women implicitly criticized the false universalism of late 18th century notions of human rights and marked a watershed moment toward truly universal and equal rights.

Social commentators in the late 18th century also pointed out another blatant contradiction in the universal claims of human rights. Several of the Founding Fathers of the United States were also slaveholders, including Thomas Jefferson, who wrote the Declaration of Independence, one of the foundational human rights documents of the new nation.¹⁵ Both slavery and racism, which established a hierarchy of value on the basis of skin color and origin, directly contradict the principles of the Declaration of Independence, which stated "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights." Only a few years after the Declaration of Independence, black slaves began to sue the courts for their freedom in a number of US states, sometimes with success. In 1783, a state supreme court ruling abolished slavery in Massachusetts.¹⁶ Known as the Quock Walker trial, this case marked the beginning of the long struggle for emancipation in the United States. Moreover, the trial reflects the fundamental insight that the universalist claims in the Declaration and other human rights documents were only credible if accompanied by a willingness to challenge and overcome racial inequality and exclusion.

One recent example of the expansion of anti-discrimination protection is the Convention on the Rights of Persons with Disabilities, which the United Nations General Assembly adopted in December 2006.¹⁷ The 1948 UN declaration on anti-discrimination did not include this category of discrimination. At the time, there was

12 Olympe de Gouges, "The Declaration of the Rights of Woman," reprinted in *The Human Rights Reader: Major Political Essays, Speeches, and Documents from Ancient Times to the Present*, 2nd ed. (New York, 2007): 177. De Gouges's manifesto went unnoticed by the National Assembly.

13 *Ibid.*, 177: Article 2.

14 *Ibid.*, 177: Article 6.

15 Charles L. Griswold Jr., "Rights and Wrongs: Jefferson, Slavery, and Philosophical Quandaries," in *A Culture of Rights: The Bill of Rights in Philosophies, Politics and Law – 1791 and 1991*, eds. Michael J. Lacey and Knud Haakenssen (Cambridge, 1991): 144-214, see especially 190ff.

16 Gerald Stourzh, "Die Begründung der Menschenrechte im englischen und amerikanischen Verfassungsdenken des 17. und 18. Jahrhunderts" in *Menschenrechte und Menschenwürde: Historische Voraussetzungen – säkulare Gestalt – christliches Verständnis*, eds. Ernst-Wolfgang Böckenförde and Robert Spaemann (Stuttgart, 1987): 78-90, see especially 87.

17 Theresia Degener, "Menschenrechtsschutz für behinderte Menschen," in *Vereinte Nationen* 3 (2006): 104-110.

little sensitivity that the widespread practice of segregating persons with disabilities as “invisible minorities” constituted a form of discrimination. In the decades that followed, organizations for disabled persons succeeded in raising awareness of disability issues and overcoming the barriers (including physical, organizational, and psychological barriers) to full inclusion and self-determination for disabled persons. At the same time, anti-discrimination for people with disabilities has become a centerpiece of human rights in general, and the Convention on the Rights of Persons with Disabilities reflects the call to overcome barriers to full inclusion and self-determination. As a result, anti-discrimination under the UN guidelines now also includes comprehensive accessibility for persons with disabilities.¹⁸

Unlike persons with disabilities, sexual minorities do not yet have an international convention for their equal treatment. This absence stems largely from the ongoing and widespread homophobia of many societies, and even today some states sponsor the persecution of sexual minorities. A universal and worldwide acceptance of the principle of non-discrimination on the basis of sexual orientation and gender identity, similar to the one in the EU Charter of Fundamental Rights, appears unlikely at present. Nevertheless, a group of international human rights experts, including some with high-ranking positions in the UN human rights organizations, have systematically analyzed international human rights law in relation to sexual orientation and gender identity. The so-called Yogyakarta Principles, named after the place they came into being, are not legally binding.¹⁹ However, they do have a legal relevance because they summarize the recent changes in the interpretation of the human rights convention by the relevant UN treaty committees. Since the mid-1990s, the UN treaty committees have been moving toward incorporating the criteria of sexual orientation and gender identity in the anti-discrimination provisions.

The EU Charter on Fundamental Rights represents yet another example of the expansion of the definition of anti-discrimination. Although the EU Charter has not yet come into force (and is not binding on the international level), it is nonetheless instructive to compare its anti-discrimination provisions with those of the 1948 Universal Declaration of Human Rights. For example, Article 21, Paragraph 1 of the EU Charter states: “Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”²⁰ However, even this expanded list of protections, which is substantially more inclusive than the 1948 protections, remains unfinished, as the words “such as” imply. The principle of equality within human rights is not exhausted by the list of protected categories, but takes it one step ahead. As such, it remains the driving force for potential expansions. It is likely that new threats to equality, such as technological developments in the field of genetics, as well as continued increases in social awareness, will lead to new changes and expansions in our understanding of discrimination.

Direct, Indirect and Structural Discrimination

Our expanded understanding of discrimination is evident not only in the additional personal characteristics protected under anti-discrimination legislation. In the past decades, there has also been a growing awareness of the types of indirect and structural forms of discrimination that often accompany direct and intentional discrimination. Although these latter forms of discrimination may be less apparent at first glance, they can have equally far-reaching effects on their victims. However, human rights enforcement also means that states

¹⁸ Art. 3 f, UN Convention on the Rights of Persons with Disabilities.

¹⁹ On the Yogyakarta Principles, see Michael O’Flaherty and John Fisher, “Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles,” in *Human Rights Law Review* 8:2 (2008): 207-248.

²⁰ EU Charter on Fundamental Rights, http://www.europarl.europa.eu/charter/pdf/text_en.pdf, accessed on Nov. 23, 2009.

are expected to actively oppose all forms of discrimination. A simply formal, legal equality is not enough. Rather, the state has to ensure that every individual can fully take advantage of these rights.

Indirect discrimination includes forms of inequality that are perpetuated or maintained despite the existence of formal equality. For example, labor market reforms like professional development and training programs can have unintended consequences. Such programs can lead to de facto systematic discrimination by under-representing women and other groups, even when laws are formally egalitarian. Indirect discrimination can be intentional or unintentional, and it can take place knowingly or unwittingly. The decisive factor is factual discrimination against specific categories of individuals. Given the importance of anti-discrimination to human rights, indirect discrimination is equally unacceptable.

Although the term indirect discrimination takes on meaning only in relation to direct discrimination, the concept of structural discrimination occupies a conceptually distinct level. Structural discrimination relates to forms of discrimination that are not carried out (at least directly) by an individual or group of “perpetrators.” Instead, structural discrimination arises from existing social structures. The exclusion of persons with disabilities from public life was not only the result of deliberate discrimination and segregation, but stemmed in large part from the lack of accessibility to public buildings and public transportation.²¹ As another example, in the last decades, multiple empirical studies have demonstrated that selection mechanisms in Germany limit the access of children and youth from immigrant and minority families to educational opportunities, which is also a major form of structural discrimination. Yet a third example is the under-representation of women in the higher echelons of academia, and the concurrent over-representation of women in elementary education.²²

Indirect and structural forms of discrimination are not always obvious at first glance, and may be extremely difficult to verify. However, statistical data can help prove that specific groups are disadvantaged. The UN committees which monitor the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women have long advised states – including Germany – to publish meaningful empirical data in order to promote social awareness and actual equality for all persons.²³

Effective equality policies may also require the adoption of temporary special measures, which are designed to combat existing structures of discrimination. These measures may appear to entail (or are commonly misunderstood to entail) special privileges. However, they are intended to undo existing structures of privilege and thus pave the way for true equality. Both the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women have expressly allowed for such measures.²⁴

21 Sigrid Arnade, “Zwischen Anerkennung und Abwertung; Behinderte Frauen und Männer im bioethischen Zeitalter,” in *Aus Politik und Zeitgeschichte* 8 (2003): 3-6.

22 Mona Motakef, *Das Menschenrechte auf Bildung und der Schutz vor Diskriminierung: Exklusionsrisiken und Integrationschancen* (Berlin, 2006) accessed on Nov. 23, 2009 from http://files.institut-fuer-menschenrechte.de/488/d50_v1_file_4472c3f75f94b_IUS-010_S_RAB_RZAnsicht_ES.pdf.

23 See the recommendations for Germany by the UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) of Feb. 6, 2009; <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/236/50/PDF/N0923650.pdf?OpenElement>, accessed Nov. 23, 2009.

24 See Art. 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and Art. 4 of the Convention on the Elimination of All Forms of Discrimination against Women. The UN Committee on the Elimination of All Forms of Discrimination against Women states that the convention “targets discriminatory dimensions of past and current societal and cultural contexts which impede women’s enjoyment of their human rights and fundamental freedoms. It aims at the elimination of all forms of discrimination against women, including the elimination of the causes and consequences of their de facto or substantive inequality. Therefore, the application of temporary special measures in accordance with the Convention is one of the means to realize de facto or substantive equality for women, rather than an exception to the norms of non-discrimination and equality.” See Article 14 of the UN Committee on the Elimination of All Forms of Discrimination against Women General Recommendation No. 25 (2004), accessed on Oct. 1, 2009 from <http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20%28English%29.pdf>.

An Ongoing Project

Discrimination is still a problem in contemporary Germany – a free and democratic society with a highly developed legal system and a sophisticated human infrastructure. People from immigrant communities still experience hurdles in the housing and labor market; even those with equivalent educational attainment have greater difficulty obtaining an apprenticeship or trainee position compared to young people with more traditionally “German-sounding” names. Even today, men and women do not receive equal pay for equal work; in fact, the wage discrepancy is substantial and has remained largely unchanged over the past several decades, despite numerous corrective policies and measures. Persons with disabilities who wish to marry and establish families often confront a lack of understanding and many practical obstacles; this applies in particular to people with developmental disabilities. Moreover, Germany lags far behind other European nations in the integration of children with disabilities into regular schools. The educational system also relegates a disproportionate number of children from immigrant backgrounds to schools for children with learning disabilities. In turn, these children suffer serious and permanent disadvantages through their segregation from the mainstream at such a young age. Despite some progress, lesbian women and gay men are still stigmatized. Muslims and other religious minorities often face significant obstacles to participation in established state and religious structures, such as religious instruction in schools. Furthermore, there has been little systematic investigation of age discrimination in Germany, and the topic is still largely unknown to the general public. Even less discussed is the complex issue of discrimination on the basis of genetic features, such as the insurance industry’s discrimination against persons with certain genetic predispositions for disease. This list of unsolved questions and problems is by no means exhaustive.

For reasons of space, I cannot describe the many different legislative, administrative, social work, and educational measures needed to enact effective anti-discrimination policies in detail here. Instead, I will close by indicating an irresolvable tension that all anti-discrimination policies face: the challenge of paying equal attention to all forms of discrimination, while paying special attention to each.

On the one hand, all forms of discrimination deserve equal attention. Any attempt to establish a hierarchy of discrimination – for example, by arguing that racial discrimination is more serious than discrimination against persons with disabilities (or the reverse) – would be contrary to the universalist principle of human rights.²⁵ The term “horizontal approach” is now being used to describe the practice of combating all potential reasons for discrimination under a single anti-discrimination provision. The horizontal approach makes it possible to address in systematic fashion multiple forms of discrimination, such as the dual discrimination of women with disabilities or the status of homosexuals from migrant communities.

On the other hand, we must also continue to pay special attention to the unique character of each form of discrimination. For example, it would be a mistake to conclude that the horizontal approach precludes focused measures like gender mainstreaming. In order to effectively combat discriminatory practices and structures, we must thoroughly analyze the social conditions which gave rise to them. This analysis requires that we assess and understand each specific form of discrimination. Only a systematic analysis of society allows us to recognize the wide range of social effects due to gender, for example, or the many obstacles that still prevent the full accommodation of persons with disabilities of mobility or vision. This specificity will allow us to devise targeted and precise anti-discrimination policies. The horizontal approach therefore does not imply the end of gender mainstreaming, disability mainstreaming, or other focused measures in favor of a kaleidoscopic

²⁵ Of course, experiences of discrimination can vary greatly, from a verbal attack to structural discrimination on the housing or employment market to violence and even genocide.

human diversity, as some anti-discrimination advocates have worried.²⁶

Devising anti-discrimination policies that do justice to the goal of human rights requires substantial energy and commitment from both the state and society. But these policies do not only benefit the victims of discrimination. Overcoming discrimination is ultimately a process of humanizing society as a whole. It requires absolute respect for the inviolability of the human dignity of every individual.

²⁶ Beate Rudolf, "Gender und Diversity als rechtliche Kategorien: Verbindungslinien, Konfliktfelder und Perspektiven," in *Gender und Diversity: Altraum oder Traumpaar?*, eds. Sünne Andresen, Mechthild Koreuber and Dorothea Lüdke (Wiesbaden, 2009): 155-173.

FREEDOM OF EXPRESSION AS A HUMAN RIGHT: THE ROLE OF HATE SPEECH IN THE PUBLIC SPHERE

Prohibitions against discrimination are one of the centerpieces of human rights. Indeed, our contemporary international human rights framework owes much to the struggle against racial discrimination across the globe. However, as Heiner Bielefeldt has noted, “Anti-racism was not intrinsic to the human rights agenda from the start, at least not explicitly.”¹ On closer examination, human rights progress in the area of anti-discrimination has often been uneven and contradictory, shaped by the interaction between universal norms and concrete historical developments. Within this context, a central dilemma has been the ongoing tension between freedom of expression and the limits placed on this freedom in the name of combating racial incitement. Most countries view racism and hate speech as morally reprehensible, and they are as such subject to legal sanctions in many nations. In Germany, for example, racial discrimination has become less overt and openly racist remarks are rarely heard in public speech as a result. However, the ongoing effort to eliminate hate speech in the public sphere continues to impose limits on the freedom of expression, a key human right that is traditionally construed as unlimited in scope. The recent trend for individuals and groups to invoke freedom of expression in the defense of their right to disseminate racist propaganda further complicates this picture.

Prohibitions on discrimination are rooted in the protection of human rights and dignity for all. From the human rights perspective, freedom of expression and the avoidance of discrimination and racism are not inherently contradictory concepts. In fact, robust anti-discrimination policies support and protect individual freedom, while racist ideologies undermine freedom, subjugating individual freedom to the needs of the collective. Indeed, as the German Institute for Human Rights has argued, “all human rights – whether freedom of religion, freedom of expression, the basic rights to justice, the right to an education or the right to participation in the labor market – are always grounded in the ideal of human equality and anti-discrimination.”²

In what follows, I will elucidate various points of tension between freedom of speech and anti-discrimination. Anja Zimmer’s *Hate Speech im Völkerrecht* describes the debates surrounding hate speech and racist acts as

1 Heiner Bielefeldt, “Rassismusbekämpfung im Streit der internationalen Menschenrechtspolitik,” in *Policy Paper No. 13* of the Deutschen Instituts für Menschenrechte (2009): 4, accessed Nov. 25, 2009 from http://files.institut-fuer-menschenrechte.de/488/d89_v1_file_49c23ff23902d_PP_Rassismus_bekaempfung_Maerz_2009.pdf.

2 Petra Follmar-Otto and Hendrik Cremer, “Der Nationale Aktionsplan der Bundesrepublik Deutschland gegen Rassismus - Stellungnahme und Empfehlungen,” *Policy Paper No. 12* of the Deutschen Instituts für Menschenrechte (2009): 5, accessed on Nov. 25, 2009 from http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/policy_paper_12_der_nationale_aktionsplan_der_bundesrepublik_deutschland_gegen_rassismus.pdf.

well as the legal restrictions on hate speech under international law.³ As such, I do not discuss state prohibitions on racial and ethnic discrimination or the legal prosecution of discriminatory acts in detail. Instead, I focus on several of the central legal and political controversies involving hate speech and freedom of expression in the United States and Germany. I explore whether free public speech that disrespects individuals and groups or incites racial hatred or genocide should be curtailed or punished. This argument will ultimately form the basis of a human rights education project that analyzes the relationship between history in human rights education and broader historical processes, above all in Germany.

A German Sonderweg?

Human rights theorists often argue that human rights transcend national boundaries, and the historical development of human rights largely bears out this claim. However, the impulse for formulating and implementing human rights always derives from concrete experiences within a particular time and place. The right to the free expression of opinion and the limitations placed on this right are a prime example with deep historical roots. Freedom of expression, understood as freedom of assembly, the arts, and the press, played a central role early in the history of human liberty, starting with the American and the French constitutions. Anti-discrimination struggles, excluding those involving religious freedom, began much later in the anti-slavery and women's movements. The ideal that "all men are created free and equal" had to be transformed into a political and social reality through concrete struggle and negotiation. After 1945, the struggle to define anti-discrimination and freedom of expression as human rights was powerfully shaped by the crimes of the Nazis, both within Germany and abroad. As Rainer Huhle notes, the lessons learned from this experience are far from straightforward, and have inevitably been shaped in each country by their encounter with existing legal and political traditions.⁴ Both before the war and after, each generation of human rights activists has grappled to define the necessary limitations on human rights.

The 1948 Convention on Genocide had already criminalized the direct and public incitement to genocide as a preparatory act. Three years earlier, the International Military Tribunal of Nuremberg sentenced the Nazi propagandist Julius Streicher to death for the same crime. The history of National Socialism in Germany demonstrated that the path from hate speech to genocide could be a short one. In postwar Germany, therefore, it seemed necessary to provide legal backing to the effort to shape public opinion and ensure that history would never again be repeated. On the other hand, strict guidelines for limiting freedom of expression are necessary to prevent abuses by an oppressive state. Thus the human rights organization ARTICLE 19 argues that any restrictions on freedom of expression must conform to narrowly defined guidelines, which include the stipulations that "no one should be punished for statements that are true," that "no one should be penalized for the dissemination of hate speech unless it can be shown that they did so with the intention of inciting discrimination, hostility and violence," and that criminal sanctions and imprisonment should be applied only as a last resort. Finally, they propose that any restrictions on freedom of expression should make it clear that the goal is to "protect individuals from hostility and violence" and not to protect belief systems and institutions from criticism, scrutiny, or debate, even when these are harsh or unreasonable.⁵

3 Anja Zimmer, *Hate Speech im Völkerrecht: Rassendiskriminierende Äußerungen im Spannungsfeld zwischen Rassendiskriminierungsverbot und Meinungsfreiheit* (Frankfurt a.M. and Berlin, 2001).

4 Rainer Huhle, "Wie weit geht die Meinungsfreiheit? Ein Rückblick aus Anlass des 60-jährigen Bestehens der Allgemeinen Erklärung der Menschenrechte," in *Zeitschrift für Menschenrechte* 2 (2008): 123.

5 Agnès Callamard, "Freedom of Speech and Offense: Why Blasphemy Laws are not the Appropriate Response," accessed on Nov. 25, 2009 from <http://www.article19.org/pdfs/publications/blasphemy-hate-speech-article.pdf>. See also the contribution by Callamard in this volume.

These strict guidelines for limiting freedom of expression are based on the distinction between individuals and their belief systems. However, while they may be juridically necessary, they are not always suited to the reality of contemporary disputes. Individuals are also members of groups, including religious and ethnic minorities, or other groups that face victimization or discrimination. This raises the question of whether hostility toward an entire group, or offenses to the dignity of a group, also affect those who identify (or are identified) as members of it.⁶

In all likelihood, a group's historical experiences and its collective memory of those experiences determine the extent to which it perceives discrimination and hate speech as a violation of its dignity. These experiences have also shaped contemporary German law. For example, Article 9 of the Basic Law bans the formation of "associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding."⁷ Sections 86, 86a, and 130 of the German Criminal code also prohibit inciting hatred against segments of the population and disseminating symbols of unconstitutional organizations.⁸

In Germany, political groups that have been shaped by the legacy of opposition to National Socialism have demanded further restrictions on freedom of expression to protect victims of hate speech and curtail the activities of far-right political groups. Their calls to ban the NPD and impose additional restrictions on the right to demonstrate pose a number of complex issues. Most centrally, from a human rights perspective, we must ask whether these additional restrictions are an attempt to impose sanctions on speech that does not fall under the German constitution's definition of hate speech. In one well-known case of 2004, the German Federal Constitutional Court reversed a decision by the Higher Administrative Court of Münster to ban a neo-Nazi demonstration in the city of Bochum. The respected information service *Blick nach Rechts* criticized the Constitutional Court's verdict:

We are left with the memory that at least the higher administrative court took a clear stand: gatherings which have National Socialist affiliations can be banned as an offense to public order. And that neo-Nazi ideas and teachings are more than just politically unpopular opinions; they are opinions that have been decisively rejected by the Basic Law itself. And that freedom of dissent must be limited at the point where an attempt is being made to revive the barbaric ideas and teachings of the Third Reich. And that, as the Higher Administrative Court President Bertram said, "the right to freedom of assembly and opinion does not mean carte blanche for neo-Nazis." If we follow the Karlsruhe precedent, this is legally incorrect. But it was and is politically correct.⁹

A broad social movement in Germany denies the right to freedom of expression for groups who use this right for neo-Nazi political agitation, even if they do not explicitly use Nazi symbols and slogans. Indeed, some activists regard the repressive measures of the state as an essential supporting instrument. The social movement is still in part influenced by the legacy of anti-fascism, which was one of the most important leftist ideals of the 20th century. This brand of anti-fascism often clashed with the largely liberal conception of human rights. Although the anti-fascist left has become less doctrinaire in recent years, it has been slow to accept that even Nazis are to be accorded freedom of speech. On the other hand, local activists who are battling the

⁶ For reasons of space, I will not be able to consider the legal distinction between hate speech and hate crimes, which is another important issue raised by the guidelines for restrictions on freedom of expression as formulated by Callamard and other free speech advocates.

⁷ Basic Law for the Federal Republic of Germany, accessed on Nov. 3, 2009 from <http://www.iuscomp.org/gla/statutes/GG.htm>.

⁸ Federal Republic of Germany Criminal Code, accessed on Nov. 3, 2009 from <http://www.iuscomp.org/gla/statutes/StGB.htm>.

⁹ The Federal Constitutional Court is located in the city of Karlsruhe; quoted in Tomas Sager, "Grenzen der Meinungsfreiheit," in *Blick nach Rechts* (Aug. 3, 2004), accessed on May 12, 2009 from <http://www.bnr.de/content/grenzen-der-meinungsfreiheit-0>.

rising neo-Nazi tide occasionally feel abandoned by the global human rights movement. According to a slogan popular with the anti-fascist activists, the priority is “contesting every inch of ground” in their battle against the far right.

Traditional Anti-Fascism and Civil Resistance against the Far Right

The regional anti-fascist movement and the campaign against the radical right in northern Bavaria typify the anti-fascist ideas and activities in Germany since 1990. The towns of Wunsiedel and Gräfenberg, where regular neo-Nazi demonstrations have taken place, are also centers of this anti-fascist movement. The Wunsiedel activists successfully spearheaded tighter restrictions on the right to assembly by the German Bundestag. Every year on the anniversary of the death of Hitler’s deputy Rudolf Hess, who was sentenced as war criminal at Nuremberg, Hess’s followers joined to march to his grave in Wunsiedel. In March 2005, the governing Social Democratic (SPD) and Green Party coalition joined with the Christian Democratic opposition in the Bundestag to vote in favor of tightening the right of assembly and making changes to the existing criminal code. The goal was to prevent rallies by far-right extremists at historically sensitive sites like concentration camp memorials and the Holocaust Memorial in Berlin. The opposition Free Democratic Party (FDP) voted against tightening the law, arguing that freedom of expression and assembly were fundamental to democracy, and criticizing the Bundestag for being increasingly prepared to violate basic rights.¹⁰ The legislation let the individual state governments decide which sites should be protected from demonstrations and rallies glorifying the Nazi dictatorship. Arguing in favor of the new restrictions before the parliament in February 2005, Minister of Justice Brigitte Zypries noted that the original purpose of the law on “protected zones” was to “safeguard the integrity of our constitutional bodies and their members.” Extending this ban on demonstrations to sites like the Brandenburg Gate and Hess’s burial site in Wunsiedel, Zypries continued, would protect the “dignity and memory of the victims of the National Socialist regime.”¹¹ Speaking one year later, Zypries returned to the topic of the proposal and attempted to locate it within the development of development of international law. According to Zypries, the majority of EU states have followed the American and English conception of freedom of expression, which has limited their ability to enact criminal penalties for racist and xenophobic expressions of opinion. Germany, however, had “followed a different path,” enacting a law on incitement to hatred that was sharpened with a ban on Holocaust denial. Germany’s change to the law on assembly, which restricted demonstrations at important Holocaust memorial sites, Zypries noted, had withstood scrutiny by the German Federal Constitutional Court.¹² What Zypries failed to note, however, is that the new law circumvented one of the basic principles of German constitutional law: that the state cannot limit freedom of expression solely on the basis of the content of opinions, even if the ideas involve fundamental legal values connected to Germany’s historical experience.

The central demand in the legal battle against the far-right has long been a ban on the NPD party. While the proposed ban is not actually a question of freedom of expression, it is explicitly justified with the claim that preventing far-right demonstrations and rallies will also prevent the spread of far-right ideas. In reality then, the proposed ban attempts to limit the freedom of expression. In addition to this “traditional anti-fascist” position, there are also a number of more nuanced positions in the political battle against the radical right that do not rest upon restrictions of freedom of expression. For example, the Berlin anti-Semitism scholar

¹⁰ dpa news report of March 11, 2005.

¹¹ Brigitte Zypries, Feb.18, 2005, speech accessed on May 12, 2009 from <http://www.bmj.bund.de>.

¹² Brigitte Zypries, 2006, speech accessed on May 12, 2009 from <http://www.bmj.bund.de>.

Michael Kohlstruck has urged us to use demonstrations as an opportunity for public relations work and political education:

“We will not budge an inch in the battle against fascism” is a historical slogan. But respect for basic rights and respect for the rule of law means that activists who oppose rallies and demonstrations by the far right should aim at protest rather than prevention. This protest should initially be directed against the rally itself. But we must also extend this immediate protest to a broader critique of the social and political ideals and agenda of the radical right.¹³

In addition to the “anti-fascist” approach, a second strain of activism derives its call for fundamental human rights and civil liberties from the political and civil deficits of German history. According to this tradition of civil and human rights activism, both the “bourgeois” and the socialist state were structurally repressive by nature. Any laws that grant the state even more repressive power thus infringe on civil rights. Civic organizations like the Humanistische Union (Humanist Union) and the Komitee für Grundrechte und Demokratie (Committee for Basic Rights and Democracy), which have been active in human rights for several decades, oppose limitations on public rallies and demonstrations by groups like the NDP. One of the most important spokespeople for the Komitee für Grundrechte und Demokratie, Wolf-Dieter Narr, has argued against bans, and for public debate that would be a “demonstration of democracy in action, and of the sincerity of the state’s commitment to human rights.”¹⁴ Narr’s argument was echoed by Federal Constitutional Court’s disagreement with the Higher Administrative Court of Münster. As the Federal Constitutional Court argued in its verdict:

Basic rights and democracy must be more than a horse-drawn carriage which we mount and dismount as circumstances decree. They must be a true “normative foundation” with real power to shape the actions of our institutions and citizenry. As such, basic rights and democracy can only be limited or obstructed under exceptional circumstances, as the outcome of a cost-benefit analysis of equally important norms, of a conflict between fundamental norms. And even in that case, we must ensure that our basic rights are restricted or modified to the least extent possible. Our liberal and democratic polity is not protected by enacting bans or limiting debate, even when the opinions in question are repulsive and advocate discrimination and xenophobia (a xenophobia that is in part also supported by official policy). The “lessons” of the Weimar Republic do not require that we limit the exercise of democracy and basic rights. In fact, quite the opposite. The opinions of extremists on the far right are terrible, but we cannot win the battle by banning the expression of opinions. Instead we must acknowledge these opinions, engage with them, and attack their underlying causes.¹⁵

In contrast to the arguments advanced by Justice Minister Brigitte Zypries and the advocates of bans on far-right assemblies, Narr and the Federal Constitutional court have thus argued that limitations on the expression of democracy and free speech do not honor the victims of National Socialism; moreover, the history of National Socialism should not determine the interpretation of the German constitution and contours of German democracy.

13 Michael Kohlstruck, “Thesen zu Workshop III: Auseinandersetzung um geschichtliche Fragen (Jahrestage, Gedenkort),” presented at the conference “Praxisorientierter Umgang mit rechtsextremistischen Aktivitäten” on Feb. 9 and 10, 2007 in Potsdam, accessed on May 14, 2009 from zfa.kgw.tu-berlin.de/lehrrmaterial/dateien/Kommunaltagung_Thesen.pdf.

14 Komitee für Grundrechte und Demokratie, “Der Umgang mit der Versammlungs- und Meinungsfreiheit offenbart den Zustand bundesdeutscher Demokratie,” (2005) accessed on Oct. 29, 2009 from http://www.grundrechtekomitee.de/ub_showarticle.php?articleID=149.

15 Wolf-Dieter Narr, “Demokratie und Demonstration Notizen zur unendlichen Demonstrationskontroverse,” accessed on May 12, 2009 from www.CILIP.de/ausgabe/2/2002-72/demo.htm.

Holocaust Denial

In Germany, publicly trivializing, condoning, or denying the crimes committed under the National Socialist dictatorship is a criminal offense. These acts can also be prosecuted as an incitement to hatred and a disturbance of the peace.¹⁶ Section 130, Paragraph 1 of the German criminal code defines incitement to hatred as follows:

Whosoever, in a manner capable of disturbing the public peace incites hatred against segments of the population or calls for violent or arbitrary measures against them; or assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be liable to imprisonment from three months to five years.¹⁷

Holocaust denial has been illegal in Austria since 1945, and some 20 other nations have similar laws.¹⁸ In its 2003 decision on the appeal of Roger Garaudy, a philosopher convicted of Holocaust denial in France, the European Court of Human Rights emphasized that Article 17 of the European Convention on Human Rights did not provide protection to the attempt to rehabilitate the National Socialist regime.¹⁹ Jürgen Zarusky has noted that Holocaust denial was an international phenomenon from the start.²⁰ Thus there has been what might be termed a French tradition of Holocaust denial, beginning with Paul Rassinier, who was incarcerated in the Buchenwald concentration camp as a pacifist and Communist, to Robert Faurisson, who was defended by a number of notable liberal thinkers and politicians, to the philosopher Roger Garaudy.²¹ And in recent years, the internet has provided an international forum for a veritable explosion of Holocaust denial. The legal response to the dissemination of the “Auschwitz lie,” in one of the favored phrases of Holocaust deniers, illustrates the tension between the concept of freedom in Anglo-Saxon countries and the willingness of other European states, many of which were occupied by Germany during the Second World War, to limit these freedoms when it comes to National Socialist propaganda.²² Thus in 2006, British historian David Irving was found guilty in Vienna of denying the Holocaust and sentenced to three years in prison. Among the reasons given by the advocates of Irving’s prosecution was the effect that his statements might have on the dignity and rights of Holocaust victims, survivors, and their families: “Contrary to the claims of the so-called revisionists, and even the claims of some serious commentators on the topic, the purpose of legal prosecution of Holocaust denial is preventing hatred and not enforcing a single and authoritative view of history.”²³ Nonetheless, the Holocaust is a historical fact, and Holocaust denial is a claim that in Germany is not protected by the right to freedom of opinion.²⁴ These historical facts include the existence of a plan for the murder all Jews in the territories under National Socialist control, and the use of gas chambers to carry out these murders.²⁵

16 On the definition of the crime of Holocaust denial and glorifying the National Socialist regime, see § 6 Par. 1 of the German International Criminal Code; on the crime of disturbing the peace, see §130 Par. 3 of the German Criminal Code.

17 Federal Republic of Germany Criminal Code, accessed on Nov. 3, 2009 from <http://www.iuscomp.org/gla/statutes/StGB.htm>.

18 See Joachim Neander, “Mit dem Strafrecht gegen die ‘Auschwitz-Lüge’: Ein halbes Jahrhundert § 130 Strafgesetzbuch ‘Volksverhetzung,’” accessed on May 22, 2009 from <http://aps.sulb.uni-saarland.de/theologie.geschichte/inhalt/2006/19.html>.

19 See the European Court of Human Rights judgment, accessed on Nov. 25, 2009 from <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=672116&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

20 Jürgen Zarusky, “Die Leugnung des Völkermords: ‘Revisionismus’ als ideologische Strategie,” in Wolfgang Benz, *Auf dem Weg zum Bürgerkrieg?: Rechtsextremismus und Gewalt gegen Fremde in Deutschland* (Frankfurt a.M., 2001): 63-86, esp. 65.

21 Lothar Baier, *Französische Zustände Berichte und Essays* (Frankfurt a.M., 1985).

22 The term “Auschwitz lie” refers to a well-known text by a Nazi apologist, Thies Christophersen, a former SS officer. According to Christophersen, the claim that Jews were gassed at Auschwitz was a “lie.” Despite the falsity of Christophersen’s claims, the term “Auschwitz lie” has become a shorthand description for Holocaust denial and mitigation in many countries. See Richard S. Levy, ed. *Antisemitism: A Historical Encyclopedia of Prejudice and Persecution*, vol. 1 (Santa Barbara, 2005): 45.

23 Zarusky, 81.

24 Verdict of the German Constitutional Court of April 13, 1994, Az. 1 BvR 23/94.

25 Neander, 277.

“State Speech – Hate Speech”

The issue of hate speech also has a long and controversial history in the United States. Under US law, a hate crime is defined as a crime in which the perpetrator targets the victim for his or her perceived membership in a specific social or ethnic group. Judith Butler has analyzed the concept of hate crimes from a Foucauldian perspective that explores the subtle relationship between speech and power in juridical discourse, and criticizes state power from a left-wing standpoint. In a 1997 essay, she argues that “By ‘suspending’ the state action doctrine, proponents of hate speech prosecution may also suspend a critical understanding of the state power, relocating that power as the agency and effect of the citizen-subject. Indeed, if hate speech prosecution will be adjudicated by the state, in the form of judiciary, the state is tacitly figured as a neutral instrument of legal enforcement.”²⁶ As a feminist, Butler draws a parallel between the social power to define gender and the state’s power to define racial identity. Because the state is not a neutral party, she argues, society must take on the task of confronting racist ideologies. Any attempt to prosecute hate speech will necessarily confront the productive and definitional power of the state.

Butler’s arguments rest on a particular understanding and skepticism toward the nation state that may be seen as refuting the concept of the nation state as the protector of human rights. One proponent of this latter ideal of the nation state was Hannah Arendt. Writing several decades before Butler, Arendt argued that the destruction of the nation state by totalitarianism would culminate in the destruction of human rights. For Arendt, therefore, the power of the state is separate from violence; the state does not promote the violence that exists in society. Quite the contrary: the state can be called on to exercise its power to protect the individual from social violence.²⁷ More recent theorists of democracy like Jürgen Habermas and John Rawls, in turn, have developed nuanced theories of the power of the state, linking state power to constitutional law, which is seen as an expression of the democratic will of the people. This link generates the requirements and criteria for legal and state intervention. For these recent democratic theorists, the law is not part of the “state apparatus,” but functions in tension with other state institutions. In these formulations, the power of the state – conceived as executive power or the “power to act” – may be used to achieve discriminatory laws or actions, but it may also be expressed in anti-discriminatory behavior. As the German Institute for Human Rights has noted, “power is always dependent on context... . The power to act is not fundamentally negative, but can also be used to protect human rights.”²⁸

Establishing International Human Rights Norms

Human rights issues are also central to the international lawmaking process, particularly in the area of discrimination. As noted briefly above, current international law includes numerous anti-discrimination regulations, ranging from United Nations statutes, to UN resolutions (for example, the 1970s resolutions on apartheid in South Africa), to the International Convention on the Elimination of All Forms of Discrimination.²⁹ In light of the existing international framework, when is it necessary to enact anti-discrimination legislation on a national level? Pointing to the examples of Rwanda and Yugoslavia, Zimmer stresses that the International Convention on the Elimination of All Forms of Discrimination permits “no margin of discretion. Racist speech and actions can be the start of a racist movement within a state” and therefore states must be required to

26 Judith P. Butler, *Excitable Speech: A Politics of the Performative* (New York and London, 1997): 47.

27 Hannah Arendt, *Elemente und Ursprünge totalitärer Herrschaft*, vol. 2 (Frankfurt a.M., Berlin and Vienna, 1951).

28 Oliver Trisch, *Der Schutz vor Diskriminierung: ein Strukturprinzip der Menschenrechte Unterrichtsmaterialien zur Menschenrechtsbildung* (2006): 2.

29 Zimmer, 37ff. and 212ff.

criminalize the spread of racist ideas.³⁰ International anti-discrimination legislation thus also appears to follow Cicero's aphorism to "resist the beginnings."

In the same vein, UN High Commissioner for Human Rights Navanethem Pillay recently reminded the countries who signed the resolutions at the Durban Review Conference on racism in Geneva of their obligations. Article 59 of the closing document of the Durban II Conference states: "The conference invites Governments and their law enforcement agencies to collect reliable information on hate crimes in order to strengthen their efforts to combat racism, racial discrimination, xenophobia and related intolerance." But the document also takes a notably liberal stance toward freedom of opinion when it states: "... the right to freedom of expression and expression constitutes one of the essential foundations of a democratic, pluralistic society and stresses further the role these rights can play in the fight against racism, racial discrimination, xenophobia and related intolerance worldwide."³¹ The German penal code meets the standards set forth in the closing document with respect to its anti-discrimination provisions, and even exceeds them in its clause on Holocaust denial. However, a number of organizations have made additional recommendations for anti-discrimination policy and measures. For example, the European Monitoring Center on Racism and Xenophobia issues periodic reports on legislative developments in the area of anti-discrimination.³² On the basis of these reports, the German Institute for Human Rights also issued a statement of recommendations to the German government, although the latter did not include any legislative measures, which the Institute agreed were not necessary.³³ Other organizations, in contrast, have continued to call for stronger legal measures against racism: thus in December 2008 the European Commission on Racism and Intolerance presented a report to the Council of Europe urging the German government to pay greater attention to racial motivations in criminal prosecutions and increase penalties for crimes with a racial component.³⁴ However, in her comparative analysis of 2003, Silvia Seehafer expressed skepticism about this line of argument. In her conclusion, she argues that "considering the perpetrator's views and beliefs when assessing the crime would blur the fundamental legal distinction between the crime itself, illegality, guilt, and the sentence. We run the risk of letting our emotional outrage become the determining factor."³⁵

Current sentencing practices already permit the court to take exacerbating circumstances into account when issuing a criminal sentence, and racial motivations can be considered an exacerbating factor. However, in my view the courts should not be required to assess every crime for racial motivation. Any legislation that required the courts to consider the defendant's racial attitudes would in effect also require the unlawful violation of the defendant's private sphere.

Lessons from Different Legal Systems

The Austrian journalist Eva Menasse observed the legal battle that followed David Irving's libel suit against historian Deborah Lipstadt. According to Irving, he sought to protect his honor and reputation. However, as

30 *Ibid.*, 219.

31 Outcome Document of the Durban Review Conference 2009, accessed on Oct. 29, 2009 from http://www.un.org/durbanreview2009/pdf/Durban_Review_outcome_document_En.pdf.

32 Beate Winkler, "Bestrebungen zur Bekämpfung von Rassismus und Fremdenfeindlich in der Europäischen Union," in *Jahrbuch Menschenrechte 2002*, eds. Gabriele von Arnim, Volkmar Deile, Franz-Josef Hutter, Sabine Kurtenbach and Carsten Tessler (Frankfurt a.M., 2002): 262-270, see esp. 270.

33 Follmar-Otto and Cremer.

34 ECRI Report on Germany, December 19, 2008, accessed on June 20, 2009 from <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Germany/DEU-CbC-IV-2009-019-DEU.pdf>.

35 Silvia Seehafer, *Strafrechtliche Reaktionen auf rechtsextremistisch / fremdenfeindlich motivierte Gewalttaten – Das amerikanische "hate crime" Konzept und seine Übertragbarkeit auf das deutsche Rechtssystem* (Berlin, 2003): 16, accessed on May 20, 2009 from <http://edoc.hu-berlin.de/dissertationen/Seehafer-silvia-2003-04-28/HTML/front.html>.

Menasse noted, the court concluded that Irving was a “racist, an anti-Semite, a Holocaust denier, and a deliberate falsifier of historical facts.”³⁶ Menasse closes her description of the Irving trial with a useful suggestion for confronting the tension between freedom of expression and restraining that freedom in order to curtail hate speech:

Many questions remain about the legal treatment of “Irving and company.” However, a diverse approach would seem to offer more possibilities than a single, uniform solution. Banning Irving from visiting Germany and Austria and disseminating his remarks there is a valid solution in light of the weight and the obligations of history. Perhaps not forever, but for a long time to come. Letting him preach his ideas and incite hatred in the United States, and then reap the punishment of civil society, is perhaps the best solution of many bad ones. The British legal system that even made it possible for Irving to “defend his honor” before the Queen’s court also provided a useful opportunity for education and democratic debate.³⁷

The literature on human rights education and memorial work has not adequately discussed the tension between the right to freedom of expression and the need to curtail that right.³⁸ However, there is widespread skepticism among scholars and practitioners in the field about legal and punitive measures to limit freedom of expression. In particular, many young people express skepticism about whether sterile legal arguments do justice to the moral component of human rights issues. Nonetheless, the tension that I have discussed is central to human rights and political education. Indeed, an appreciation and understanding of the law is also an important pedagogical goal, particularly because right-wing extremists in these educational programs increasingly legitimize their politics on the basis of freedom of expression, academic freedom and open debate. Those who hope to counter the far-right with the principles and practice of “democracy in action” must also engage with the issue of the human right to freedom of expression. And by the same token, those who analyze the history of human rights as a response to National Socialism and incorporate this analysis into educational work must consider the experiences of activists who work to eliminate right-wing extremism. Taking the tension between freedom of expression and the desire to limit it into account would provide a better basis for educational programs on human rights.

³⁶ Eva Menasse, *Der Holocaust vor Gericht: Der Prozess um David Irving* (Berlin, 2000): see esp. 12, 157.

³⁷ *Ibid.*, 178.

³⁸ See for example, Barbara Schäuble and Hanne Thoma, “Ergebnisse des europäischen Workshops ‘Antisemitismus – Eine Herausforderung für die politische Bildungsarbeit: Eine Dokumentation,” in *Neue Judenfeindschaft?: Perspektiven für den pädagogischen Umgang mit dem globalisierten Antisemitismus*, eds. Fritz Bauer Institut and Jugendbegegnungsstätte Anne Frank (Frankfurt a.M., 2006): 233-244.

Agnès Callamard

FREEDOM OF EXPRESSION AS A CORNERSTONE HUMAN RIGHT

Behind every right, there is a history of oppression. Every human right plays a role in the construction of our common humanity and what it means to be human, but it is the indivisibility of these rights and their synergy that makes up human dignity. The importance of non-discrimination to human rights is well known and understood: human history is replete with instances of racism and intolerance that have given rise to genocide and crimes against humanity. The international community has identified discrimination and racism as an abuse of human dignity and equality, and a major cause of other massive violations, including genocide.

Less well known is the fact that national and international bodies and courts worldwide have insisted and demonstrated that the right to freedom of expression is central to the international human rights regime and to human dignity. They have done so because the greatest man-made calamities in history involved full control over expressions, opinions and, at times, conscience: the slave trade and slavery, the Inquisition, the Holocaust, the genocide in Cambodia or Rwanda, the Stalin regime and the gulag.

Control over freedom of expression is “the handmaiden of power, without which power is inconceivable. It is an instrument to assist in the attainment, preservation or continuance of somebody’s power, whether exercised by an individual, an institution or a state. It is the extension of physical power into the realm of the mind and the spirit...”¹ Such control encompasses all interferences with the right of individuals to hold opinions and to express them without fear. It can be pursued via multiple routes, both direct and indirect, making censorship particularly complex and difficult to confront and defeat.²

For these reasons, on numerous occasions international courts and bodies have emphasized the importance of freedom of expression. As early as 1946, at its very first session, the UN General Assembly adopted Resolution 59 (I), which states that “freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.” This has been echoed by other courts and bodies. For example, the UN Human Rights Committee has said: “The right to freedom of expression is of paramount importance in any democratic society.”³ Also, the European Court of Human Rights has recognized the vital role of freedom of expression as an underpinning of democracy: “Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the develop-

1 Michael Scammell, “Censorship and its History – A Personal View,” in *ARTICLE 19, 1988 World Report, Information, Freedom and Censorship* (London, 1988): 5.

2 See the reports, for example, in *ARTICLE 19, 1988 World Report, Information, Freedom and Censorship* (London, 1988).

3 *Tae-Hoon Park v. Republic of Korea*, Oct. 20, 1998, Communication No. 628/1995, para. 10.3.

ment of every man.”⁴

The Inter-American Court of Human Rights also underscored the democratic significance of freedom of expression:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade union, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its opinions, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.⁵

Freedom of expression is guaranteed under Article 19 of the Universal Declaration on Human Rights (UDHR), and more or less in similar terms under Article 19 of the International Covenant on Civil and Political Rights (ICCPR): “Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.” Freedom of expression is also protected in all three regional human rights treaties, in Article 10 of the European Convention on Human Rights (ECHR), in Article 13 of the American Convention on Human Rights and Article 9 of the African Charter on Human and Peoples’ Rights.

Freedom of expression, including the right to access information, is therefore a fundamental human right, central to achieving individual freedoms and meaningful electoral democracies. It is a cornerstone or an empowering right: it safeguards the exercise of all other rights and underpins legitimate government. Without the right to speak and the right to know, many other human rights cannot be exercised and respected. Freedom of expression increases the knowledge base and participation within a society. At the same time, it provides the external checks on state accountability necessary for combating the corruption that thrives on secrecy and closed environments.

It forms a central pillar of the democratic framework that protects all rights and ensures the exercise of full citizenship. In turn, a robust democratic framework helps create the stability necessary for society to develop in a peaceful and prosperous manner. Through freedom of expression, politics can unfold in an unfettered and constructive manner.

Free expression also allows people to demand the right to health, to a clean environment and to effective implementation of poverty reduction strategies. It makes electoral democracy meaningful and builds public trust in administration. Access to information strengthens mechanisms to hold governments accountable for their promises, obligations and actions.

The free flow of information increases the capacity of all to participate in the life of their nation or community and in policy-making. Political processes require the freedom to participate in public life, to advance ideas and to advocate for their realization. Individuals and groups must have the right to demand, without fear of recrimination or discrimination, that governments uphold their obligations. Freedom of expression enables individuals and groups to become active the political process.

The media has a specific task to inform the public; it can enhance the free flow of information and ideas to individuals and communities, which in turn can help them make informed choices for their lives. A free, independent and professional media, using investigative methods, plays a key role in providing knowledge

⁴ *Handyside v. United Kingdom*, Dec. 7, 1976, Application No. 5493/72, para. 49.

⁵ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85, Nov. 13, 1985, Series A, No. 5, para 70.

and in giving voice to the marginalized. An independent media highlights corruption and develops a culture of criticism where people are less apprehensive about questioning government action. Undue restrictions on freedom of expression undermine the realization of many other rights.

Freedom of Expression and Memory: The Right to Truth

Freedom of expression, including access to information, is also essential to the realization of what is commonly referred to as the “right to truth.” In its 61st session, the UN Commission on Human Rights adopted Resolution 2005/66, which “recognizes the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights.” From a focus on information about missing or disappeared persons, the right to truth quickly evolved to include details of other serious violations of human rights and the context in which they occurred. The right to the truth imposes an obligation on the state to disclose information about the circumstances and reasons that led to “massive or systematic violations.”

A 1997 report by the French expert Louis Joinet to the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities includes an important definition of the right to know:

This is not simply the right of any individual victim or closely related persons to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a “duty to remember,” which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people’s national heritage and as such must be preserved. These then, are the main objectives of the right to know as a collective right.⁶

In essence, the argument in favor of disclosing the truth about past human rights violations is no different than the broader argument in favor of freedom of information. Information should be routinely available to the public so that they can hold those in power to account for their actions. This accountability clearly applies, for example, to the government committees. Surely it applies *a fortiori* to gross human rights violations.

By their very nature, human rights violations are obscured by misinformation and untruths. Sometimes, the perpetrators and victims are the only witnesses. Surviving victims and relatives are entitled to a full explanation of the events because excavating the truth of the past helps prevent future abuses. This process may entail punishing those responsible.

Uncovering the truth is also a precondition for redressing the victims. In many instances, the process of speaking the truth may itself be a way to repay the victims of human rights violations. It may also serve to remove the stigma that is often attached to victims of human rights violations and is a way of declaring that the innocence of the victim. Speaking the truth about acts of brutality can be a first step in empowering the victim and restoring him or her to a respected place in society.

While the right to truth is most commonly and logically associated with the right to justice, it is also profoundly connected to freedom of expression: people must have the right to express themselves by reporting or recalling incidents, or acting as witnesses without fear. The media must be able to carry out its function and report freely on investigations, truth telling, and amnesties.

As importantly, the right to truth presupposes access to government-held information – without it, “truth” about past events is bound to be one-sided and lacking in evidence. The success of efforts to uncover the truth about the past depends on the extent of access to public information for those who undertake investigations.

⁶ See the revised final report prepared by Louis Joinet pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.1, para. 17.

Fundamental reform of the legal regime governing freedom of expression is therefore an essential precondition for meaningful efforts to uncover the truth about the past. From this standpoint, it may be argued that the right to truth derives from the more general right of access to information, contained within the right to “seek, receive and impart information” which is guaranteed by Article 19 of the Universal Declaration of Human Rights.

Both legal practice and jurisprudence around the world have increasingly insisted that the truth be made public. Indeed, the right to “truth” is first and foremost a right to an official statement about what happened, or “to an authoritative version of events, over and above partisan considerations.”⁷

As Yasmin Naqvi argues, “such ‘statements’ by the state need not be in a particular form but could be expressed aurally, visually, musically, pictorially or through sculpture. This could mean that the right to the truth could also be, at least partially, satisfied through such actions by the state as erecting monuments dedicated to victims or works of art or musical compositions that explain what happened.”⁸

The right to truth does not preclude the rights of victims to compensation or punishments for perpetrators. Over the last 20 years, myriad approaches to the right to truth have evolved, that include criminal prosecutions, reconciliation and amnesties. All have requested freedom of expression and demand that the state to uncover and publicize the truth.

Limitations to the Right to Truth

In spite of its multiple functions, the right to truth is not absolute; it is limited by the same exceptions that apply to the right of expression more generally under Article 19 of the International Covenant on Civil and Political Rights. Framed in general terms, these exceptions allow governments to withhold certain types of information from the public. For example, the right to freedom of expression may be restricted in order to protect the rights of others, or public order, if it is “necessary in a democratic society” and is done by law.

The European Court has established a strict three-part test for the restriction of freedom of expression. For a restriction to be legitimate, it must meet all three parts of the test: a restriction must indeed pursue the legitimate aim that it claims to pursue; the restriction must be imposed in a democratic framework (i.e., either by parliament or pursuant to powers granted by parliament); and the restriction must be “necessary in a democratic society.” The word “necessary” must be taken quite literally and means that a restriction must not be merely “useful” or “reasonable.” States maintain discretion over the exact measures, but above all their restrictions must be “necessary in a democratic society.” There should be a clear presumption in favor of the right to information about serious human rights violations. The onus falls on the authorities to justify a refusal to make information available upon request.

International law imposes one clear positive duty on states: as stated in Article 20(2) of the UN Covenant on Civil and Political Rights: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”⁹ Yet there are vastly different regional or national approaches to hate speech. At one end of the spectrum, the US approach protects hate speech unless the speech actually incites violence or is likely to give rise to imminent violence. It is a stringent standard which means that even speech advocating violence and filled with racial insults is protected if there is no evidence that physical violence is likely to occur. At the other hand of the spectrum are tight restrictions on hate speech,

7 José Zalaquett, quoted in *ARTICLE 19: Moments of Truth in Sierra Leone* (London, August 2000): 10-11, accessed on Oct. 29, 2009 from <http://www.article19.org/pdfs/publications/sierra-leone-moments-of-truth.pdf>.

8 Yasmin Naqvi, “The Right to the Truth in International Law: Fact or Fiction?” in *International Review of the Red Cross* 88 (June 2006): 862 ff.

9 United Nations, *International Covenant on Civil and Political Rights*, accessed on Jan. 31, 2010 from <http://www.hrweb.org/legal/cpr.html>.

as well as on denying the Holocaust or other genocides. Nowhere are the substantial differences in the ways states will restrict hate speech clearer than in the European Union. EU countries have approached hate speech in a variety of fashions, from strong restrictions in France and Germany, to the greater protections offered to different types of speech in the UK or Hungary.

Holocaust Denial Policies

Holocaust denial laws proliferated in Europe through the 1990s to the present. In early 2007, Germany pushed for an EU-wide ban on denying the Holocaust. In 2006, the French National Assembly passed, by a vote of 106-19, a draft law that made it an offense to deny the existence of the 1915 Armenian genocide, punishable by five years in prison and a € 45,000 (\$56,400) fine. In 2006, Holocaust denier David Irving was arrested and detained in Austria, adding further confusion and tension to the question of criminal speech. Whether these Holocaust denial laws are responses to a genuine incitement to genocide is highly debatable. It may be more appropriate to see them as political statements, primarily against anti-Semitism. However, from this standpoint existing hate speech regulations would serve the purpose of setting boundaries and common values.

A blanket ban on denial of the Holocaust, or, for that matter, any other genocide or historical event, raises multiple issues and its actual impact is highly questionable. First, this type of ban goes beyond the established international law standard of incitement to hatred by elevating a historical event to dogma and by prohibiting a category of statement, regardless of the context or impact. The French Armenian genocide draft bill, for example, would create taboos and stifle potentially dissenting or controversial research and publications. Second, prosecutions under Holocaust denial laws actually augment the appeal of “revisionist historians,” providing them with high-powered platforms and casting them as dissidents against the state, which loses its moral high ground. The arrest of British Holocaust denier David Irving gave him a level of international prominence that he had not previously enjoyed. It also made him a martyr in the eyes of his followers.¹⁰ Third, government use of genocide denial laws to stifle critics should also be cautionary. In Rwanda, charges of “negationism” (in essence genocide-denial) or incitement to hatred are frequently launched against perceived opponents and critics of the government, including journalists, in order to silence them.¹¹ Fourth, there is the difficult challenge of defining precisely and narrowly in law what constitutes Holocaust denial, a requirement under international law for any legitimate restriction on freedom of expression. Most Holocaust denial laws go beyond the key facts recognized by leading courts, such as the existence of the gas chambers and the genocide against the Jews. For instance, the European Court of Human Rights found France in breach of its obligation to respect freedom of expression when it convicted two citizens who had contested the legitimacy of the judgment against wartime leader Marshal Pétain for collusion with the Nazis. The European Court of Human Rights specifically noted:

[The impugned statements form] part of the efforts that every country must make to debate its own history openly and dispassionately. The Court reiterates in that connection that ... freedom of expression is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.¹²

Finally, where instances of Holocaust or genocide denial do willfully incite racial hatred, general hate speech

10 In Britain itself, which does not have a Holocaust denial law, David Irving was thoroughly and dramatically discredited when he unsuccessfully sued historian Deborah Lipstadt for describing him as a Holocaust denier in 1998.

11 Amnesty International, *Report 2008*, accessed on Jan. 18, 2010 from <http://www.amnesty.org/en/region/rwanda/report-2008>.

12 *Lehideux and Isorni v. France*, para. 55. Although the events took place before the Gayssot Law was passed, and so the case did not formally involve France's Holocaust denial law, they clearly fell within its scope.

laws can be used to prosecute the perpetrators.

In November 2008, the French parliament recognized that “memory laws” were not an appropriate mechanism for national memory. A report made public in November 2008 indicated that it is not the role of Parliament to adopt laws which pre-judge the relative importance or value of historical facts, particularly when such laws include criminal sanctions. The report was commissioned by the French National Assembly as part of the work of a mission of inquiry (*Mission d’information sur les questions mémorielles*) and was adopted unanimously.¹³

Historians and other scholars have also maintained that it is not the business of any political authority to define historical truth and to restrict the liberty of historians through penal sanctions. The *Appel de Blois*, adopted by internationally recognized historians, called on politicians not to adopt, through legal means, “state-led truths” which undermine intellectual freedoms.¹⁴ Memory laws too often end up elevating history to dogma, thus preventing and punishing research and debate. They legally silence potentially dissenting or controversial research and publications, create taboos, and reinforce an overall atmosphere that effectively stifles controversial research. The risks inherent in criminal laws on “historical” truths are particularly evident in Turkey, where a large number of authors, journalists and academics have been prosecuted for their writings on the Armenian genocide. Some of these individuals have been murdered. For instance, many writers, including the Nobel laureate Orhan Pamuk, have been tried for insulting “Turkishness” under Article 301 of the Turkish penal code, which prohibits a range of criticisms. The cases rest on statements or publications explicitly or implicitly recognizing the 1915 Armenian genocide, a major taboo under both Turkish law and within the country’s political culture.

In January 2007, Hrant Dink, a Turkish journalist of Armenian descent, was murdered in front of his office, allegedly by an extreme nationalist. He was the editor of the bilingual weekly *Agos* and one of the most insightful commentators on Armenian-Turkish relations. In October 2005 Mr. Dink had been convicted under Article 301 and received a six-month suspended sentence. In the month preceding his murder, Dink had strongly criticized the French bill on the denial of the Armenian genocide:

We should not be a pawn for the irrational attitude between the two states. I am being sued in Turkey, because I said that there was genocide, which is my own belief. But I will go to France to protest against this madness and violate the new French law, if I see it necessary, and I will commit the crime to be prosecuted there.¹⁵

In fact, these “memory laws” have very little to do with the right to truth. The duty to memory requires full disclosure of official and historical archives and access to information on human rights violations without restriction. It does not require criminalizing what may be considered “untruths” unless these incite hatred or violence.

Striking the Balance: Freedom of Expression and Hatred

Fundamental to the protection of human rights are the principles of the inherent dignity and equality of all human beings and the obligation of all Member States of the United Nations to take measures to promote “universal respect for, and observance of, human rights and fundamental freedoms for all, without distinc-

¹³ For a French version of the report on the memory laws, see http://www.assembleenationale.fr/13/dossiers/mi_questions_memorielles.asp, accessed on Jan. 18, 2010.

¹⁴ See <http://www.lph-asso.fr/actualites/50.html>, accessed on Jan. 18, 2010.

¹⁵ See <http://www.democracynow.org/article.pl?sid=07/01/23/1530254>, accessed on Jan. 18, 2010.

tion as to race, sex, language or religion.”¹⁶ There is no denying that certain forms of hateful expression can threaten the dignity of targeted individuals and create an environment in which the enjoyment of equality is not possible. Therefore reasonable restrictions on freedom of expression may be necessary or legitimate to prevent advocacy of hatred based on nationality, race, or religion that constitutes incitement to discrimination, hostility or violence.

Hate speech laws, unlike blanket memory laws, meet an essential human rights objective: they aim at protecting human rights including the right to equality, the right to mental and physical integrity, the right to be free from discrimination, and ultimately the right to life. Hate speech has too often been associated with ethnic cleansing, wars, and genocide. As a 2009 ARTICLE 19 publication argues, “freedom of expression and equality are foundational rights, whose realization is essential for the enjoyment and protection of all human rights. They are also mutually supporting and reinforcing human rights. It is only when coordinated and focused action is taken to promote both freedom of expression and equality that either can effectively be realized.”¹⁷

The Camden Principles on Freedom of Expression and Equality identify key principles on the positive relationships between respect for freedom of expression and the promotion of equality. They argue that:

... rules prohibiting hate speech should be narrowly defined to prevent any abuse of restrictions, including for reasons of political opportunism. Effective steps need to be taken to ensure that such rules are applied equitably for the benefit of all protected groups. In this regard, a case-by-case approach which takes into account context and patterns of vulnerability is important, especially on the part of judicial authorities. Such rules should be used only to protect individuals and groups.¹⁸ They should not be invoked to protect particular beliefs, ideologies or religions.

An effective response to vilifying expression requires a sustained commitment on the part of governments to promote equality of opportunity, to protect and promote linguistic, ethnic, cultural and religious rights, and to implement public education program about tolerance and pluralism. All of these depend on respect in practice for the right to freedom of expression:

Problems of discrimination and negative stereotyping are deeply rooted socio-economic and political phenomena. Their eradication requires sustained and wide-ranging efforts, including in the areas of education, social dialogue and awareness-raising. Limiting debate about contentious issues, including religion, will not address the underlying social roots of the prejudice that undermines equality. In many contexts, restrictions on freedom of expression target disadvantaged groups, undermining rather than promoting equality. Instead of restrictions, open debate is essential to combating negative stereotypes of individuals and groups and exposing the harm created by prejudice.¹⁹

Media Self-Regulation: Positive Action, not Censorship

In the current global and regional context, there is a serious escalation of intolerance and discrimination against Muslims in Western societies and against religious minorities all over the world, including in the Middle East. This national, regional and global context cannot be ignored when assessing and discussing the ethical obligations of journalists and media organizations.

Independent media organizations, media enterprises and media workers have a moral and social obligation

¹⁶ Article 55(c) of the Charter of the United Nations.

¹⁷ See ARTICLE 19, *Camden Principles on Freedom of Expression and Equality* (London, 2009), accessed on Oct. 29 2009 from <http://www.article19.org/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

to make a positive contribution to the fight against racism, discrimination, xenophobia and intolerance. They must combat intolerance and ensure open public debate about matters of public concern. As far as public service broadcasting is concerned, they have a legal obligation to play this role.

Media organizations could design and deliver media training programs that promote a better understanding of issues related to racism and discrimination and foster a sense of the moral and social obligations of the media to promote tolerance. Likewise, media employers could take measures to ensure that their workforce is diverse and reasonably representative of society as a whole. Ensuring that effective ethical and self-regulatory codes of conduct prohibit the use of racist terms and prejudicial or derogatory stereotypes, as well as unnecessary references to race, religion and related attributes, would help work against intolerance. If media outlets reported factually and sensitively on acts of racism and discrimination, while ensuring that they are brought to the public's attention; if they ensured that reporting on specific communities promoted a better understanding of difference while reflecting the perspectives of those communities; these actions would give members of those communities a chance to be heard. These courses of action by the media would make great contributions to the fight against intolerance.²⁰

²⁰ This call for action is based on the 2001 Joint Statement on Racism and Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.

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THE RIGHT TO ASYLUM: REFUGEE POLICIES IN THE FEDERAL REPUBLIC OF GERMANY, 1949–1975

The West German Basic Law, adopted by the Parliamentary Council in 1949 and valid in the Federal Republic until its 1993 amendment, stated that “persons persecuted on political grounds shall enjoy the right of asylum.” Impressive in its conciseness and simplicity, the constitutional provision granted protection from expulsion and extradition to foreign citizens and stateless persons seeking asylum in West Germany.¹ In its wording, the constitutional right to asylum owed much to the recent experience of National Socialism and was deliberately generous in its formulation.² The constitutional protection under the asylum law was two-fold in nature. First, the Federal Republic as a sovereign nation guaranteed protection to foreign citizens who were the targets of political persecution on their own territory. In addition, the Basic Law guaranteed victims of political persecution the subjective right to asylum within the Federal Republic of Germany. As a result, officially recognized victims of political persecution were granted similar rights to West German nationals in many areas, including labor, social and family law.³ The unusually broad right to asylum under Section 16 of the Basic Law was unprecedented within both the German constitutional tradition and international politics and practices of the time. Indeed, from the 19th century until the end of the First World War, the German states, and later the German Reich, had more often been a departure point than place of sanctuary for political refugees in Europe.⁴ Even under pressure from the wave of Eastern European refugees following the Russian Revolution, the new democratic constitution of the Weimar Republic contained no provisions for a secure right to asylum.⁵

1 Ursula Münch, *Asylpolitik in der Bundesrepublik Deutschland: Entwicklung und Alternativen*, 2nd ed. (Opladen, 1993): 22-35; see also Bertold Huber, *Ausländer- und Asylrecht* (Munich, 1983): 151.

2 Hans-Peter Schneider, “Das Asylrecht zwischen Generosität und Xenophobie: Zur Entstehung des Artikels 16 Absatz 2 Grundgesetz im Parlamentarischen Rat,” in *Jahrbuch für Antisemitismusforschung* 1 (1992): 217-236; see also Hans Kreuzberg, ed., *Grundrecht auf Asyl: Materialien zur Entstehungsgeschichte* (Cologne, 1984); and “Der Parlamentarische Rat und das Asylrecht in der Bundesrepublik Deutschland [documentation],” in *Asyl bei den Deutschen: Beiträge zu einem gefährdeten Grundrecht*, ed. Herbert Spaich (Reinbek, 1982): 18-37.

3 “Die Rechtsstellung nach der Anerkennung, Abschnitte Aufenthaltsrecht und Arbeiterlaubnis,” in *Handbuch des Asylrechts*, vol. 2, eds. Wolfgang Beitz and Michael Wollenschläger (Baden-Baden, 1981): 586-601 and 618-622.

4 Herbert Reiter, *Politisches Asyl im 19. Jahrhundert: Die deutschen politischen Flüchtlinge des Vormärz und der Revolution von 1848/49 in Europa und den USA* (Berlin, 1992).

5 Jochen Oltmer, “Flucht, Vertreibung und Asyl im 19. und 20. Jahrhundert,” in *Migration in der europäischen Geschichte seit dem späten Mittelalter*, ed. Klaus J. Bade (Osnabrück, 2002): 107-134.

The 1953 Asylum Ordinance

Although the Basic Law was enacted in 1949, procedural rules governing the Federal Republic's asylum law did not take effect until the Asylum Ordinance of January 1953. The initiative for drawing up binding regulations on asylum came from the Allied occupation authorities in West Germany, who had given clear signals to the federal government that it would be required to live up to its obligations under the Basic Law.⁶ In July 1950, for example, the Allied High Commission instructed the German federal government to take in all foreign refugees who requested asylum at the border.⁷ At that point, however, the admission of foreign refugees was at best a secondary priority for the Federal Republic, which was still focused on the needs of German refugees and expellees.⁸ Hoping to forestall the Allied demand for new asylum regulations, the West German authorities claimed that the 1938 Police Decree on Foreigners, which still remained in effect after the war, was sufficient to address the right to asylum. In any case, the West German authorities argued that admitting large numbers of foreign refugees was not feasible because of the difficulties surrounding the influx of German refugees.⁹

Despite its reluctance to divert resources to the issue of asylum, the ratification of the United Nations Convention Relating to the Status of Refugees (CRSR) in Geneva was a key foreign policy priority for West Germany. In their negotiations with the Allied High Commission, West German authorities therefore downplayed the constitutional right to asylum and instead emphasized that any future asylum ordinance would comply with the CRSR. The West German authorities acknowledged the CRSR would grant the United Nations High Commissioner for Refugees a voice in the Federal Republic's refugee and asylum policies.¹⁰ However, West German officials assumed that doing so would not require the repeal of the Police Decree on Foreigners, which included no specific provisions on asylum. Instead, the Police Decree on Foreigners granted local authorities broad discretion in granting residency permits, which had the desirable effect of preserving the primacy of domestic interests. This primacy is also apparent in the first section of the decree, which stated that foreigners would only be granted residency if their personality and reason for staying in West Germany "deserved hospitality."¹¹ Under National Socialism, this formulation had justified the exclusion of foreigners on racial grounds. In the early 1950s, the category of "deserving" foreigners could in theory be used to limit residency to persons who were deemed acceptable to the Federal Republic's constitutional order, foreign policy interests, or demographic policies. In any case, the legal basis for asylum under the 1938 decree was diametrically opposed to the right as it was formulated under the Basic Law, which emphasized the subjective right to asylum on the basis of political persecution.

In the early 1950s, a new and more expansive asylum policy still seemed a distant prospect. As a result of the negotiations with the Allies, however, the new asylum ordinance of 1953 made reference to the CRSR, which granted refugee status to foreigners who were persecuted for reasons of race, religion, or political opinion.

6 Ulrich Herbert and Karin Hunn, "Beschäftigung, soziale Sicherung und soziale Integration von Ausländern," in Bundesministerium für Arbeit und Soziales, *Geschichte der Sozialpolitik in Deutschland seit 1945*, vol. 3 (Baden-Baden, 2005): 788-790.

7 Allied High Commission from July 14, 1950, "Admission and treatment of non-German refugees in the Federal Republic," Bundesarchiv Koblenz (BArch), B 106, No. 47453.

8 Letter from the Federal Ministry of the Interior to the Federal Chancellery, Liaison Office to the Allied High Commission, dated Sep. 21, 1950, regarding a memorandum to the Allied High Commission of July 14, 1950 concerning the admission and treatment of non-German refugees in the Federal Republic, BArch, B 106, No. 47453.

9 The Police Decree on Foreigners (*Ausländerpolizeiverordnung*, or APVO) was passed on Aug. 28, 1938. For a discussion of the West German government's attitude toward German refugees, see Klaus J. Bade, *Europa in Bewegung: Migration vom späten 18. Jahrhundert bis zur Gegenwart* (Munich, 2000): 284-305. See also the letter from the Liaison Office to the Allied High Commission to the Secretary-General Joseph E. Slater, dated Nov. 10, 1950, BArch, B 106, No. 47453.

10 DBMdl (BMI), MR Kleberg, annotation to discussion with the refugee department of the AHC at Petersberg on Sep. 27, 1951, BArch, B 106, No. 47453.

11 Bernhard Santel and Albrecht Weber, "Zwischen Ausländerpolitik und Einwanderungspolitik. Migrations- und Ausländerrecht in Deutschland," in *Migrationsreport 2000: Fakten, Analysen – Perspektiven*, eds. Klaus. Bade and Rainer Münz (Bonn, 2000): 111.

However, even under the CRSR, the definition of political asylum remained vague, and in any case, the right to political asylum applied only to events that had taken place before January 1, 1951. As a result, foreign asylum seekers in West Germany could follow one of two paths to asylum. Either the asylum seeker could invoke the CRSR, in which case the Federal Office for the Recognition of Foreign Refugees handled their application, or the asylum seeker could invoke the constitutional right to asylum, in which case the local immigration police would have sole discretion over the decision on residency.¹² The 1953 asylum ordinance also afforded a broad right to appeal, allowing two levels of administrative appeal and three tiers of appeal to the courts. The asylum procedure was originally intended to take no longer than two or three months. During the first years of the asylum ordinance, the number of asylum seekers totaled only two to three thousand refugees per year, with the majority coming from the Eastern bloc.¹³ Despite the relatively low number of applicants, however, the asylum process often took between two and three years. As West German jurists of the early 1950s astutely observed, the concise language of the constitutional right to asylum under the Basic Law ultimately worked to the detriment of foreigners who sought asylum on the basis of political persecution, as the practical implementation of the law was both arbitrary and restrictive. Despite the expansive constitutional right to asylum, in the early years of its implementation the Asylum Ordinance of 1953 thus served to deter rather than guarantee the right to asylum.¹⁴

The Political Transformation of the Right to Asylum in the Early Federal Republic

In 1959, the Federal Constitutional Court ruled that asylum for political refugees should not be guaranteed exclusively on the basis of the Geneva Refugee Convention.¹⁵ This ruling sparked a legal conflict whose significance extended far beyond the debate on the liberality or restrictiveness of West German asylum policies and practices. Ultimately, the issue of asylum became a tool in a fundamental constitutional debate that centered on the issue of state sovereignty and the question of whether state interests and actions took precedence over constitutional norms.¹⁶ In 1975, the Federal Administrative Court ruled that the right to asylum under Article 16 of the Basic Law was not limited to persons who had proven to be “deserving” of asylum. The ruling affirmed that the fundamental right to asylum inhered in the person, and that foreign citizenship could not place an asylum seeker at a disadvantage either during the asylum proceedings or once asylum had been granted.¹⁷ The decision on asylum therefore had to be granted solely on the basis of political persecution, and not on the basis of state interest and state security.

More than 25 years after the constitutional right to asylum was established in West Germany, this high court decision finally ensured that the right to asylum was expansive in both intent and practice. In striking fashion, the ruling also demonstrated that foreign asylum seekers frequently sought legal recourse in West German courts, with varying success.¹⁸ Moreover, as the early practice of asylum makes clear, the constitutional right

12 The Federal Office for the Recognition of Foreign Refugees was based in Valka, a former DP camp in Nuremberg, and in 1961 moved to the nearby town of Zirndorf. See also the letter from the Federal Office for the Recognition of Foreign Refugees to the Interior Ministry on May 16, 1953, “Admission and Accommodation of Further Offices in Future Refugee Camps,” BArch, B 106, No. 47472.

13 See Regine Heine, “Ein Grundrecht wird verwaltet,” in Amnesty International, ed., *Bewährungsprobe für ein Grundrecht* (Baden-Baden, 1978): 413; and Otto Kimminich, *Grundprobleme des Asylrechts* (Darmstadt, 1983): 111.

14 Heinrich Meyer, “Neues vom Asylrecht,” in *Monatsschrift für Deutsches Recht* (1953): 534–536.

15 BVerfGE 9, 174 (181) on Feb. 2, 1959; see also Münch, 53.

16 Kimminich, 99–106.

17 BVerwGE 49, 202 on 7.10.1975.

18 Erhard Schüller and Peter Wirtz, eds., *Rechtsprechung zur Ausländerpolizeiverordnung und zum Ausländergesetz* (Berlin, 1971).

to asylum was highly contested from its inception.¹⁹ The Federal Administrative Court's 1975 ruling confirmed that the constitution took precedence over lesser regulations such as the Police Decree on Foreigners and the 1965 Aliens Act, as well as political considerations, and especially policies on foreigners. Because the liberal right to asylum clashed with West Germany's restrictive immigration policies, the ruling did not bring an end to the debate on political asylum in West Germany.²⁰ Nonetheless, the Federal Administrative Court's 1975 ruling was a significant break with prevailing refugee and asylum policies. As such, the ruling was not simply the outcome of a process of legal transformation, but also an expression of the transformations in political attitudes towards foreign refugees and asylum seekers since the 1950s.²¹

The Hungarian Refugees and Asylum Policies

After the Asylum Ordinance of 1953, the revolutionary uprising in Hungary and the wave of refugees that followed its suppression by Soviet troops in the fall and winter of 1956 marked a new turning point. West German asylum policy increasingly moved from a straightforward rejection of foreign refugees to a pragmatism that was inflected by the vicissitudes of the Cold War.²² Hungarian refugees were met with great sympathy in neighboring European countries, including the Federal Republic of Germany. News coverage and pictures of the Soviet military intervention in Hungary, a former German ally, raised awareness among the West German population and led to public displays of solidarity that reflected longstanding anxieties about the Soviet Union and a sense of belonging to the "democratic West."²³ Within the context of an ever-worsening confrontation between the Eastern and Western blocs in Europe, the West German public and parliament regarded the Hungarian refugees as allies in the fight against Communism.²⁴

At the same time, West German federal ministries initially reacted to Austria's request for help in absorbing Hungarian refugees with considerable caution. The Interior Ministry in particular took pains to maintain its defensive stance in accepting foreign refugees. As it had in 1952, the Interior Ministry pointed to the burden of postwar expellees and ongoing internal immigration from the GDR. However, the steady flow of refugees from Hungary and the dramatically deteriorating humanitarian situation in Austrian refugee camps soon undermined the West German position.²⁵ The cautious attitude toward Hungarian refugees also encountered little understanding in the emotionally charged political atmosphere of West German society at the time. In late November 1956, the federal government decided to admit over 10,000 Hungarian refugees.²⁶ As a result, local immigration police authorities could no longer reject individual asylum appeals by Hungarian refugees, even in the case of refugees who had entered West Germany from the safe refuge of Austria. The legal basis for this new policy was justified with the argument that the Hungarian revolution was the result of the Communist power grab of 1948 and 1949 – in other words, before the deadline of January 1, 1951. As a result, the Hungarian

19 See Simone Wolken, *Das Grundrecht auf Asyl als Gegenstand der Innen- und Rechtspolitik in der Bundesrepublik Deutschland* (Frankfurt a.M., 1988): 37; and Simone Klausmeier, *Vom Asylbewerber zum "Scheinasyllant": Asylrecht und Asylpolitik in der Bundesrepublik Deutschland seit 1973* (Berlin, 1984): 3-16.

20 Klaus J. Bade, *Normalfall Migration: Deutschland im 20. und frühen 21. Jahrhundert* (Bonn, 2004).

21 Peter Nicolaus, "Der Flüchtlingsbegriff in der obergerichtlichen Rechtsprechung," in *Asylrecht und Asylpolitik – eine Bilanz des letzten Jahrzehnts*, ed. Gustav-Stresemann-Institut e.V. (Bonn, 1986): 79-100.

22 Sándor Csik, "Die Flüchtlingswelle nach dem Ungarn-Aufstand 1956 in die Bundesrepublik," in *Almanach II, 2003-2004*, ed. Deutsch-Ungarische Gesellschaft (Berlin, 2005): 207-246.

23 "Stille Demonstration gegen Terror": Überfüllte Kirchen in Budapest – Über 191000 Flüchtlinge," in *Die Welt*, Oct. 25, 1956; "Mehr Flüchtlinge aus Ungarn: Österreich gewährt jedem Hilfesuchenden Asyl," in *Frankfurter Rundschau*, Oct. 31, 1956.

24 Commemorative address given by the vice president of the German Parliament at the 168th meeting of the German Parliament, Bonn, on Nov. 8, 1956, in *Verhandlungen des Deutschen Bundestag, 2. Wahlperiode, Stenografische Bericht*, vol. 32, 9259 B.

25 Telegram sent by the German Embassy in Vienna on Nov. 16, 1956, "Admittance of Hungarian Refugees," BArch, B 106, No. 47465.

26 Federal Chancellery, IA2, Cabinet Matter on Nov. 22, 1956, "Aid for Hungarian Refugees," BArch, B 106, No. 47465, see. 161; cabinet meeting on Nov. 28, 1956, in *Die Kabinettsprotokolle der Bundesregierung 9 (1956)* (Munich, 1998): 746.

refugees officially fell under the provisions of the CRSR.²⁷

The West German public gave the Hungarian refugees a warm welcome, as did advocacy associations for expellees and the Federal Ministry of Expellees, Refugees and War Victims, which took a special interest in these non-German immigrants.²⁸ In the West German parliament, the delegates who represented the expellee associations, which included delegates from all the government and opposition parties, now started speaking on behalf of all refugees, whether German or foreign citizens.²⁹ At the same time, the Ministry of Expellees began acting as a federal integration authority for expellees and “homeless foreigners.” The ministry provided a range of services, including language courses, integration aid, housing assistance, business loans, assistance reuniting families abroad, and hardship aid for refugees who were unable to work.³⁰ The extensive assistance offered to this new influx of refugees is remarkable in its own right and also highlights the considerable scope for social and political action on behalf of a favored group of foreign refugees.

Despite the claims of numerous historical commentators, the improved labor market conditions of the late 1950s cannot fully explain the comparatively smooth and untroubled integration of Hungarian refugees in West Germany.³¹ Instead, the favorable reception and economic opportunities accorded to German refugees and expellees and foreign refugees stemmed in large part from an active federal policy to promote their integration into West German society.³² Ten years after the Hungarian refugees were granted admission, the Ministry of the Interior decided not to deport Eastern European asylum seekers whose applications had been rejected, even though West Germany was in the grip of one of the first economic recessions of the postwar period. Here again, the political desirability of this class of foreign refugees played a significant role in policy decisions. Moreover, during the Cold War, West German officials in charge of immigration were loathe to insist on policies that would require repatriating refugees to Communist dictatorships.³³

After its initial hostility to foreign refugees, the shift in West German asylum policy reflected the general liberalization of West German society that began in the late 1950s.³⁴ The early fear expressed by federal authorities that uncontrolled admission of foreign refugees could undermine domestic stability receded in the face of the imagined threat of communism. This made it possible to gradually bring West German asylum policies in line with the expansive constitutional rights outlined in the Basic Law. The 1968 invasion of Czechoslovakia and the 1973 coup d'état against Chile's leftist government elicited further impassioned declarations of solidarity for victims of political persecution by the West German public and the parliament.³⁵ Refugees from both

27 Arpad von Klimó, *Ungarn seit 1945* (Göttingen, 2006): 33–37. See also Federal Interior Ministry to State Interior Ministries, “Legal Status of Hungarian Refugees,” Dec. 20, 1956, BArch, B 106, No. 47476. See also Reinhardt Marx, “Vom Schutz vor Verfolgung zur Politik der Abschreckung: Zur Geschichte des Asylverfahrensrechtes in der Bundesrepublik Deutschland,” in *Kritische Justiz* 18:4 (1985): 380ff.

28 “Viel Hilfe für Ungarn: Die ersten Flüchtlinge in der Bundesrepublik – Letzte Augenzeugenberichte,” in *Stuttgarter Nachrichten*, Nov. 20, 1956. See also “Federal Ministry for Expellees to all State Refugee Bodies,” in *Care of Hungarian Refugees*, Nov. 29, 1956, BArch, B 106, No. 24545, 62f.

29 Parliamentary Committee for Expellees to Federal Government, Nov. 7, 1956, BArch, B 106, No. 47465.

30 Foreign Ministry to Federal Ministry for Expellees on Jan. 8, 1958, “Formation of a Special Hardship Fund for Foreign Refugees,” BArch, B 106, No. 25038, 3.

31 See Eugen Deterding, *Asyl: Anspruch und Wirklichkeit* (Berlin 1987): 9.

32 Michael Schwartz, “Zwangsheimat Deutschland’: Vertriebene und Kernbevölkerung zwischen Gesellschaftskonflikt und Integrationspolitik,” in *Nachkrieg in Deutschland*, ed. Klaus Naumann (Hamburg, 2001): 114–148.

33 Standing Interior Ministers’ Meeting, Aug. 26, 1966 in Hannover, BArch, B 106, No. 60299.

34 Ulrich Herbert, “Liberalisierung als Lernprozeß: Die Bundesrepublik in der deutschen Geschichte – eine Skizze,” in *Wandlungsprozesse in Westdeutschland: Belastung, Integration, Liberalisierung 1945–1980*, ed. Ulrich Herbert (Göttingen, 2002): 7–49.

35 Federal Office for the Recognition of Foreign Refugees to Federal Interior Ministry, “Admission of Czech Refugees in Refugee Camp for Foreigners in Zirndorf,” Nov. 18, 1968, BArch, B 106, Nr. 25086, 143f.; BMI to the Foreign Ministry, “Acceptance of politically persecuted persons from Chile in the federal republic of Germany,” Oct. 17, 1973, BArch, B 106, No. 69037.

nations were admitted to West Germany, where they applied for asylum under the liberalized procedures.³⁶ The admission of Hungarian and Czech refugees to West Germany also reflects the anti-Communist leanings of Cold War asylum policies in Europe. In contrast, the admission of Chilean refugees was based on the universal principle of providing asylum from dictatorships on both sides of the political spectrum. The political controversies of 1974 and 1975 that surrounded the admission of Chilean political refugees reflected the disintegration of the anti-totalitarian consensus of the 1950s and 1960s and exposed the fault lines in West Germany's liberalized asylum policies. The Chilean controversy ultimately rested on the issue of whether communists could also be granted asylum in West Germany.³⁷ The decision to admit Chilean refugees irrespective of their political leanings testifies to the domestic stability and transformed political culture of West Germany, and marks the high point of West German asylum policy.³⁸

By the late 1960s, the official debate on asylum was shaped by arguments about its burdens and risks, although such rhetoric would not dominate public opinion on immigration in West Germany until the asylum debate of the 1980s.³⁹ However, in the 1960s these arguments were still not capable of casting doubt on the constitutional framework of West German asylum law. Despite considerable pressure from the executive branch, neither the Bundestag nor the Bundesrat was willing to amend asylum law to reflect such political misgivings.⁴⁰ The proposal to sharply restrict the right to asylum was also highly controversial among legal scholars, and ultimately deemed unconstitutional.⁴¹ The federal courts also consistently opposed limitations on the admission of refugees and restrictions on asylum.⁴² The decision to admit Chilean asylum seekers in 1974 and 1975 and the 1975 Federal Administrative Court decision were important milestones within a long and ongoing debate about asylum policies and practice.⁴³ What later appeared as the high point of West German asylum policy was always historically contingent and contested, a fact that was often overlooked by those who harked back to the "good old days" of liberal asylum during the 1980s.⁴⁴

1975 and Beyond

The reform of West German asylum law in 1993 took place against a backdrop of domestic political tension equaled only by the 1956 reintroduction of compulsory military service and the 1968 decision to pass the emergency laws.⁴⁵ The extraordinary public interest in asylum from the late 1970s to the early 1990s had in part to do with the dramatic nature of the political events which spurred successive waves of asylum seekers to leave their homelands, and in part reflected the challenge posed by the asylum seekers to an increasingly

36 Jiri Prenes, "Das tschechoslowakische Exil 1968: Exilanten, Emigranten, Landleute: Diskussion über Begriffe," in *Unfreiwilliger Aufbruch: Migration und Revolution von der Französischen Revolution bis zum Prager Frühling*, ed. Dittmar Dahlmann (Essen, 2007): 187-196; on the issue of Chilean asylum seekers, see Irmtrud Wojak and Pedro Holz, "Chilenische Exilanten in der Bundesrepublik Deutschland, 1973-1989," in *Exile im 20. Jahrhundert*, eds. Claus-Dieter Krohn, Erwin Rotermund, Lutz Winckler and Wulf Koepke (Munich, 2000): 168-190.

37 Standing Interior Ministers' Meeting on Dec. 9, 1974 in Bonn, Point 14 "Acceptance of Chilean nationals in the Federal Republic of Germany," BArch, B 106, No. 39858.

38 Fred Balke, Norbert Kreuzkamp, Diane Nagel and Thomas Seiterich, eds., *Mit dem Kopf hier – mit dem Herzen in Chile: Zehn Jahre Diktatur – zehn Jahre Exil. Chilenen berichten* (Reinbek, 1983).

39 Martin Wengeler, *Topos und Diskurs: Begründung einer argumentationsanalytischen Methode und ihre Anwendung auf den Migrationsdiskurs, 1960-1985* (Tübingen, 2003): 442-514.

40 Herbert and Hunn, 808.

41 Otto Kimminich, *Asylrecht* (Berlin, 1968).

42 Schüler and Wirtz.

43 BVerwGE 49, 202 of Oct. 7, 1975, cited in Kimminich (1983), 103.

44 Heiko Kaufmann, ed., *Kein Asyl bei den Deutschen: Anschlag auf ein Grundrecht* (Reinbek, 1986).

45 Peter Graf Kielmansegg, *Nach der Katastrophe: Eine Geschichte des geteilten Deutschland* (Berlin, 2000): 319-332.

beleaguered West German welfare state.⁴⁶ However, even more importantly, the refugee issue was always tied to fundamental questions about the political and moral foundations of West German society. For advocates of a liberal asylum policy, generous refugee and asylum conditions were proof of West Germany's decisive rejection of its National Socialist and racist past. For their opponents, the liberal asylum policy undermined their deeply held belief that Germany was not a nation of immigrants, which was seen as central to Germany's historic, cultural and ethnic identity.⁴⁷

Despite impressions to the contrary, the policies and practices of asylum in West Germany were always the subject of negotiation and debate even before the controversies surrounding the 1993 amendment to the Basic Law.⁴⁸ These ongoing debates reflected larger social and political developments both within and outside post-war West Germany, as well as fundamental beliefs about the rule of law, democracy, and constitutionality in West German political culture. However, the abiding conflict over the right to asylum also reflects the ongoing and profound tension between the sovereignty of the modern nation state and the development of universal human rights norms, which has historically been inseparable from the issue of state sovereignty.⁴⁹

The conflicts that marked the policies and practices of political asylum after 1975 represent another new stage in the ongoing debate surrounding West German asylum law.⁵⁰ This debate culminated in the 1993 reforms popularly known as the “asylum compromise,” in which the right to asylum was significantly restricted through an amendment to the Basic Law.⁵¹ For some advocates of a generous and unlimited right to asylum, the asylum compromise represented a defeat. However, given the vigorous and vocal calls for the abolition of the right to asylum, the fact that a compromise could be reached on this contentious issue is a testament to the vitality of democracy in the newly reunified Germany, and the fundamental importance of human rights in German political culture.⁵² Moreover, even after the 1993 compromise, the debate on immigration and asylum continued to be shaped by the ongoing tension between national sovereignty and human rights. The persistence of this conflict suggests that it is likely to continue as a feature of contemporary social and political debate, even as it becomes increasingly negotiated on a European level.⁵³

46 Johannes Müller, ed., *Flüchtlinge und Asyl: Politisch handeln aus christlicher Verantwortung* (Frankfurt a.M., 1990); Hans F. Zacher, “Sozialer Einschluß und Ausschluß im Zeichen von Nationalisierung und Internationalisierung,” in *Koordinaten deutscher Geschichte in der Epoche des Ost-West-Konflikts*, ed. Hans Günter Hockerts (Munich, 2004): 103-152.

47 Klaus J. Bade, *Ausländer – Aussiedler – Asyl: Eine Bestandsaufnahme* (Munich, 1994): 91-146.

48 Olaf Köppe, *MigrantInnen zwischen sozialem Rechtsstaat und nationalem Wettbewerbsstaat: Zur Bedeutung von Justiz und Politik bei der Vergabe von “bürgerlichen” und sozialen Rechten an MigrantInnen unter sich verändernden sozialen, politischen und ökonomischen Bedingungen*, Ph.D. Diss. (Duisburg, 2003).

49 Joan Fitzpatrick, “The Human Rights of Migrants,” in *Migration and International Legal Norms*, eds. Thomas Alexander Aleinikoff and Vincent Chetail (The Hague, 2003): 169-184.

50 Konrad H. Jarausch, “Verkannter Strukturwandel: Die Siebziger Jahre als Vorgeschichte der Probleme der Gegenwart,” in *Das Ende der Zuversicht? Die siebziger Jahre als Geschichte*, ed. Konrad H. Jarausch (Göttingen, 2008): 9-26.

51 Günter Renner, “Aktuelle und ungelöste Probleme des Asyl- und Flüchtlingsrechts,” in *Migrationsreport 2002: Fakten – Analysen – Perspektiven*, eds. Klaus J. Bade and Rainer Münz (Frankfurt a.M., 2002): 179-206.

52 Mathias Hong, *Asylgrundrecht und Refoulementverbot* (Baden-Baden, 2008).

53 Elisabeth Haun, *The Externalisation of Asylum Procedures: An Adequate EU Refugee Burden Sharing System?* (Frankfurt a.M., 2007).

FROM ABOLITION TO ERADICATION: SLAVERY IN THE TWENTY-FIRST CENTURY

The modern world, or more precisely, the relatively few privileged people who live in the modern world, accept the comforting delusion that slavery is a thing of the past. It is not. Despite all the laws passed by diverse nations across the globe, its prevalence remains an open secret of the globalizing political economy. Slavery is one of the key causes of poverty in the world, as well as a consequence of poverty; it is the most extreme manifestation of prejudice and racism, and it is the most powerful indicator of any government's seriousness, or lack of seriousness, about honoring the promises of its laws and cherishing all the children of its nation equally. In this paper I will sketch some of the principle challenges in the contemporary struggle for the eradication of slavery and outline the national and international responses necessary to effectively and sustainably reduce slavery in the world today.

Understanding Contemporary Slavery

When Anti-Slavery International talks about slavery, it is not using a metaphor. Anti-Slavery International is careful to use the term as defined under international law. When we speak of slavery, therefore, we mean what the 1926 United Nations Slavery Convention describes as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised,” and what the 1930 International Labor Organization (ILO) Forced Labor Convention describes as “all work or service that is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”¹ Even with that precise definition, the ILO estimates that there are a minimum of 12.3 million people in slavery today. Others estimate a figure closer to 27 million.² Furthermore, according to the 2005 ILO Global Report on Forced Labor, some 40 to 50 percent of forced laborers are children.

Debt Bondage

Contemporary slavery has a number of particular manifestations that must be understood if there is to be any hope of its eradication. One of these aspects is the issue of debt bondage. The 1956 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery specifically

¹ United Nations Slavery Convention, signed in Geneva on Sep. 25, 1926 (see esp. Article 1.1) accessed on Nov. 2, 2009 from <http://www2.ohchr.org/english/law/slavery.htm>; and the International Labor Organization Convention Concerning Forced or Compulsory Labour (No. 29), adopted June 28, 1930 (see esp. Article 2), accessed on Nov. 2, 2009 from <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029>.

² Kevin Bales, *Disposable People: New Slavery in the Global Economy* (Berkeley, 2004).

identifies debt bondage as a slavery-like practice.³ Debt bondage is a means of coercion whereby individuals take on a loan which they must pay off with their labor, which generally is compensated well below its market value. It is the most common form of slavery in the world today.

Debt bondage is endemic across South Asia despite being illegal in all of countries of the region. It is prevalent in agriculture, gem polishing, cigarette manufacturing, mines and quarries, the sex industry and garment making. For visitors to the region, debt bondage is most visible in the brick kilns at the outskirts of most South Asian towns and cities. These are predominantly staffed by people who have been enslaved by debt bondage. Those who are enslaved are chronically poor. Yet chronic poverty alone is not sufficient to render people into slavery. In Pakistan, for example, 74 percent of the population survives on less than 2 US dollars per day. Not all of these people are enslaved. The Indian anti-slavery organization Centre for Education and Communication notes that those who are enslaved in debt bondage are those “with nothing to sell but themselves.” The landless population is therefore particularly at risk.

Example 1: The Descent into Bondage

“After my sister got sick, we took her to the hospital, but the doctor said we had to pay more money, so my parents bonded me for 1,700 rupees (\$33). I was seven or eight years old... I only went home once a week. I slept in the factory with two or three other children. We prepared our food there and slept in the space between the machines. The owner provided the rice and cut it from our wages – he would deduct the price. We cooked the rice ourselves. We worked twelve hours a day with one hour for rest. If I made a mistake – if I cut the thread – he would beat me.”⁴

Another crucial factor is the issue of social or minority status. For example, in South Asia, 90 percent of slaves are from scheduled castes, especially the Dalit; in India, many slaves are from the Muslim minority population.⁵ These minority groups are subject to widespread and institutionalized structures of prejudice, discrimination and social exclusion. The broad popular support for this discrimination ensures that slavery remains both informally sanctioned and socially tolerated. Even governments collude in tolerating the enslavement of the vulnerable by failing to enforce their own laws or protect their own citizens. For example, India criminalized bonded labor as a result of political pressure from the indigenous protest movement in 1976. Yet today India still has the largest number of bonded laborers in the world. This problem is exacerbated by the recent trend toward lax labor protection in the formal economy and the ongoing failure to address the issue of landlessness across the region.

Trafficking

Trafficking refers to the movement of people from one place to another for the purpose of forced labor and sexual exploitation. This is the most common form of slavery in Europe today, and generally affects migrants. Migrants are vulnerable for a variety of reasons, including their lack of support networks, the tendency of

3 For a discussion of bonded labor, see Krishna Prasad Upadhyaya, *Poverty, Discrimination and Slavery: The Reality of Bonded Labour in India, Nepal and Pakistan* (London, 2008).

4 Human Rights Watch, *Small Change*, 15:2 (2003): 26.

5 The caste system makes distinctions between different sections of society by dividing communities into rigid social groups, determined by birth and occupation. In India the caste system has existed for more than 3000 years and eventually became formalized into four distinct classes. Beneath the four main castes is a fifth group, the Dalits, or so-called untouchables, known in Indian law as scheduled castes. They literally have no caste. Discriminatory, cruel, inhuman and degrading treatment has been justified on the basis of caste. More than 260 million people worldwide continue to suffer under what is often a hidden apartheid of segregation, exclusion, modern day slavery and other extreme forms of discrimination, exploitation and violence. See the Dalit Solidarity Network, accessed on Oct. 29, 2009 from www.dsnuk.org.

some governments to tie immigration status to employment, and the often high level of prejudice against migrants in many countries of destination. This prejudice encourages toleration for this form of enslavement, similar to the way in which bonded labor is tolerated in South Asia.

Debt bondage is often used to coerce people who are trafficked for labor or sexual exploitation. For example, people from Eastern Europe, Africa and Southeast Asia may be promised a good job in Western Europe, and encouraged to take out a loan to pay for travel. But once they arrive, they often discover that the promised job does not exist. To pay off the loan, they are then expected to submit to forced labor. While media attention tends to focus on trafficking for sexual exploitation, trafficking also affects thousands of people who are tricked or coerced into forced domestic servitude or forced labor in agriculture, food processing, catering, construction, and cleaning services.

The ILO estimates that 2.4 million people are trafficked across the world each year in a trade they estimate as worth some 32 billion US dollars. According to ILO estimates, some 270,000 people are trafficked into industrialized countries in Europe and North America each year; this trade alone is worth 15.5 billion US dollars. In blunt business terms, human trafficking to industrialized countries comprises just over 10 percent of their trade volume, but is worth almost half the global value. Trafficking is also a significant feature of many forms of slavery, including debt bondage in South Asia (see Box 2).

Example 2: Baura's Story

Baura, from Uttar Pradesh in India, was 35 years old when he was released from bonded labor. The total population of his village is 400, and the entire population belongs to the Chamar caste, which is a scheduled caste.

Baura was a bonded laborer in a stone quarry leased by Navneet Singh, a prominent local landlord belonging to the higher-caste Rajput (Thakur) community. Baura was bonded for a period of 7 years. Prior to this, he was bonded to another quarry leased by Chandan Mishra, a Brahmin landlord. In other words, Baura had been sold from one employer to another. The amount which Baura owed Chandan Mishra was paid as a lump sum by Navneet Singh. Since Baura was unable to repay the bonded debt of 1,200 rupees (approximately \$25), he had to continue to work as a bonded laborer for Navneet Singh. Baura's daily wage was fixed at 20 rupees, but he never received it. He received no holidays and his labor rights were ignored.⁶

The case of Baura demonstrates that trafficking need not be transnational. Nor is it necessarily associated with immigration crime, as is often assumed by the media. Some people who are trafficked internationally enter their country of destination illegally. However, research conducted by Anti-Slavery International in 2006 demonstrated that the majority of people trafficked to the United Kingdom enter legally as European nationals or on a visitor's visa. Often the traffickers force the migrants to give up their legal entry status in order to use the threat of denunciation and deportation to increase their control. These threats are another form of coercion that exploits the human capacity for hope of a better life.

⁶ Recorded in Uttar Pradesh, 2005. From the Centre for Education and Communication (CEC), *Analysing the Effectiveness of Eradication Programmes on Bonded Labour: Uttar Pradesh* (Delhi, 2005): 25.

Worst Forms of Child Labor under ILO Convention 182

As described in ILO Convention 182, the worst forms of child labor are all forms of slavery and slavery-like practices, including trafficking, debt bondage and forced or compulsory labor. These forms of labor may be used in armed conflict, prostitution and pornography, and illegal activities such as the drug trade. The Convention also defines the worst forms of child labor as work that is likely to harm the health, safety or morals of the child; it is left to individual state governments to classify certain types of work as hazardous and unfitting for children. This determination should be made on the basis of relevant international standards and consultation with employer and worker groups. The Convention applies to all children under 18 years of age.

However, as we see from the example in Box 3, children can still be trafficked into debt bondage, even in democratic states.

Example 3: Guddu's Story

Twelve-year-old Guddu is from the small village of Mehsaul in Bihar, India. Guddu's family is part of the Muslim Indian minority. Guddu's father and his brother work as assistants in a transport company. The family is landless.

Guddu began as an apprentice embroiderer in a Delhi workshop run by a man called Anwar Seth. Anwar brought Guddu to Delhi. He did not pay an advance to Guddu's parents, who may have assumed that Guddu would have better prospects as an apprentice than as the child of a landless family.

Guddu describes his work as an apprentice as filled with abuse and harassment. The apprentices were the youngest and most vulnerable workers. Guddu was beaten often, sometimes with sticks. If the children did not perform their tasks properly, they were burned with matchsticks.

Guddu's father heard about the mistreatment and came to bring Guddu home. However, Guddu's father was turned away by the owner, who said had not yet recovered his "investment."

After a year as an apprentice, Guddu discovered he supposedly owed money to Anwar Seth, even though he had never taken a loan or advance. Guddu works some 14 hours a day. Apart from the 50 rupees Guddu receives each week, ostensibly for expenses, Guddu is uncompensated for his labor. Guddu hopes he will one day work off his accumulated debt and recover his freedom.⁷

Slavery as a Weapon of War

Slavery remains a brutal but neglected aspect of war. The conscription of children into armed forces is perhaps the most obvious form of this type of slavery, but it is not the only form. According to research conducted by the Darfur Consortium, civilians are systematically kidnapped for sexual slavery and forced labor by both the Sudanese Armed Forces and government-supported militias such as the Janjaweed and the Popular Defense Forces. One woman who managed to escape described how "they used us like their wives in the night and during the day time we worked all the time – preparing food, collecting firewood and fetching water from nearby. The men they abducted with us were used to look after their livestock. We worked all day, all week with no rest. I believe those who I have left behind are still doing the same work."⁸

The chaos and poverty of war and its aftermath also allows other forms of enslavement to flourish which are not part of systematic military policy. These forms of enslavement are fostered by the destruction of liveli-

⁷ Recorded in Delhi, 2007. Centre for Education and Communication (CEC), 36.

⁸ Darfur Consortium, *Darfur Abductions: Sexual Slavery and Forced Labour* (London, 2008).

hoods, impoverishment, social disruption, and lawlessness which result from widespread violence. Under these conditions, ordinary people become vulnerable to exploitation for profit. The Balkan conflict of the 1990s facilitated widespread exploitation and trafficking, particularly of women and girls who were forced into sexual exploitation. These atrocities are not unique. The Angolan conflict also fostered this form of trafficking and exploitation, as does the conflict in Uganda today.

Descent-Based Slavery

Most people associate the word “slavery” with traditional forms of chattel or ownership slavery. This form of slavery also exists today, most notably in West Africa, where children are born into slavery by inheriting their status from their mother. In this way, slavery is passed down through the generations. Anti-Slavery International describes this form of slavery as *descent-based slavery*. People enslaved in this way are attached to a master’s family; they are their master’s property and wholly under their master’s control, forced to perform unpaid domestic and agricultural work.

One example of this form of decent-based slavery is the case of Hadijatou Mani. Mani was born into an established slave class. Like all slaves in Niger, her slave status was inherited. She was forced to work without pay, and was also used as a sexual slave by her master. In October 2008, the Community Court of Justice of the Economic Community of West African States (ECOWAS) found the Republic of Niger guilty of failing to protect twenty-four-year-old Mani, a citizen of Niger, from this form of slavery. After the verdict, Hadijatou Mani said, “We are all equal and deserve to be treated the same. I hope that everybody in slavery today can find their freedom. No woman should suffer the way I did.”⁹ Yet six years after Niger formally criminalized slavery, at least 43,000 people remained enslaved across the country. Although largely ignored by the rest of the world, decent-based slavery continues to affect thousands of people across West Africa today.

The Evolution of Slavery in History

The ILO has established six indicators to identify forced labor. According to the ILO criteria, forced labor may exist under conditions of threat or actual *physical harm* to the worker; *restriction of movement* and confinement to the workplace or to a limited area; *debt bondage*, including when the employer provides food and lodging at such inflated prices that the worker cannot escape the debt; *withholding of wages* or excessive wage reductions that violate prior agreements; *retention of passports* and identity documents to prevent escape, or to prevent the worker from confirming his or her identity or status; and *threat of denunciation* to the authorities when the worker has an irregular immigration status.

At Anti-Slavery International, we argue that any one of these indicators is suggestive of forced labor. When two or more indicators exist, we consider the worker a forced laborer. The ability to identify working conditions as forced labor is crucial, particularly because the history of slavery shows that sustained abolition campaigns often cause slavery to mutate in form. As new slavery practices emerge, we need to be able to assess them against a consistent standard.

The mutability and durability of slavery as an institution is amply demonstrated by the history of its development across the centuries. In the late 18th century, British abolitionists believed that ending the Atlantic slave trade would spell the end of slavery as an institution. This proved a mistaken hope, although the abolition campaigns may have improved the lives of people in slavery because slave holders found it more difficult to replace slaves they had tortured and worked to death. However, the campaign to end the Atlantic slave trade

⁹ The verdict is reprinted in http://www.unhcr.org/refworld/publisher,ECOWAS_CJ,,,496b41fa2,0.html, accessed Nov. 3, 2009.

brought the horrors of slavery to public attention, and so paved the way for abolitionist laws. In August 1834, slavery was formally abolished in the British Empire. Although people could be no longer bought, sold or owned in the British colonies, slaves on plantations could be converted to “apprentices” and forced to continue to work. This practice was finally abolished in 1840.

To fill the need for cheap labor in the West Indies, “coolie” laborers were then imported from India on five-year contracts. When the British and Foreign Anti-Slavery Society (the former name of Anti-Slavery International) investigated the situation in Guyana, they discovered that laborers were often beaten and forced to work against their will under extremely harsh conditions, which led to high mortality rates. The situation in Guyana was repeated across the Caribbean. The British also recruited Chinese laborers to work in the gold mines of South Africa; these laborers also suffered long hours and virtual imprisonment.

Britain was not alone in these practices. In the early 20th century, King Leopold II of Belgium allowed a genocidal system of forced labor to flourish in the Congo under the guise of “civilizing colonialism,” a practice that was finally exposed by an initiative headed by the British journalist E. D. Morel and the Irish patriot Roger Casement. In 1911, Casement also exposed a similar form of forced labor in the Amazon. Despite the formal abolition of slavery and widespread public revulsion for the practice, many states continued to recreate the practice under a different name to further their economic interests. Even Britain, which had played an important role in ending the Atlantic slave trade, remained party to these deceptive and hypocritical practices.

Similar hypocrisies continue. As noted above, bonded labor is still tolerated in South Asia despite legislation prohibiting this form of labor across the region. In fact, new forms of bondage are emerging that appear to adhere to the letter of the law while continuing to facilitate forced labor and exploitation. In India, for example, young women and girls are recruited under the Sumangali scheme to work for three years in spinning mills. The parents are told they will be paid money that can be used as a dowry at the end of the three-year term. The young women and girls live and work under deplorable conditions. At the end of their contract period, their employers often find reasons to refuse payment.

Elsewhere in the industrialized world, the practice of linking work visas to specific jobs often facilitates the trafficking of forced labor. For example, a migrant worker may enter a European state to work in a restaurant. Upon entry, she may find herself required to work long hours for less than minimum wage. If the worker protests the exploitive conditions, she is likely to be dismissed from her job without recourse. Because her visa is tied to her work, she will then be deported. In this scenario, there are two indicators for forced labor: excessive deduction of wages and coercion through threat of denunciation and deportation. This form of forced labor is facilitated by contemporary immigration legislation.

Causes of Slavery

Given the mutability and durability of slavery throughout history, we must understand the underlying causes of slavery in order to eradicate it. In this section, I consider a number of key points raised by the case studies of contemporary slavery presented above.

As I have already alluded, many people today believe that slavery is a thing of the past. In 2006, Anti-Slavery International published research into trafficking for forced labor in the United Kingdom. In the course of our research, we encountered 27 men and women who had not been identified as forced laborers during their interactions with state and professional institutions. More surprisingly, the forced laborers themselves sometimes fail to recognize the nature of their predicament. For example, in 2006 the Migrants’ Rights Centre in Ireland noted that trafficked people often perceive themselves as migrant workers, not forced laborers. This

invisibility of forced labor is in part due to the lack of familiarity with the legal and practical definition of forced labor. However, if the problem cannot be identified, it cannot be eradicated.

My case studies also demonstrate how slavery emerges at the juncture of poverty, prejudice and governmental apathy and inaction. Clearly, slavery is as much a social issue as an economic or political one. Individuals and groups who are the target of social prejudice are especially vulnerable to exploitation and slavery. These groups include migrant workers in Western Europe and North America and people from scheduled castes in South Asia. However, the abolition movement has historically neglected this social dimension, which in part explains why slavery continues to persist despite political and social advances such as the promotion of democracy and the reduction of poverty.

Over the past two centuries, the anti-slavery movement has tended to emphasize law and policy reforms, including the legal prohibition of slavery. While these developments are a necessary first step and have undeniably advanced the abolitionist cause, they are not sufficient to end slavery. As the ILO studies have demonstrated, forced labor remains a widespread problem, even today. In societies where social prejudice is a persistent problem, government authorities are also likely to be affected by these prejudices. As a result, government authorities may delay or hinder the implementation of anti-slavery laws, and fail to initiate measures to systematically tackle abuses. India, for example, still has millions of bonded laborers even though bonded labor was officially banned in 1976.

In Europe, many states have ratified the 2005 Convention on Action against Trafficking on Human Beings, which guarantees minimum standards of protection for people who have been freed from trafficking. However, a 2008 European Commission report found that many states were failing to adequately implement the action plan. In the United Kingdom, there are worrying reports that trafficked people continue to be threatened with deportation. Once returned to their countries of origin, these men and women not only face the same horrors that originally caused them to flee their homelands, but are particularly vulnerable to re-trafficking and to added social prejudice as a result of their status as former forced laborers.

The fundamental social dimension of slavery also has implications for the modern development agenda. Development and slavery have always been closely linked. The economies of Britain and other European slave trading nations were built on the profits of the Atlantic slave trade. By the same token, the countries and communities that have historically supplied trafficked labor have been further harmed by the economic and social effects of this trade. For example, the social and economic divides that erupted in the Angolan civil war can be traced back to the consequences of the Atlantic slave trade.

Anti-Slavery International's experience in the struggle against contemporary slavery demonstrates that the majority of slave laborers today come from the most impoverished and disadvantaged sections of society. Slavery often exists in poor communities; sometimes poor people enslave even poorer people, justifying this practice with prejudice and economic necessity. Once caught in a contemporary form of slavery, people are unlikely to be able to break out of the cycle of poverty and forced labor.

Yet efforts to reduce poverty remain largely blind to the problem of slavery. It is entirely possible that even if we achieve the Millennium Development Goals, slaves will not benefit from these advances. Indeed, humanitarian and development efforts that fail to take into account the dynamics of power and prejudice in poor communities can exacerbate the problem of slave labor. For example, during the West African famine of 2005, the Niger anti-slavery and development organization Timidria discovered that some food-for-work programs were employing slaves who had been sent there by their masters. When the enslaved workers returned home, their masters confiscated their ration cards and collected the food for their own use. In other parts of West

Africa, former slaves are excluded from access to community water resources. Children of migrant laborers are often excluded from local schools.

Two further themes are worth noting. First, many of the millions of people in slavery today might have escaped this fate had they been able to meet their basic subsistence needs. People are often trapped in slavery for comparatively small amounts of money. For example, research into bonded agricultural labor in India found that nearly 70 percent of laborers were bonded for an initial loan of Rs. 700 or less – the equivalent of 13 US dollars or less.¹⁰ Second, prejudice and social exclusion play an important role in the poverty that leads to slavery. These facts raise another important issue. Although anti-poverty programs that are blind to the problem of slavery have a limited impact on reducing forced labor, anti-slavery programs can have a major impact on reducing slavery as well as reducing poverty. Enabling poor people to work for themselves and their families instead of enriching a local slaveholder could therefore greatly reduce poverty and have an immense benefit to society as a whole.

At Anti-Slavery International, we argue that anti-poverty programs must explicitly work to reduce the social and economic underpinnings of slavery and prejudice. This approach has parallels to the efforts of the 1980s and 1990s to take into account issues of gender in anti-poverty work, which led to qualitative improvements in poverty reduction programs. Mainstreaming the anti-slavery agenda in poverty reduction work would also benefit these programs as a whole and thus improve the lives of forced laborers and their wider communities.

From Abolition to Eradication

It is possible to eradicate slavery. However, eradicating slavery will require the combined efforts of government, business and civil society, animated by clear political will and a proper understanding of the complexity of the problem. To end slavery, we will also need to make the issue of slavery central to the larger issue of the political economy. In what follows, I outline the actions that are required by each of the major actors if we are to succeed in abolishing slavery.

As Steve Biko once noted, the first step in the struggle for justice is to “put our own house in order.”¹¹ This exhortation also applies to the struggle against slavery. All countries in the world are affected by slavery to some degree. We should judge the political leadership in these countries not by the existence of slavery, but by their active efforts to eradicate it. In counties and regions where slavery is deeply ingrained in the political economy, systematic and sustained efforts are necessary to address slavery. One key goal must be achieving universal primary education, which would immediately reduce the worst forms of child labor, reduce the vulnerability of children and other disadvantaged groups to future enslavement, and benefit overall economic and social development.

In South Asia, for example, governments must establish permanent national mechanisms to monitor and coordinate the action of the multiple stakeholders involved in the eradication of bonded labor, which include national and state organizations, trade unions, businesses, civic organizations, bonded-labor organizations, and international donors and agencies, particularly the ILO. Governments must also train law enforcement and labor officials to identify bonded laborers and implement bonded-labor laws and standards. Former slaves also need access to rehabilitation programs that will help them achieve a sustainable livelihood. In South Asia in particular, land reforms will be crucial to the ongoing effort to address bonded labor.

However, slavery is not solely an economic issue. Governments must also ensure that all citizens receive equal

¹⁰ Gandhi Peace Foundation and the National Labour Institute, *National Survey of the Incidence of Bonded Labour* (New Delhi, 1979): 41 and 43.

¹¹ Steven Biko, *I Write What I Like* (Chicago, 2002).

treatment in the economic, social and political spheres. Any government that tolerates caste systems and other forms of social discrimination is betraying its own citizens. Political leaders in wealthy nations must also ensure that the rights of forced and slave laborers are enforced. In Europe, the Council of Europe Convention on Action against Trafficking in Human Beings outlined minimum standards for the treatment of victims of trafficking. Drawing upon the experiences of the past few years, the signatory states must ascertain how best to identify and protect the victims of slave labor, and bring the traffickers to justice. In other words, European states must ensure that the rights of victims are protected while punishing the perpetrators, and ensure that prejudice does not lead the police and judiciary to confuse the two. A systematic and consistent anti-trafficking program would increase Europe's moral authority and ability to move the problem of trafficking to the foreground in development, trade, and foreign policy.

Anti-Slavery in International Affairs

The issue of slavery is notably absent from foreign, aid and trade policies across the globe. Yet given its potential impact on poverty reduction and human dignity, the eradication of slavery should be central to our agenda. For "reasons of state," even governments that profess concern for peace, human rights and democratization tend to ignore the issue of slavery in their dealings with states where slavery is prevalent. Yet all states are harmed by the persistence of slavery across the world. The anti-slavery agenda is not only morally necessary; it is a matter of self-interest for all countries and the international community. According to some economists, states that tolerate slavery have an unfair advantage in the competitive global economy. Moreover, countries that allow slavery to persist from generation to generation exacerbate local poverty, which damages their domestic market, their economic growth, and their ability to engage in international trade.

Enslaved populations are also more likely to have a limited stake in society, and are less likely to have the means or desire to limit ecological harm. The cheap labor of slaves also serves as a disincentive to maximize productivity through ecological conservation. The existence of slavery also promotes social unrest. Martin Luther King, Jr. called violence the cry of the voiceless. In Nepal, research by Anti-Slavery International suggests that the failure to address the problem of bonded labor has promoted the Maoist insurgency. India's current failure to address bonded labor raises the specter of similar violence. If the rest of the world continues to watch idly while further bloodshed unfolds, global peace and economic stability is likely to suffer as a result. Anti-slavery must therefore become a central element within our development programs, foreign policies, and trade agendas. National governments and international donors must recognize that universal education for all children in all nations is crucial to ending the cycle of exploitation and forced labor. Our efforts must also target the poorest and the most exploited populations, and ensure that interventions advance the cause of justice and equality rather than reinforcing existing patterns of social exclusion. The governments of South Asia, where slavery is a massive problem, need assistance to help liberate and rehabilitate bonded slaves and end the practice of slavery.

The international community must take steps to address slavery as a weapon of war. The rule of law can only flourish under a lasting peace, so ending war and violent conflict is key to ending slavery. In some cases this may require intervention by outside actors to act as mediators between warring factions or to supply peacekeepers. The example of Darfur shows that peacekeeping efforts are crucial to reducing human rights abuses and slavery. However, these peacekeeping missions still lack the training, investigative capacity, staffing and mandates needed to combat such abuses. To end human rights abuses and enforce the rule of law, wealthy nations must bear their share of the burden.

Business

Businesses are the most obvious potential beneficiaries of forced labor because forced labor can reduce their production costs. Even when Western business executives express horror at the thought of slave labor, their aggressive cost reduction measures may serve to promote it. When Western companies drive down the prices paid to their suppliers, the suppliers may be tempted to reduce costs by resorting to forced or child labor. For example, the pressure on cocoa prices has helped lead West African cocoa producers to use child labor. In the Cote d'Ivoire, trafficked child laborers are forced to work on cocoa plantations. The abuse of children's rights and labor rights can therefore be an unintended consequence of economic decisions reached by corporations higher on the supply chain. In addition to the horrific human consequences of this failure to consider the issue of forced labor, the reputations of corporations may suffer as a result. This risk can outweigh any benefits accrued from aggressive cost reduction strategies that are blind to human rights and labor standards.

Similar to our position on state governments, Anti-Slavery International argues that firms should be judged less on the existence of slavery-like practices in their supply chains, and more on their efforts to reduce forced labor. Supply-chain audits can help identify risks, but are not sufficient to end the practice of forced labor. A more promising approach is Cadbury's Cocoa Partnership, whose international board has also given a seat to Anti-Slavery International. In this program, Cadbury will invest roughly 1 percent of its profits over 10 years, channeled through non-governmental organizations such as CARE, with the goal of reducing child labor in cocoa production and improving labor conditions in cocoa-producing regions.

At Anti-Slavery International, we believe that all businesses have a moral obligation to ensure that the Universal Declaration of Human Rights is respected across their entire business operation, including their supply chains. However, we cannot rely simply on the good intentions of individual executives and ethical companies. Many corporations, particularly international corporations and corporations that benefit from home government support, are also national institutions that express the expectations of their consumers and other stakeholders. This fact should be taken into account in trade policies, and governments should provide support only to companies that meet minimum ethical standards. Furthermore, national and European legislation should be enacted to ensure that business executives and companies can be held legally accountable for extra-territorial breaches of international law, particularly relating to forced and child labor. National and international businesses that operate in South Asia must pay particular attention to issues of human rights, labor standards, and anti-slavery laws. They should also adopt the Ambedkar Principles, a set of guidelines to address the problem of caste discrimination in the private sector.

Trade Unions

Trade unions are uniquely positioned to reduce the risk of slave labor today, as workers who can act collectively and who have access to advice on their rights and recourses in the workplace are less vulnerable to exploitation. To optimize this potential, trade unions must adopt organizing methods that are adapted to our globalizing political economy. As already noted, the most vulnerable populations tend to be workers in the informal economy and migrant workers, who have been bypassed by traditional union organizing efforts and practices. In some parts of the world, the flexibility of the union movement is hampered by rigid approaches to industrial organization. In some states, including in South Asia, social prejudice further hinders the ability of unions to support vulnerable migrant workers and workers in the informal economy. However much we may yearn for the halcyon dates of the immediate postwar era, it is likely that the age of mass unionization is a thing of the past. The most vital struggles in the coming decades will be efforts to protect the rights of ordi-

nary people from ancient forms of abuse, including slavery, which are being facilitated by developments in our globalizing political economy. As the lesson of history has shown, slavery tends to mutate in form to stay ahead of the letter of the law. This mutability helps slavery elude the institutions that wish to eradicate it. For this reason, trade unions must be willing to be flexible in organizing workers and defending workers' rights.

Civil Society

Civil society has a crucial role to play in the struggle to end slavery. This is particularly true for organizations working on behalf of poverty reduction. Civic organizations must pressure states to prioritize the eradication of slavery. These organizations can also play an important role in providing professional expertise to programs that address the root causes and the consequences of slavery. Although it is often overlooked, community development is a crucial skill for addressing the social causes of slavery.

Over the years, development organizations have pioneered innovative and effective approaches towards poverty reduction. Directing these efforts towards populations at risk for slavery practices could have an immense and positive effect. Donors and program developers could encourage potential aid recipients to address the issues of discrimination and slavery in the local communities. While no project or program can do everything, foregrounding the issue of slavery will encourage programs to include anti-slavery measures in their planning and implementation.

Conclusion

Legal efforts will not suffice to eradicate slavery. Many countries have enacted anti-slavery legislation, but failed to adequately implement these laws. Because slavery exists at the juncture between poverty, discrimination and governmental apathy, it is a highly vested social issue. It is estimated that between five and six million slaveholders across the world are currently exploiting the forced labor of between 12 and 27 million slaves. When governments fail to enforce their anti-slavery laws, they make a mockery of the concept of the rule of law, and concretely help the slaveholders to continue to profit from this trade.

However, slavery will not be eliminated solely by effective poverty reduction. Slaveholders can be found among both the poor and the wealthy. In Brazil, wealthy ranchers exploit forced labor. In the Cote d'Ivoire, poor cocoa farmers use trafficked child labor. Thus, slavery is an issue that bridges the economic divide. Any comprehensive effort to eradicate slavery must therefore address the many political, economic and social dimensions of the slave labor system. This effort will require immense political will, which can only come about as a result of public demands for leadership. Our complacency on the issue of slavery is therefore an indictment of us all.

Günter Saathoff

COMPENSATION FOR NAZI SLAVE LABOR: THE CONTEXT OF HUMAN RIGHTS

The initial legal mandate of the Foundation “Remembrance, Responsibility and Future” was administering compensation programs, particularly for former forced and slave laborers under the National Socialist regime. The program, which ran from 2001 to 2007, compensated the people deported mainly to Germany for the “war economy” between 1939 and 1945, who had been subjected to forced labor for public authorities as well as for private companies, at times under prison-like conditions. However, this essay does not examine the compensation process or its complex prehistory in detail, although I will briefly touch on this process in my conclusion.¹ Rather, the aim of this essay is to trace the political and legal context of the last century in order to elucidate the *significance* to the human rights debate of the payments made to individuals as compensation for state-organized injustice. In other words, my analysis is a case study of the significance of compensation to addressing injustices carried out by the state against private individuals, particularly citizens of other countries. In addition, I analyze the political and legal framework established for this process.

I focus on the fundamental question of forced and slave labor in the Nazi regime from the perspective of criminal and civil law and within the context of the debate on human rights. Here, on the occasion of our conference at the historic site of the Nuremberg Trials of 1945–1946, I would like to examine the significance of the fundamental assumptions that shaped the Nuremberg Trials and especially the Major War Criminals trials. Importantly, the trials of 1945 and 1946 did not take place under ordinary jurisdiction, but instead already applied the principles which were later established by regulations such as Article 4 of the European Human Rights Convention (EHRC) and the Universal Declaration of Human Rights (UDHR), which prohibit forced labor and slavery. These early trials were conducted on an ad hoc basis by the victorious powers, and by a military tribunal that tried criminal acts committed by the defeated state.

The victorious powers defined forced labor under the Nazi regime as a form of “slave labor” and a crime against humanity, and also established penalties for the crime. The codification of the prohibition against slavery in the EHRC in 1950, as well the incorporation of this prohibition under slightly reworded terms in the UDHR, were a direct political consequence of decisions made by the victorious powers in the Nuremberg Trials.

The Nuremberg trials convicted some of the main defendants, who represented the Nazi state and party apparatus, of crimes against humanity for their involvement in the deportation and forced labor of millions of

¹ See Michael Jansen and Günter Saathoff, eds., “A Mutual Responsibility and a Moral Obligation” – *The Final Report on Germany’s Compensation Programs for Forced Labor and other Personal Injuries* (New York, 2009).

persons. Fritz Sauckel, who headed the forced labor program from 1942 to the end of the war, was sentenced to death. Albert Speer, who was Hitler's minister of armaments and administered the use of forced labor in the concentration camps for war production, was sentenced to 20 years.

Significantly, the Nuremberg military tribunal charged no industrialists as major war criminals, even though large German firms had used many thousands of forced laborers, who often lived and worked under extremely poor conditions. However, some industrialists were charged in the subsequent Nuremberg trials, most famously the directors of the Flick, Krupp and I. G. Farben companies, although debate persists about the political motivations of these trials. None of the industrialists convicted in the subsequent Nuremberg Trials served their full sentences, but were released from prison in the 1951 amnesty granted by the US High Commissioner. The property and financial holdings confiscated from Krupp as part of the sentence were also returned.

What is also remarkable is that the Nuremberg Trials did not provide the individual victims of forced labor with legal standing to obtain compensation from the perpetrators of the Nazi state and private firms. The Nuremberg Trials were purely criminal trials, and the victims only appeared as witnesses for the prosecution. As such, the Nuremberg Trials did not enable the victims to lodge a claim for compensation against the perpetrators. This fact gives rise to a number of basic legal and political questions. What are the legal and material consequences of a conviction for slave or forced labor? What is the relationship between international law and national law in such cases? How do these international legal norms interact with other norms, such as state immunity? What courts are responsible for handling these claims? I will only be able to consider a few of these questions in depth.

First, I want to consider another historical example. Nuremberg was not the first time that crimes committed by the state during wartime became a subject of international law. For example, Article 3 of the Hague Convention of 1907 stipulates a claim against the state, which was not standard practice for violations of international law at the time. However, the Hague Convention did not stipulate how to assess the extent of the damages, or who would receive compensation from the state. Moreover, the Hague Convention made no provision for compensation by the state when it was found to have wronged individual persons, and its signatory states assumed that compensation could be paid only by one state to another state (which is called "reparation"). This provision for claims against the state was later incorporated into Article 91 of the First Additional Protocol of the 1949 Geneva Convention, titled "Responsibility," which stipulates that states that violate the provisions of the Convention are liable for all acts they commit.

In fact, as a result of (or in spite of) Nuremberg and later international legal reforms, international law *in principle* still allows prisoners of war to be used for forced labor. Moreover, there is no international statutory law that gives individual persons the right to lodge a claim for compensation against the perpetrator state for their slave or forced labor. These rights, which are often defined under the rubric of reparations law, exist solely between states, with the fictive assumption that each state will defend the rights of its citizens. Whether the state in fact defends the rights of its citizens is another matter entirely.

This legal position corresponds closely to the principle of national jurisdiction and state immunity, which holds that citizens of one state may not seek redress against another in their own state's courts. Both the issues of subjective right and state immunity are immensely important to present-day Germany, since cases concerning Nazi crimes are still before courts in Italy, Greece, and even the European Court of Human Rights.

The Hague Convention and Nuremberg Tribunal also failed to resolve another problem: under international law, what claims could a victim of slave or forced labor lodge against a civilian perpetrator, such as an industrial firm or farm that clearly did not belong to the state apparatus? This question was defined not at an

international level, but by the highest German courts in complaints that former forced laborers filed against civilian operations for decades after the war. The German courts construed these companies as institutions that had taken their orders from the Nazi state. As such, they were regarded as “agencies of the Reich” acting on behalf of the Nazi state, which had (allegedly) dictated their use of forced labor for the war economy. By this line of argumentation, the companies fell under the protection of what might be called an “extended state immunity,” and the courts defined claims lodged against German companies as part of the “protected sphere of state activity.” They therefore declared the companies “immune” to legal claims lodged abroad under reparations law. With only a few exceptions, the majority of German courts followed this line of reasoning.

However, this line of argumentation was not yet an airtight legal argument for Germany and German firms to counter the compensation claims of former forced laborers. The victorious powers and other third-party states could have lodged a claim on behalf of their citizens from “state to state,” as the Soviet Union did until 1953 in order to enable Soviet citizens to sue the German Democratic Republic for reparations.

A subsequent legal barrier eliminated this possibility. In the 1953 London Agreement on German External Debts, Germany succeeded in establishing that it would assume repayment obligations to the 33 Western states that participated in the war (with the exclusion of the Eastern Bloc states) only for debts incurred before the start of the Second World War. Germany also initially succeeded in defining the concept and scope of these repayment claims. This definition excluded the possibility of compensation for individuals (and thus former forced laborers) under the debt repayment scheme.

The political problem for Germany in the 1950s thus remained essentially the same: the West German government realized that it would be unable to establish normal relations with its neighbors, let alone with Israel, without some material compensation for victims of the Nazi regime, who at the time were mainly understood to be former concentration camp inmates. For this reason, Germany developed a “soft” political and legal concept that recognized certain forms of injustice, the so-called “specific National Socialist injustice.” At the same time, this form of injustice was distinguished from war crimes as defined under the Hague Convention of 1907 and did not fall under the 1953 London Agreement on German External Debts. According to the German interpretation, this “specific” form of National Socialist injustice would and should be compensated without violating the London debt agreement, which would have triggered the assertion of individual compensation claims.

This interpretation resonated in the initial round of negotiations for the “Israel Agreement” and the corresponding agreement reached with the Jewish Claims Conference in 1953. Later, it informed the additional omnibus agreements for the compensation of National Socialist injustice that were reached with 11 Western states.² Because of the Cold War, similar agreements were not reached with Central and Eastern European states until the early 1990s. However, the Federal Republic of Germany was always careful to ensure that these agreements did not provide for individual compensation for forced labor, including wages withheld during forced labor, since these claims were supposedly covered under reparations law. In other words, these bilateral agreements were reached between states, and did not apply to individual claims for compensation against the German state (such as former concentration camp inmates or victims of medical experiments). Individual victims were granted the right to lodge these claims only when a German law explicitly provided authorization for compensation, for example under the West German Federal Indemnification Law (*Bundesentschädigungsgesetz*, BEG).

² See among others Ernst Feaux de la Croix and Helmut Rumpf, *Der Werdegang des Entschädigungsrechts* (Munich, 1985); and Ludolf Herbst and Constantin Goschler, eds., *Wiedergutmachung in der Bundesrepublik Deutschland* (Munich, 1989).

For several decades, Germany succeeded in legally and politically defending against the claims of former forced and slave laborers. This situation began to change for three reasons. First, after 1989, the German courts had to decide whether the 1990 Treaty on the Final Settlement with Respect to Germany (the “Two-Plus-Four Treaty”), which paved the way for German reunification, was a peace treaty for the Second World War. If it was a peace treaty, then by extension, it would end Germany’s “grace period” for reparation claims. Second, the political parties that formed the German federal government in 1998 (the Democratic Socialists and Alliance ’90/The Greens) were meanwhile open to the possibility of individual compensation to former forced laborers of the Nazi regime (who lived mainly in Eastern and Central Europe). And third, in the 1990s, class-action suits began to be initiated in US courts against German firms that had used forced labor under the Nazi regime. German firms realized that the US courts, which did not regard German firms as protected “agencies of the Reich,” might affirm the subjective right to compensation.

The rest of this history has been described well elsewhere. Although none of the court cases in the United States resulted in a *final* verdict against a German firm, they set the stage for a political solution to the problem. In 2000, an agreement between Germany and the United States and a number of additional states enacted the Law on the Creation of a Foundation “Remembrance, Responsibility and Future.”³ Together with its international partner organizations, the new Foundation made financial payments totaling 4.37 billion Euros to 1.66 million former slave and forced laborers from 98 states. In return, the United States established a unilateral waiver of further compensation claims against Germany. German firms were thus granted legal certainty against further claims by former forced laborers in the United States.

The question of compensation to former forced laborers and their claims against the German state and German firms was therefore not addressed by the German federal government with formal and legal reference to human rights norms such as the prohibition on slavery. Unfortunately, at both that time and today, there are no clear international legal norms that make international claims for compensation possible. At the same time, however, this history shows that the administration of justice and legal theory on international law was slowly moving toward a solution, and even arriving at isolated verdicts that boldly interpreted Article 3 of the Hague Convention of 1907 and Article 91 of the First Additional Protocol of the 1949 Geneva Convention.

For this reason, the German “compensations” or “humanitarian benefits,” as the individual payments made under the Law on the Creation of a Foundation “Remembrance, Responsibility and Future” were called, were not the outcome of an international legal norm, but another *sui generis* ruling. It is therefore not surprising that the law does not contain a clear legal definition of the term “slave labor,” a term that is by definition linked to the human rights debate. Instead, it contains only a politically defined concept of forced labor. In fact, the Law on the Creation of a Foundation “Remembrance, Responsibility and Future” makes no mention of the term “slave labor,” but uses the term “forced labor” instead. In my opinion, this omission is not fatal, since the precise definition of the term “slave labor,” as it refers to the use of forced labor under the Nazi regime, is contested by the victims of National Socialism and within legal and political debate. For example, the international human rights expert Benjamin Ferencz titled one of his books “Less than Slaves,” noting that slaves were generally not killed during the exploitation of their labor, while the Nazis pursued a conscious policy of “annihilation through work” against the Jews.⁴

From a broader point of view, international law has recently succeeded in establishing international courts,

3 The Law on the Creation of a Foundation “Remembrance, Responsibility and Future” is known in German as the *Gesetz zur Errichtung einer Stiftung “Erinnerung, Verantwortung und Zukunft” (EVZStiftG)*.

4 Benjamin Ferencz, *Less than Slaves: Jewish Forced Labor and the Quest for Compensation* (Cambridge, MA, 1979).

which have reached legal verdicts against war criminals, who have been stripped of personal legal immunity deriving from the sovereign immunity of states.⁵ Even today, there is no international codified legal standard regarding individuals harmed by war crimes, such as the right to individual compensation for forced or slave labor. However, the history of the human rights debate demonstrates that the assertion of a human right, such as the right to be free of slavery or obtain compensation for enslavement, cannot over the long term remain at the discretion of a state that perpetrated this injustice. Human rights are subjective rights, and as such there must be an individual legal recourse for lodging claims against the state that violated these rights. This path remains long and difficult because state governments will understandably continue to insist on the principle of state immunity. With respect to the cases that are currently pending against Germany, we must also take into account the prohibition on *ex post facto* law.

It is likely that over time, we will begin to breach “absolute state immunity” in the most serious human rights violations. This may also entail the establishment of international courts concerning human rights violations. As yet, we do not know if the claims of citizens against the state will initially entail the right to petition, or whether they will contain an individual right to litigation for individual compensation.

In the final analysis, we are heading in the right direction, even if we are proceeding more slowly than we had hoped. By way of reminder, Article 41 of the European Convention of Human Rights envisions, under certain conditions in contemporary legal violations, an individual claim to compensation through claims lodged at the European Court for Human rights. Only a few years ago, Article 15 of the Council of Europe Convention on Action against Trafficking in Human Beings established the possibility that citizens could sue civilian perpetrators of slavery even outside of an act of war, meaning under normal civil conditions. We hope that Germany soon ratifies this 2005 Convention. In terms of legal practice, we are still at the beginning.

Within the larger context of the debate on human rights, the establishment of the Foundation “Remembrance, Responsibility and Future” is an example in two senses. First, it established a concept for the previously unsolved issue of an individual claim for compensation, here for state-run and privately run forced labor. We have seen that such examples of the establishment of a limited individual right can serve as the basis for later universal norms. With its ongoing mission to keep alive the memory of injustice and continue its work on behalf of human rights, the Foundation is also an example of how states and society can prevent such crimes committed by the state. In this sense, states and society learn from history and can take preventive action against slavery and forced labor.

⁵ Here I am speaking of international courts, not war tribunals organized by combatant states.

HUMAN RIGHTS EDUCATION AS THE OUTCOME OF HUMAN RIGHTS MOVEMENTS

Uta Gerlant

“THE LAW IS OUR ONLY LANGUAGE”: SOVIET DISSIDENTS AND HUMAN RIGHTS

“Adhere to the Soviet Constitution!” was one of the slogans on the banners waved at the independent Moscow demonstration on December 5, 1965 on behalf of the arrested authors Yuli Daniel and Andrei Sinyavsky. Daniel and Sinyavsky had published writings under pseudonyms abroad and stood accused of “anti-Soviet propaganda.” With the knowledge that the state had unlimited power to “violate the law behind closed doors,” some 200 protesters demanded that the trial be open to the public.¹ This demonstration became an annual event. In 1977, the demonstration was moved from December 5, the anniversary of the Soviet Constitution, to December 10, the international day of human rights. Ludmilla Alexeyeva later called this the “birthday of the human rights movement.”²

The 1965 demonstration in front of the Pushkin memorial was organized by the mathematician Alexander Esenin-Volpin, who became one of the mentors of the human rights movement.³ As Vladimir Bukovsky later remembered, “Alik was the first person who met with us, who spoke to us in a serious way about Soviet law. We all laughed at him. ... Who would have thought at the time that the ... amusing Alik Volpin ... would spark

1 Call for a public demonstration on December 1965; see Alexander Ginsburg, ed., *Weißbuch in Sachen Sinjavskij – Daniel* (Frankfurt a.M., 1967): 44. Although the trial was in theory open to the public, access to the courtroom was by invitation only; only the wives of the two writers were permitted to attend. This procedure was repeated during later trials; barred from the courtroom, friends, supporters and other sympathizers for the accused would gather for days in front of the court building. Sinyavsky and Daniel were sentenced to 7 and 5 years in the camp, respectively.

2 Ludmilla Alexeyeva, *Istoriya inakomyслиya v SSSR* (Vilnius and Moscow, 1992): 194. Ludmilla Alexeyeva played two roles: she was a dissident as well as a historian of the dissident movement. Alexeyeva was born in 1927. In the latter half of the 1960s, she joined the human rights movement in Moscow, and was a member of the Moscow Helsinki Group. She became head of the Moscow Helsinki Group after it reconvened in 1996. She is the president of the International Helsinki Federation since 1998, and remains active on human rights issues today. Alexeyeva studied history in Moscow. During her exile in the United States (1977 – 1993), she authored numerous historical works, including the standard history of the Soviet dissident movement, which analyzed the national and religious movements as well as the human rights movement. For our purposes, the term “dissident” refers to dissenters who invoked the law to engage in non-violent resistance against the Soviet system (during the period from the mid-1950s to the mid-1980s.) The Soviet dissident movement was pluralistic and included many different strains (see fn. 13).

3 In addition to Alexander Esenin-Volpin, Andrei Amalrik also names Boris Zuckerman and Valery Chalidze as two other key legal advisors to the human rights movement: “When expulsion began to be used against the dissidents, Chalidze, Volpin and Zuckerman were among the first to be expelled – which was proof of the importance of their actions.” See Andrei Amalrik, *Aufzeichnungen eines Revolutionärs* (Berlin, 1983): 110.

the movement for human rights in the Soviet Union.”⁴ Bukovsky continued, “I’m still surprised at the seriousness with which he spoke about rights in our ‘arbitrary state,’ as if we didn’t all know that the laws were only written on paper for propaganda purposes, and that they could be ignored at any time. After all, the KGB had told us quite openly, ‘We’ll always be able to find a law.’ ... As we saw, only ten years before these laws had done nothing to prevent the murder of nearly 20 million innocent people.”⁵

Demanding the Enforcement of Rights: The Example of the Crimean Tatars

For Soviet citizens of the 1960s, human rights were not a historical legacy, but the result of bitter life experiences. Soviet citizens’ consciousness of human rights as something that could be invoked matured only over time. In March 1968, Pyotr Grigorenko, a Ukrainian army general who fell out of favor in the early 1960s, appealed to the Crimean Tatars, who had come to Moscow from the areas where they had been forcibly resettled.⁶ The Tatars were refused the right to return to the Crimea even though the laws justifying their deportation had been overturned:

What is the reason given for the discrimination against your people? Article 123 of the Soviet Constitution states: “Direct or indirect limitations on civil rights on racial or national grounds ... is punishable by law.” The law is on your side. [Long applause.] Despite this, your rights are being trampled on. ... You are turning to the party leadership and to the government with servile written requests. ... In order to make your inalienable rights a reality, you cannot request them, you must demand them!⁷

Already in the early 1960s, the Crimean Tatars had begun to establish initiative groups in the places where they had been forcibly resettled. They elected delegates to Moscow to represent their demands for a return to the Crimea. The Crimean Tatars thus founded their own democratic and decentralized organization, which was unique in the history of independent movements in the Soviet Union.⁸ When the Crimean Tatar dissident Mustafa Dzhemilev helped found the Initiative Group for the Defense of Human Rights in the USSR in Moscow in 1969, they took over the term “initiative group” from the Crimean Tatar organizations.⁹ This is only one of many examples of the exchange and mutual influence between the human rights movement and other dissident trends.

The “Creative Miracle of the People”: The Samizdat

The dissidents did not count on being able to convince Soviet officials of the power of their arguments in specific cases of legal violations. They knew that only public pressure could bring results.¹⁰ One of the most important goals of the dissidents was publicizing violations of the law, and thus the samizdat, which circulated important writings and eluded censorship, became one of their most important tools.

With the samizdat, the “creative miracle of the people” as Grigorenko called it, the dissidents contributed to the “formation of independent public opinion and awareness of the law” by publishing literary texts, politi-

4 Vladimir Bukovsky, *Wind vor dem Eisgang* (Berlin, 1978): 133.

5 *Ibid.*, 189; he is speaking here in the year 1961.

6 The Crimean Tatars were deported from the Crimea to Central Asia on May 18, 1944. Nearly half the deportees died; see Alexeyeva, 93. Although the Crimean Tatars were politically rehabilitated in 1967, this had no practical consequences; see Gerhard Simon, *Nationalismus und Nationalitätenpolitik in der Sowjetunion: Von der totalitären Diktatur zur nachstalinischen Gesellschaft* (Baden-Baden, 1986): 397.

7 Pyotr Grigorenko, *Erinnerungen* (Munich, 1981): 434.

8 Unlike the Chechens and the Ingushetians, who returned spontaneously and without obtaining permission to their homeland en masse in the mid-1950s, the Crimean Tatars met with little success; see Simon (1968): 275ff.

9 Alexeyeva, 101.

10 *Ibid.*, 205.

cal essays, documentation, and news.¹¹ Novels and essays, in particular, expressed the plurality of dissident discourse, which also included open conflicts like the one between Sakharov and Solzhenitsyn over Solzhenitsyn's 1974 "Open Letter to the Soviet Leadership."¹² Following the example of the *Information Bulletin*, which the Crimean Tatars had been publishing since 1966–1967, the human rights movement started the *Chronicle of Current Events* in 1968, followed in 1970 by the *Messenger of Ukraine* and in 1972 by the *Chronicle of the Catholic Church* in Lithuania.

The first five issues of the *Chronicle of Current Events* appeared in 1968 under the title "Year of Human Rights in the Soviet Union." The first page of each of the 65 issues printed by December 1982 reprinted Article 19 of the Universal Declaration of Human Rights. The *Chronicle* was thus in a sense the "mouthpiece" of the dissident movement. It painstakingly reported on human rights violations by the state and on dissident activities from across the Soviet Union. In addition to reporting on the human rights movement, the *Chronicle* devoted attention to national, religious and other strands of Soviet dissidence.¹³ Today the *Chronicle* is the quintessential source for the history of the Soviet dissident movement.

"Monologue with a Gagged Mouth": The Early Human Rights Movement

At the end of the 1960s, the human rights movement in the Soviet Union began to gather steam. In 1969, dissidents from Russia, the Ukraine and the Baltic states passed the Program of the Democratic Movement of the Soviet Union. In it, they demanded civic rights, adherence to the Universal Declaration of Human Rights and political and national self-determination.¹⁴

In May of the same year, the Initiative Group for the Defense of Human Rights in the USSR was founded. The group's formation followed the arrest of Ivan Yakhimovich, who together with Pyotr Grigorenko wrote a letter protesting the Soviet invasion of Czechoslovakia.¹⁵ The Initiative Group directed its letter to the United Nations and later to other international organizations as well: "We appeal to the UN because our protests and grievances, which we have sent to the highest state and judicial bodies in the Soviet Union for years, have met with no response. Our hope that our voice could be heard and the power of lawlessness would end, which we

11 Grigorenko, 417; see also Alexeyeva, 205.

12 See also Alexander Daniel, "Počemu ne 'perestroilis' dissidenty?" in *Novoe Vremya* 15 (1995): 13-15, see esp. 15; Roy Medvedev, "Fragen, die jeden bewegen: Über Meinungsverschiedenheiten unter den Dissidenten in der UdSSR," in *Aufzeichnungen aus dem sowjetischen Untergrund: Texte aus der Moskauer Samizdat-Zeitschrift "Das XX. Jahrhundert"*, ed. Roy Medvedev (Hamburg, 1977): 18-40; and Larisa Bogoraz, Vladimir Golycin and Sergej Kovalev, "Političeskaja bor'ba ili zaščita prav? Dvadcatiletnij opyt nezavisimogo dviženija v SSSR: 1965-1985," in *Pogruženie v trjasinu. Anatomija zastoja*, ed. T. A. Notkina (Moscow, 1991): 501-544, see esp. 538. Bogoraz et al. note that the official Soviet response caused the dissidents to scale down the intensity of their protests in order to deflect additional persecution on the part of the state.

13 The national movements included the Russian national dissidents as well as dissident movements from the Ukraine, Lithuania, Latvia, Estonia, Georgia, and Armenia. In addition, the Crimean Tatars, the Meskhitians (Muslim, Turkish-speaking Georgians) and the Germans, who had been deported under Stalin, formed movements to return to their homelands in the Crimea, South Georgia, and along the Volga River near Saratov, respectively. The Germans' failure to obtain permission to return gave rise to an emigration movement similar to the Jewish emigration movement of the late 1960s (which also gave rise to a revival of Jewish culture). Among the religious groups in the Soviet Union, a number of Protestant Free Churches gave rise to movements that opposed the anti-religious state directives, including the Baptists, the Seventh Day Adventists, and the Pentecostals; the latter also gave rise to an emigration movement. The Catholic movement in Lithuania was part of the larger Lithuanian movement, while the Russian Orthodox movement remained relatively small. Other groups included the human rights activists, the artists from the so-called "Second Culture," the Socialists, the movements for socioeconomic rights (especially the independent unions), and the women's, environmental, and peace movements.

14 "Program der demokratischen Bewegung der Sowjetunion," in Borys Lewytkyj, *Politische Opposition in der Sowjetunion 1960-1972: Analyse und Dokumentation* (Munich, 1972): 136-175.

15 On the founding of the initiative group, see the journal "Khronika tekushchikh sobytij" (KhTS) 8 (1969): 175f; and Amalrik (1983): 110f. The letter by Ivan Yakhimovich and Pyotr Grigorenko is reprinted in *KhTS* 6 (1969): last page. The brief letter also stated, "We call upon all Soviet citizens to employ all legal means, avoiding any hasty or ill-considered acts, to obtain the withdrawal of the Soviet troops from Czechoslovakia and an end to the interference in their domestic affairs." Ivan Yakhimovich, who was born in 1931, was incarcerated in a mental institution and released two years later as an "invalid of the second degree." See S. P. de Boer, E. J. Driessen and H. L. Verhaar, eds., *Biographical Dictionary of Dissidents in the Soviet Union, 1956-1975* (The Hague, 1982): 202.

have constantly advocated, this hope is now gone.”¹⁶ However, the international organizations also failed to reply. The UN representative in Moscow refused to accept the letter, saying that the organization did not have jurisdiction over issues relating to private individuals.¹⁷ The founding of the Initiative Group for the Defense of Human Rights in the USSR, which emerged from the petition campaigns of the later 1960s, was nonetheless the first time that the generally individualistic human rights activists joined together in an informal organization.¹⁸

On November 4, 1979, Andrei Sakharov, Valery Chalidze and Andrei Tverdokhlebov established the Moscow Human Rights Committee; this was the only dissident group that Sakharov would join. The Committee aimed to engage in dialogue with the Soviet government, but this turned out to be a “monologue with a gagged mouth,” in Andrei Amalrik’s words.¹⁹ A half a year later, the Committee joined the International League for Human Rights. Even though the Committee was established to analyze and offer political advice on human rights issues, many private individuals turned to the Committee for assistance.²⁰

In September 1974, Valentin Turchin and Andrei Tverdokhlebov founded an Amnesty International group in the Soviet Union.²¹ As the *Chronicle of Current Events* announced in December 1974, “The declaration of the founding of the group was issued by 11 people, and was dated October 1973. Anyone who wishes to participate in the work of the Soviet group can contact the head of the group in Moscow, Valentin Turchin (Tel. 129 25 30) or secretary Andrei Tverdokhlebov (Tel. 297 63 69).” The amount of time that passed between the establishment of the group and the announcement hints at the difficulties the Soviet human rights activists faced in registering their group with the international organization. Yuri Orlov remembered the visit of the representatives to Moscow, who expressed numerous concerns:

It would be difficult to negotiate with a totalitarian government; we had to expect challenges from the KGB; we would have difficulties sending delegates to Amnesty congresses; Tverdokhlebov should direct his efforts towards more worthwhile activities than to an Amnesty group “if he wanted to overthrow the system.” “That is not our goal,” I announced to the room, just in case. After several hours of negotiations, the Amnesty representatives agreed to a compromise. In two months, Amnesty would register us as a “group” – the lowest level of member organization, which did not entail the right to send delegates to congresses. ... When Sean MacBride was awarded the Lenin Prize in 1977, many of us had already been arrested for our beliefs.²²

Ludmilla Alexeyeva described the role of the Soviet Amnesty group, which was assigned cases from Yugoslavia, Uruguay and Sri Lanka, as follows: “The appearance of Amnesty International in the Soviet Union strengthened the international ties of Soviet human rights activists and helped them learn about human rights in other countries. For that reason alone, the experience was valuable for creating an independent social association.”²³ Among the members of the Soviet Amnesty group were the Ukrainian dissident Mykola

16 Alexeyeva, 215. The first Soviet dissidents to appeal to the world public were Larisa Bogoraz and Pavel Litvinov, who wrote an open letter protesting the trial of Alexander Ginsburg and Yuri Galanskov in January 1968; see Amalrik (1983), 50f. Alexander Ginsburg and Yuri Galanskov were arrested along with Vera Laškova and Aleksei Dobrovolski because they published the White Book about the trial of Yuli Daniel and Andrei Sinyavsky in the samizdat. Their trial was known as the Trial of the Four, which was documented in a White Book by Pavel Litvinov, which was then published by Andrei Amalrik after Litvinov’s arrest.

17 *KHVS* 8 (1969): 175f.

18 On the 1974 founding of the Initiative Group for the Defense of Human Rights in Georgia, and its central figure Zviad Gamsachurdia, see Alexeyeva, 86.

19 Amalrik (1983), 34.

20 *KHVS* 34 (1974): 64; and Alexeyeva, 217f.

21 Alexeyeva, 245f.

22 Jurij Orlov, *Ein russisches Leben* (Munich, 1992): 213f. Seán MacBride was one of the founders of Amnesty International in 1961.

23 Alexeyeva, 246.

Rudenko, the Georgian dissident Zviad Gamsakhurdia and Sergey Zheludkov, who came from the Russian Orthodox dissident movement. In December 1973, the *Chronicle* reported in its column “news from the samizdat” that Tverdokhlebov had published three issues of the journal *Meždunarodnaja Amnistija* (Amnesty International), and hoped to establish it as a regular publication.²⁴

“Only International Public Support Can Protect Us”: Helsinki Groups in the Soviet Union

By the time the Final Act to the Conference on Security and Cooperation in Europe was signed in Helsinki in 1975, the national and religious dissident movements and human rights activists in the Soviet Union had developed a strong sense of justice. Although they had some reservations about its foreign policy implications, they viewed the Final Act as relevant to the issue of human rights.²⁵ In May 1976, the Moscow Helsinki Group was founded to promote the fulfillment of the Helsinki Accords in the USSR. In November 1976, Ukrainian and the Lithuanian Helsinki Groups were established, followed by the Georgian Group in January 1977 and the Armenian Group in April 1977. In addition, the Working Commission to Investigate the Use of Psychiatry for Political Purposes was founded in January 1977 under the aegis of the Moscow Helsinki Group. The Commission was advised by psychiatrists and jurists, and continued its work until its last member was arrested in 1981. On May 20, 1976, only eight days after the establishment of the Moscow Helsinki Group, the *Chronicle* reported on the first reactions by the state authorities. Orlov was summoned to the KGB, and TASS published a declaration abroad stating that “Orlov’s actions are difficult to interpret as anything other than an attempt to cast doubt among the international public on the sincere efforts by the Soviet Union to unconditionally implement the international obligations that it has assumed.”²⁶

The state authorities also reacted promptly, and with illegal means, to the establishment of the Ukrainian Helsinki Group. After Mykola Rudenko announced the founding of the Ukrainian Helsinki Group to the foreign journalists accredited in Moscow on November 9, 1976, unknown persons threw rocks into his apartment, injuring an elderly member of the group, Oksana Meško. The first memorandum by the Group, dated December 6, described this attack as a clear signal: “Only international public support will be able to protect the group from such acts of brutal violence.”²⁷

Shortly thereafter, on November 26, 1976, the establishment of the Lithuanian Helsinki Group was announced at a press conference held by the Moscow Group. Ludmilla Alexeyeva described her role as follows: “The Lithuanian Helsinki Group did not take a leading position within the Lithuanian opposition like the Moscow Group did in the human rights movement there or the Ukrainian Group in the Ukraine. However, the pure human rights emphasis of the Lithuanian Helsinki Group was one of its chief attractions to the national and civil resistance efforts of the Lithuanian Republic’s neighbors – Estonia and Latvia.”²⁸ The Georgian and Armenian Helsinki Groups, which were founded on January 14 and April 1, 1977, respectively, focused primarily on national issues, as did the Ukrainian group, which related in particular to the protection of their language and culture.

24 *KHIS* 30 (1973): 103f.

25 See also the contribution by Ernst Wawra in this volume.

26 *KHIS* 40 (1976): 120.

27 Vasyli Ovsijenko, ed., “Memorandum No. 1,” in *Ukraïns’ka Gromads’ka Grupa spryjannja Hel’sinks’kych uhod*, vol. 2 (Charkiv, 2001): 34-43, see esp. 36.

28 Alexeyeva, 51.

Four members of the Georgian Helsinki Group were arrested in April. In December, the Armenian group disbanded after two of its members were arrested. While the Armenian group had managed to release several statements on human rights violations in the Armenian SSR as well as a statement to the Belgrade conference, the Georgian group only succeeded in publishing a document about the release of the group member Viktor Rchcheladze from the Georgian Ministry of Culture and about his work on behalf of the Meskhetians.²⁹ Most effective were the Moscow and the Ukrainian Helsinki groups, who compiled numerous memoranda, held press conferences, and looked after the victims of human rights violations.

In the early 1980s, when the Soviet Union’s international reputation had been damaged by the invasion of Afghanistan, the persecution of the dissidents intensified. In the 1970s, especially the Moscow and the Ukrainian Helsinki Groups managed to recruit new members to replace those who had been arrested. However, the increased repression of 1981–1982 spelled the end of the groups that were still active at the time. In Lithuania, four members of the Helsinki group were incarcerated, and an additional member, the priest Bronislovas Laurinavičius, was killed.³⁰ When the 74-year-old attorney Sofia Kalistratova was threatened with arrest in Moscow in 1982, the last remaining members of the Moscow group who had not been arrested announced the dissolution of the group.³¹ By contrast, the Ukrainian Helsinki Group never formally disbanded. In the early 1980s, when 18 members of the Ukrainian group were incarcerated in the forced labor camp near Kuchino in the Urals alone, the Ukrainian group stated that its activities had been “displaced” to the camps.³² In addition, beginning in 1977 the Ukrainian group had representatives abroad, with Leonid Plyushch in France and Nadiya Svitlychna, Pyotr Grigorenko and Nina Strokata in the United States.³³ With glasnost and perestroika underway and with the return of the first Ukrainian group members from the camps, they resumed their work for a democratic Ukraine in 1987. Their group later became the nucleus for a number of political parties and democratic initiatives.³⁴ The Moscow Helsinki Group also resumed its activities and continues to operate today.

With the Bible and the Declaration of Human Rights: The Christian Dissidents’ Conception of Law

The appeal to law was central for all of the dissident currents in the Soviet Union, including the comparatively small number of Russian Orthodox dissidents. In December 1965, two young orthodox priests, Nikolai Elishman and Gleb Yakunin, sent a letter to the Patriarch of Moscow and Chairman of the Presidium of the Supreme Soviet of the USSR. In it, they invoked the constitution and Soviet law to demand the right to freedom of belief and the separation of church and state. The authorities, with the cooperation of the church hierarchy, constantly circumvented both of these fundamental principles. Some time later, Igor Shafarevich and Gleb Yakunin published analyses of Soviet laws on religion in the samizdat.³⁵

29 Alexeyeva, 76f and 88; on the founding of the Georgian Helsinki Group, see *KhTS* 44 (1977): 27.

30 Alexeyeva, 51; *KhTS* 63 (1981): 102f.

31 See Document 195, “O prekreaščēnii raboty Moskovskoj grupy Chel’sinski,” reprinted in *Dokumenty Moskovskoj Chel’sinskoi gruppy, 1976-1982*, eds. G. V. Kuzovkin, and D. I. Zubarev (Moscow, 2006): 555. See also *KhTS* 65 (1982); on Sofia Kalistratova, see also Yevgenija Pechuro, ed., *Zastupnica: Advokat S.V. Kallistratova, 1907-1989* (Moscow, 1997).

32 Vasył Ovsijenko, “Pravozachysnyj ruch v Ukraīni (Seredyna 1950-ch – 1980-i roky),” in *Ukraīns’ka Gromads’ka Grupa spryjannja Hel’sinski’kych uhod*, vol. 1, ed. Yevgen Zacharov (Charkiv, 2001): 5-42, see esp. 38; the members of the Ukrainian Helsinki group spent a total of 170 years in prisons, psychiatric institutions, and in exile. When that figure is added to the years that they had spent imprisoned before joining the Group, the total is some 550 years. There are different figures for the number of members of the Ukrainian Helsinki group; this author has counted a total of 49 members based on a variety of sources.

33 *Ibid.*, 30.

34 *Ibid.*, 39ff.

35 Igor Shafarevich, *Zakonodatel’stvo i religii v SSSR* (Paris, 1973); Gleb Yakunin, “O sovremennom položenii RPC i perspektivach religioznogo vozroždenija Rossii,” in *SSSR: Vnutrennye protivorečija*, vol. 3, ed. Valerij lidze (New York, 1982): 149-197.

Similar to the Jewish and German dissident movements, many in the independent Pentecostal movement began to pursue emigration.³⁶ In 1977, Nikolai Goretoy, who was a priest in a Pentecostal church in the far eastern region of the Soviet Union, told foreign journalists in Moscow, “We are free people, not prisoners or slaves. We are appealing to President Carter as a brother in Christ for assistance in implementing the right to emigration for believers on the basis of the agreements signed by the Soviet Union as well as the Universal Declaration of Human Rights.”³⁷

Ludmilla Alexeyeva estimates that of all the Evangelical Free Churches who opposed the unacceptable state regulations, the Church of True and Free Seventh-day Adventists most strongly invoked civic rights in defense of their claims. Since the mid-1970s, the independent Adventists published religious literature and human rights documents through the True Witness publishing house in Samarkand. In 1975, their apartments in Samarkand were searched and their bibles, the Universal Declaration of Human Rights, and additional documents were seized. The Free Adventists demanded the return of the confiscated materials, but only their bibles were returned.³⁸ When the new constitution, which was ultimately passed in 1977, was still under debate, many Adventists sent letters to the Constitutional Commission demanding the inclusion of democratic rights, including the right to freedom of religion and conscience.³⁹

At a press conference on May 11, 1978, Rostislav Galeckiy stated that the Free Adventists had formed a group two years earlier that was active on legal issues and had already published 31 documents. He declared that the group would now abandon anonymity and carry out their activism openly and in public. After naming the seven members of the group, Galeckiy described their goals as follows: to submit protests and appeals to local authorities, international organizations, and the governments of Helsinki Agreement signatory states, as well as to work to educate their church members who were being persecuted on religious grounds about their legal rights. The group also provided assistance to the victims of persecution and their families.⁴⁰ The preacher Vladimir Shelkov described the activities of the Free Adventists as “a peaceful battle for basic rights and freedoms of humans and citizens.”⁴¹

At the same time as the Helsinki groups were formed, a number of committees were founded to work on behalf of religious rights. On December 27, 1976, Gleb Yakunin founded the Christian Committee for the Defense of the Rights of Believers in the USSR in Moscow, which sought to collect and disseminate information about the situation of Orthodox Christians and other religious groups in the Soviet Union. The Committee also worked to reopen churches, monasteries and convents, and to defend the victims of religious persecution. Their founding declaration stated: “At present neither the episcopate of the Russian Orthodox Church nor the leaders of other religious organizations are defending the religious rights for various reasons. Under these circumstances, the Christian public must assume responsibility for the legal defense of religious rights.”⁴²

In November 1978, five Lithuanian priests founded the Catholic Committee for the Defense of the Rights of Believers. The Committee published a number of declarations, including one protesting the new regulations on religious associations. As Ludmilla Alexeyeva wrote, “The majority of Catholic priests openly support this declaration by the Catholic Committee, and thanks to their opposition the new regulations are largely ineffec-

36 I am referring here only to the independent orthodox and free churches, not the churches that accepted the authority of the state.

37 *KHTS* 45 (1977): 68.

38 *KHTS* 38 (1975): 68.

39 *KHTS* 46 (1977): 93.

40 *KHTS* 49 (1978): 61f.

41 Vladimir Shelkov, *Edinyj ideal* (Munich, 1976): 1.

42 Christian Committee, ed., *Christianskij komitet zaščity prav verujuščich v SSSR: Dokumenty. Vol'noe slovo*, vol. 28 (Frankfurt a.M., 1977): 3.

tive in Lithuania.”⁴³ During the Madrid Conference in November 1980, the Catholic Committee sent a declaration to the Helsinki Accord signatory states describing the violations of the rights of religious believers.

On September 9, 1982, Josyp Terelya, who at the time lived in Transcarpathia, founded the Initiative Group for the Defense of Believers and the Church in the Ukraine.⁴⁴ The Initiative Group fought for the legalization of the Ukrainian Uniate Church (UUC): “From now on, all information about the UUC will be conveyed to the international public – the Catholics of the world should know and should remember the conditions under which we exist.”⁴⁵ The central demand of the group was the reopening of the churches, monasteries and convents of the Ukrainian Catholic Church, as well as the seminaries at Lviv and Uzhhorod, and to obtain permission to send Ukrainian theology students to study in Rome and other European cities.⁴⁶ The Initiative Group for the Defense of Believers and the Church published the Chronicle of the Catholic Church in the Ukraine. After the second arrest of Josyp Terelya in February 1985, the Initiative Group disappeared from the historical record.⁴⁷

The Struggle for Workers’ Rights and against Red Tape: The Independent Trade Unions

“They [the unions] are not always tenacious in defending collective agreements and work safety, and they often are weak in their response to violations of workers’ rights, and in countering bureaucracy and red tape.”⁴⁸ These were the words of Leonid Brezhnev at the 26th Congress of the Communist Party of the Soviet Union in 1981. The movement for socioeconomic rights in the Soviet Union took shape against the backdrop of these conditions. The earliest efforts began in 1977 with collective missives to the international public, which were passed on to foreign journalists at press conferences. The signers came from several different regions of the Soviet Union and had met in government agency waiting rooms in Moscow, where they had gone to protest their dismissals from their jobs. The protesters cited the Soviet constitution and Soviet law in support of their complaints. In November 1977, a collective complaint signed by 33 protesters stated: “it is the solemn duty of all citizens of the Soviet Union to preserve our Socialist properties and to work against gross violations of human rights.”⁴⁹

Gradually, a movement began to form to work for a greater right of co-determination in order to eliminate problems such as corruptions and violations of labor laws. This movement also protected workers from arbitrary dismissal and other forms of harassment, which were often directed against labor activists. In April 1978, Vsevolod Kuvakin led a group that attempted to officially register the Independent Trade Union of Workers. He sent copies of the founding declaration to the International Labor Organization (ILO) and the International Confederation of Free Trade Unions (ICFTU).⁵⁰ When this founding declaration went largely unnoticed, Kuvakin founded the Working Group for the Defense of Labor, Economic and Social Rights in the USSR, which publicized violations of labor law and comparative studies on work and living conditions of workers in dif-

43 Alexeyeva, 47.

44 Document 39, File 67, Archive Smoloskyp, Kiev.

45 Document R-9, File 67, Archive Smoloskyp, Kiev. The 1596 Union of Brest placed the Orthodox Church of western Ukraine under the Roman Church, although they were permitted to keep their Byzantine rites. Under pressure from the Soviet authorities, a council of the Uniate Church dissolved the union with Rome in March 1946 and joined the Moscow Patriarchate. Only half of the Ukrainian Orthodox priests followed; many were arrested while others only formally acceded to the jurisdiction of Moscow. A branch of the church went underground. For more on the Uniate Church, see also Iwan Hvat, “Die ukrainische katholische Kirche des byzantinischen Ritus,” in *Kirche in Not* 23 (1975): 111-113.

46 The Initiative Group also compiled their demands into a memorandum, which they directed to the Ukrainian government; see Sofija Karasyk, “Josyp Terelja,” in *Mižnarodnyj biografičnyj slovnyk dysydydentiv*, 1:2 (Charkiv, 2006): 771-774; and also *KhTS* 65 (1982).

47 Cronid Lubarsky, ed., *Vesti iz SSSR: Prava Čeloveka*, vol. 2, see Journal No. 21 from the year 1983, Art. 21-28 (Munich, undated).

48 *Pravda*, Feb. 24, 1981.

49 “Svobodnyj profsojuz trudjaščichsja: Ustav i drugie dokumenty,” in *Vol’noe Slovo* 30 (Frankfurt a.M., 1978): 56.

50 The International Labor Organization (ILO) is based in Geneva; the headquarters of the ICFTU was in Brussels.

ferent countries in the samizdat. The best-known organization was the Free Interprofessional Association of Workers (SMOT), whose establishment was announced to Western press correspondents on October 28, 1978. By December 1978, ten groups from a variety of locations, with a total of 150 to 200 members, had joined SMOT. They were not only interested in representing workers' interests, but also in cultural and human rights issues more generally, which they also discussed in their information bulletin. The SMOT, which was an initiative founded by intellectuals, succeeded in bringing the social problems of working people to the attention of human rights activists. Independent trade union activists and socialist groups also published pamphlets on socioeconomic issues. In December 1982, for example, SMOT pamphlets circulated in Perm and Ivanovo called on workers to boycott the subbotnik (voluntary Sunday work) and participate in the struggle for workers' rights. In April 1983, pamphlets with a similar content appeared in Moscow, signed by a group that called itself the "New Path."⁵¹

"To the Success of Our Hopeless Cause!": Dissidence as an Act of Self-Liberation⁵²

In his memoirs, Sergei Kovalev described what united the diverse strains of dissidents:

... our own moral incompatibility with a regime that tramples upon the dignity and rights of the individual. There is no other way to explain the behavior of people who did not believe they would succeed, even partially, during their own lifetime. What we did we did first of all for ourselves, to liberate ourselves from what was for any adult person a demeaning domination by the authorities. Above all, we wanted to liberate ourselves, not to liberate others.⁵³

How did these dissidents attempt this act of self-liberation? Under the conditions of the Soviet system, the dissidents developed specific methods to express their opposition. Without asking for permission from the party and the state, they collected and disseminated information, formed groups and held meetings. By protesting the denial of basic rights for themselves and their fellow citizens, they staked their claim to multiple basic rights and freedoms. First, they struggled for the right to freedom of opinion and information with letter campaigns and the samizdat, as well as pamphlets that were distributed and pasted on walls. Second, they advocated the right to freedom of association through the establishment of groups and organizations. Third, they advocated the right to freedom of assembly, through demonstrations, popular assemblies (by Crimean Tatars and the Meskhetians) and religious services within the independent and free churches, the celebration of their own memorial holidays, and poetry readings and nonconformist exhibitions, which were often held outdoors.⁵⁴ In addition, they fought for the right to private religious education, through the founding of underground seminaries.

However, there are also rights that cannot be achieved unless they are granted by the state. For these rights, the dissidents could only make demands and engage in symbolic action. For the right to freedom of movement, the Crimean Tatars attempted to return to the Crimea, and Jews, ethnic Germans and Pentecostals requested permission to emigrate. For the right to stand in elections, they supported independent candidates,

51 Alexeyeva, 316ff; Karl Schlögel, *Widerstandsformen der Arbeiterschaft in der Sowjetunion: 1953-1983* (Berlin, 1982): 171, 180, 190; and Marina Sedunova, *K istorii SMOTa – neoficial'nogo profsojuzna rubeža 1970-80-ch gg.*, manuscript of a lecture delivered at a conference organized by the Memorial titled "Dissidentskoe dvizhenie v SSSR. 1950e-1980e gg. Predmet issledovaniya. Istočniki. Metodika izučeniya," held in Moscow, Aug. 24-26, 1992.

52 This was a favorite drinking toast among many dissidents.

53 Sergei Kovalev, *Der Flug des weißen Raben. Von Sibirien nach Tschetschenien: Eine Lebensreise* (Berlin, 1997): 110.

54 These national memorial celebrations included May 22, the Ukrainian day commemorating the national poet Taras Ševčenko; the Crimean Tatar's celebration of Lenin's birthday on April 22 and the anniversary of their deportation on May 18; the Jewish commemoration of the massacre at Babi Yar in late September and other religious holidays commemorated at the Moscow Synagogue.

for example candidates from the group Elections 79.⁵⁵ And for the right to a fair trial, they remained uncompromising when placed on trial and showed solidarity with friends.

In order to demonstrate their independence from and disagreement with the state, the dissidents also engaged in other forms of civil disobedience, including forms of self-sacrifice. For example, they took legal action against the arbitrary use of state power, rejected national awards or Soviet citizenship, boycotted elections, refused military service, undertook hunger strikes and carried out public self-immolation.⁵⁶

The forms of dissident action were varied, and dissident movements and their members also varied in their goals and points of view. However, the dissidents were united in their appeal to the rule of law and in their refusal to engage in violence. They did not believe that the ends justified the means and insisted that their own actions be in conformity with their goals.

“We Did Not Sign Those with You in Mind”: State Arbitrariness and the Law

The opening quotation by Vladimir Bukovsky on the compatibility of the law with the worst forms of state terror against the Soviet population in the 1930s elicits the legal nihilism that was both the origin and the outcome of this terror.

Soviet citizens in the post-Stalin era were confronted with many different legal norms, some of them contradictory. These norms ranged from international agreements to constitutional principles and laws that protected the rights and freedoms of citizens, to laws that sometimes contradicted these same principles. Other laws were specifically formulated to persecute unpopular individuals and groups. These latter laws fell under the so-called “flexible and all-purpose law” that could be employed in an arbitrary fashion, even when no crime had been committed. Although formally illegal under international standards of jurisprudence, such laws were used by the state in cases like that of Gennadi Kryuchkov, a Baptist who was put on trial in Moscow in November 1966. Kryuchkov invoked the constitutional principle of freedom of religion and the law on the separation of church and state and argued that the state had made it impossible for a Christian to observe all the laws on religion in the Soviet Union.⁵⁷

The laws that the Soviet state could use at any time and with complete arbitrariness against its citizens, and which were often used to convict dissidents, included Articles 70 (“Anti-Soviet Agitation and Propaganda”), 190-1 (“Slander of the Soviet State or Social System”) and 190-3 (“Collective Action in Disturbance of the Public Order”) of the Russian Soviet Federative Socialist Republic penal code, and the corresponding articles in the penal codes of the other Soviet Republics. Article 227 was also used against religious dissidents. The introduction of Articles 188-3 in October 1983 allowed the state to extend the terms of convicts, thus facilitating the ongoing persecution of political prisoners.⁵⁸

The cynical exploitation of the law on the part of the state is illustrated by an episode that Andrei Amalrik describes in his memoirs: after his return from exile, he again received a summons, where he was accused of refusing regular employment. Amalrik responded that he was working “at my desk; and I also invoked the

55 Alexeyeva, 262.

56 Refusing citizenship was a symbolic act, as it would have required recognition by the state to take effect. Public self-immolations were mainly carried out by Crimean Tatars, Ukrainians, and citizens of the Baltic republics.

57 Gerhard Simon, “Der Kampf für die Glaubentoleranz,” in *Opposition in der Sowjetunion. Berichte und Analysen*, ed. Heinz Brahm (Düsseldorf, 1972): 137-162, see esp. 138.

58 Article 190 was added to the Russian Soviet Federative Socialist Republic penal code in September 1966; see Radio Liberty, ed., *Research No. 430* (Munich, 1983).

conventions signed by the Soviet Union regarding the abolishment of forced labor. The state's attorney replied with great common sense: 'But we did not sign those with you in mind.'⁵⁹

How to Negotiate with Officials: The Law as the Only Language

At the start of the 21st century, we are witnesses to events in Russia that are the legacy of two contradictory traditions: the tradition of legal nihilism, in which the state undertakes illegal actions and even violence, as was exemplified by Andrei Amalrik, and the unconditional appeal to the law, as was exemplified by Alexander Esenin-Volpin and his fellow dissidents.

The state used the law "as an instrument of control, as a tool of state politics, as a mechanism for achieving and defending state interest, and the interest of the state was the highest interest of all."⁶⁰ The dissidents countered this view with the primacy of the law, arguing that "the law takes precedence over power."⁶¹ Although the Soviet Union had signed the humanitarian articles of the Helsinki Final Act primarily due to foreign policy considerations, Soviet citizens began to invoke the Act to justify their demands. Andrei Amalrik called the sphere of conflict occasioned by these contradictory goals the "gray zone," in which laws existed that the Soviet state preferred to ignore. Whereas the dissidents attempted to "lighten" this gray zone by invoking the law on behalf of their demands, the state authorities attempted to "darken" it amending existing laws, carrying out show trials, and undertaking other forms of repression.⁶² In the process, the dissidents were often caught between the constitution and the law; the same rights that were guaranteed under the constitution were retracted by the laws. The law was employed as a means of communication, as the sphere in which the conflict took place between citizens who were demanding their rights and freedoms and the repressive state. As Larissa Bogoraz asked:

If we are not going to turn away, to remain silent, what language can we use to speak to power without losing our independence, without becoming trapped by doctrine and a political cat-and-mouse game? We were lucky to realize that the law could be this language – the only language in which the state is obligated to speak with its citizens; a language that is not part of the sphere of politics and political dogma; a language that prescribes equality for all participants in the conversation, whether an individual, a collective, the society, the "people," or the state.⁶³

However, some of the dissidents were also critical of this reliance on the law. They argued that the state could only be said to be in violation of the law when the rule of law actually existed; where legal codes and declarations only served to mask arbitrary politics, any invocation of the law and violations of the law on the part of citizens was less than useless.⁶⁴ Mario Korti argued that the slogan "adhere to the Soviet Constitution," which hung on banners at the protest December 5, 1965, was ultimately a statement of loyalty toward the Soviet power, which had assumed power by disbanding the constitutional assembly and which refused to allow free and fair elections. The dissidents were thus arguing over the letter of the law instead of grasping its essence.⁶⁵ But even if the 1936 Constitution, which guaranteed the basic rights of citizens, was acknowledged as a farce,

59 Amalrik (1983), 391.

60 Bogoraz, 525.

61 Alexander Esenin-Volpin, "Zakony vyše vlasti! Interview mit Alexander Esenin-Volpin," in *Karta: Rossijskij nezavisimyj istoričeskij i pravozaščitnyj žurnal*, 7-8 (1995): 37f.

62 Andrei Amalrik, *Kann die Sowjetunion das Jahr 1984 erleben?* (Zurich, 1992), 41.

63 Bogoraz, 525.

64 *Ibid.*, 542.

65 Mario Korti, "O nekotorych aspektach dissidentskogo dviženija," in *Karta: Rossijskij nezavisimyj istoričeskij i pravozaščitnyj žurnal* 6 (1994): 42-46, see esp. 45.

what else could be done other than take the state authorities at their word? The dissidents showed that they were willing to pay a high price with the years they spent in prisons and penal colonies, while the Soviet authorities undermined their own legitimacy with every criminal conviction of dissenters. That was the true accomplishment of the dissidents; they insisted on their rights as Soviet citizens fully aware that they were not only morally in the right, but that they had the law on their side.

THE HELSINKI FINAL ACT AND THE CIVIL AND HUMAN RIGHTS MOVEMENT IN THE SOVIET UNION

The average dissenter has operated openly by trying to draw the regime's attention to his protest; or semi-openly, by engaging in activities like circulating forbidden literature, which, as he fully realizes, must lead sooner or later to an interview with the secret police, loss of his job, perhaps exile or a camp. In most cases it is not a craving for martyrdom, but a rational design which lies behind such tactics: to make the regime come out from behind its protective screen of ideology and "socialist legality."¹

This description by Adam Ulam captures the underlying principles of the foundation of the Public Group to Promote Observance of the Helsinki Agreements in the USSR. Generally known as the Moscow Helsinki Group, the organization was founded on May 12, 1976 following the passage of the Helsinki Final Act. The Helsinki Final Act, which was also known as the Helsinki Accords, was signed by 35 nations on August 1, 1975, during the Conference on Security and Cooperation in Europe (CSCE), held in Helsinki, Finland. According to one of the key clauses in the Accords, the signatories had to "respect human rights and fundamental freedoms, including freedom of thought, conscience, religion or belief."² The full text of the Act was published in the Soviet press and would soon become a rallying point for dissenters (*inakomyslyashchiy*) and dissidents in their struggle for human rights.³ A few months after the signing, a Moscow group was formed to monitor the Soviet government's behavior under the provisions of the Act. Much to the consternation of the Soviet authorities, the Helsinki Accords initiated the development of a new era in the Soviet civil and human rights movement known as the "Helsinki period."⁴

The Moscow Helsinki Group would play an influential role in the Soviet human rights movement. The Group drew both its legitimacy as well as its name from the human rights provisions contained in the Final Act.⁵ Its members included a number of leading dissidents such as Yuri Orlov and Alexander Ginzburg. In the course of

1 Adam B. Ulam, *Russia's Failed Revolutions: From the Decembrists to the Dissidents* (London, 1981): 420.

2 Helsinki Final Act 1975, reprinted in *100(0) Schlüsseldokumente zur deutschen Geschichte im 20. Jahrhundert*, accessed on April 10, 2009 from http://mdx.bib-bvb.de/de1000dok/dok_0024_ksz.html?object=translation&lang=de&teil=1.

3 For a discussion of the terms "dissident" and "dissenter" (literally, "inakomyslyashchiy" or "one who thinks differently") see Ludmilla Alexeyeva, *Soviet Dissent: Contemporary Movements for National, Religious, and Human Rights* (Middletown, 1985); Larissa Bogoras and Alexander Daniel, "Auf der Suche nach einer nichtexistenten Wissenschaft: Dissens als historisches Problem," in *Rußland heute: von innen gesehen. Politik, Recht, Kultur*, ed. Arsenij B. Roginskij (Bremen, 1993): 117-135; Christian Schneider "Der unsichtbare Dritte" in *Mittelweg* 36:2 (2001): 8-29; Anke Stephan, *Von der Küche auf den Roten Platz: Lebenswege sowjetischer Dissidentinnen* (Zürich, 2005).

4 Alexeyeva, 335.

5 See the Declaration of Foundation "Ob obrazovanii obshchestvennoy grupy sodeystviya vypolneniyu khel'sinkskikh soglasheniy v SSSR – The Formation of the Public Group to Promote Observance of the Helsinki Agreements in the USSR" of the Moscow Helsinki Group, reprinted in *Dokumenty Moskovskoy Khel'sinskoy grupy, 1976-1982*, eds. G. V. Kuzovkin and D. I. Zubarev (Moscow, 2006): 23f.

their work, the members of the Moscow Helsinki Group came in contact with various state authorities, including the Communist Party, the KGB, and the courts. In addition, they came to the attention of an international audience, primarily via their contacts to Western journalists who were active in the Soviet capital. In the years following its foundation, the Moscow Helsinki Group would continue to serve as the cornerstone of the emerging Soviet human rights movement.⁶

This essay will describe how the provisions of the Helsinki Final Act were received by the Soviet Union and incorporated into an agenda for change. I focus on the Moscow Helsinki Group to examine how international agreements such as the Helsinki Final Act can serve to mobilize human rights activists and agendas. In doing so, I will illustrate the struggles and the significance of the human rights movement in the Soviet Union during the 1970s.

The Origins of the Civil and Human Rights Movement in the Soviet Union

The inception and inspiration for the later Helsinki movement can be traced back to early civil and human rights activism in the Soviet Union. Although the earliest starting point of the movement might be traced back to the period of Khrushchev's Thaw, by 1968 the nascent Soviet human rights movement had definitively emerged on the political stage.

In the 1960s, a number of dissidents had begun to publish statements criticizing the oppression of the Stalin years and the abuse of human rights during the 1960s. Many of these critiques were published in the samizdat. Although the writers did not specifically use terms such as "human rights," they often legitimized their critiques by referring indirectly to the principles of the movement. Some of the most famous writings include Boris Pasternak's *Doctor Zhivago*, Alexander Solzhenitsyn's *One Day in the Life of Ivan Denisovich* and *The Gulag Archipelago*, and Andrei Amalrik's *Will the Soviet Union Survive until 1984?* In the mid-1960s, a number of writers who warned of a new wave of Stalinization were put on trial. One such a case was the 1966 trial of Yuli Daniel and Andrei Sinyavsky, who had published their writings in the West under the pseudonyms Nikolai Arzhak and Abram Tertz.⁷ In an unprecedented move, the two defendants denied the accusations. This shattered the conventions created by the show trials during the Stalinist era, whereby defendants were typically coerced to enter a plea of guilty in order to demonstrate contrition for their supposed crimes.⁸ Daniel and Sinyavsky were accused of "verbal anti-Sovietism" and writing slanderous statements against the Soviet system, and of allowing their works to be published abroad where they were used to malign the Soviet Union.⁹ The two writers were sentenced to seven years in a labor camp. Alexander Ginzburg compiled documents related to the trial and published the work underground and abroad as *The White Book*.¹⁰ Both Ginzburg and the authors of the individual documents were imprisoned for this "illegal trial transcript." In imposing such harsh sentences, the authorities hoped to make an example of Daniel and Sinyavsky. Instead the verdicts had the opposite effect, resulting in an enormous increase of protests and a signature campaign against the verdict. These protests created unprecedented publicity for dissenting literature and writings in the Soviet Union.

Another example of early human rights activism in the Soviet Union was the annual Pushkin Square demonstrations. The first demonstration was held on December 5, 1965 on the anniversary of the Soviet constitu-

6 See Alexeyeva, 286.

7 Max Hayward and Leopold Labedz, eds., *On Trial: The Case of Sinyavsky (Tertz) and Daniel (Arzhak)* (London, 1967).

8 See Jörg Baberowski, *Der Rote Terror: Die Geschichte des Stalinismus* (Munich, 2003); Robert Conquest, *The Great Terror: A Reassessment* (London, 1990); and Karl Schlögel, *Terror und Traum: Moskau 1937* (Munich, 2008).

9 On the accusation of "verbal anti-Sovietism," see Alexeyeva, 277.

10 Alexander Ginzburg, ed., *Weißbuch in Sachen Sinjawschij – Daniel* (Frankfurt a.M., 1966/67).

tion. Beginning in 1966, Andrei Sakharov and other leading human rights activists attended the December 5th demonstrations to hold brief speeches and participate in a moment of silence. These demonstrations were the first rallies in several decades to be organized entirely by private citizens, and the first rallies in decades to be held on a date other than May 1. The demonstrators used the occasion to express their solidarity with political prisoners in the Soviet Union, and to draw attention to the legal violations and abuses carried out by the Soviet state.¹¹

A number of factors coalesced in 1968 to mark the definitive emergence of the human rights movement in the Soviet Union.¹² In spring 1968, Andrei Sakharov, who was also the co-inventor of the Soviet hydrogen bomb, published *Progress, Coexistence and Intellectual Freedom*, in which he emphasized the convergence of the two superpowers.¹³ The principles Sakharov outlined in this essay would serve as further inspiration for the emerging human rights movement. As Alexander Daniel has noted, “Once this essay had appeared, the concept of human rights was no longer merely an aide for moral orientation; it had taken on a new character (not only for Russia, but for the whole world), that of political philosophy.”¹⁴

The second key event marking the founding of the Soviet human rights movement was the establishment of the *Chronicle of Current Events* (“*Khronika tekushchikh sobytiy*”). Published in over 60 issues from 1968 to 1981, the *Chronicle* documented numerous cases involving violations of human rights. Every issue of the *Chronicle* reprinted Article 19 of the 1948 UN Universal Declaration of Human Rights, which stated: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”¹⁵ The *Chronicle* aimed to serve as a source of information for both the human rights movement and for the world public. The issues were compiled and distributed by the samizdat, an underground self-publishing movement established to elude the oversight of state censorship. Because the *Chronicle* authors rarely had access to a printing press, they prepared up to seven or eight copies using carbon paper, either by hand or with a typewriter. Each recipient was then to follow the procedure of recopying and distributing the works. The result was a lively exchange of manuscripts, letters of appeal, poems, songs, and even reports on human rights violations on the part of the state.¹⁶ In addition to the individual works, the samizdat also published periodicals such as *Sintaksis*, *Sfinksy*, *Kokteyl* and *Feniks*. Vladimir Bukovsky, who documented the abuse of psychiatry for political purposes, defined samizdat as follows: “I myself write it, edit it, censor it, publish it, distribute it, and am imprisoned for it.”¹⁷

The final disillusionment and break with the state came in summer 1968 with the invasion of Czechoslovakia by the Soviet Union and other Warsaw Pact states. Before 1968, the majority of dissidents believed that the

11 See Alexeyeva, 269, 290-291 and Alexander Daniel, “Im Geist der Freiheit – Zur Geschichte der Menschen- und Bürgerrechtsbewegung in Russland,” in *Russland auf dem Weg zum Rechtsstaat? Antworten aus der Zivilgesellschaft*, ed. Deutsches Institut für Menschenrechte (Berlin, 2003): 18-41.

12 This list of events which took place in the Soviet Union in 1968 is by no means exhaustive. For example, for reasons of space I omit mention of the “Trial of the Four,” the “Appeal to the World Community” by Larisa Bogoras and Pavel Litvinov, and the demonstrations against the invasion of Czechoslovakia by the Soviet Union and Warsaw Pact allies in the wake of the Prague Spring.

13 Andrei Sakharov, *Progress, Coexistence and Intellectual Freedom* (New York, 1968).

14 Alexander Daniel, *1968 in Moscow: A Beginning*, accessed on April 22, 2009 from <http://www.eurozine.com/articles/2008-09-02-daniel-en.html>.

15 Universal Declaration of Human Rights 1948, accessed on April 9, 2009 from <http://www.un.org/Overview/rights.html#a19>.

16 The name “samizdat” was a play on the names of the state publishing houses, the Gosizdat and Goslitizdat. In addition, the “magnitizdat” (from magnitofon, or magnetic recorder, and izdatel'stvo, meaning publisher) were also widely distributed underground. Another form of distribution was the “tamizdat” (from tam izdatel'svo, meaning “published there”), in which works by Soviet authors were smuggled abroad for publication. See Dietrich Beyrau, *Intelligenz und Dissens: Die russischen Bildungsschichten in der Sowjetunion 1917 bis 1985* (Göttingen, 1993): 230-234; Daniel (2003): 21; and Gene Sosin, “Magnitizdat: Uncensored Songs of Dissent,” in *Dissent in the USSR. Politics, Ideology, and People*, ed. Rudolf L. Tökés (Baltimore, 1975): 276-309.

17 Wladimir Bukowski, *Wind vor dem Eisgang* (Berlin, 1978).

Soviet system was capable of reform.¹⁸ In response to the invasion, a number of Russian human rights activists gathered at the Red Square on August 25, 1968, carrying signs and placards demanding freedom and protesting the Soviet military intervention in Czechoslovakia. This demonstration was one of the first attempts to create a public response to a current political event in the Soviet Union. In his memoir, Sakharov described the invasion of Prague as follows:

The hopes inspired by the Prague Spring collapsed. And “real socialism” displayed its true colors, its stagnation, its inability to tolerate pluralistic or democratic tendencies, not just in the Soviet Union but even in neighboring countries. Two natural and rational reforms – the abolition of censorship and free elections to a Party Congress – were regarded as too risky and contagious. The international repercussions of the invasion were enormous. For millions of former supporters, it destroyed their faith in the Soviet system and its potential for reform.¹⁹

The Formation of the First Human Rights Groups

As the previous analysis demonstrates, the early human rights movement was dominated by individual activists. By the late 1960s, however, the first civil and human rights organizations in the Soviet Union had been founded. These organizations included the Initiative Group for the Defense of Human Rights in the USSR (1969), the Moscow Human Rights Committee (1970), Group 73 (1973), and Amnesty International Moscow, which was founded in 1974 as the successor to the Initiative Group. The organizations legitimized their work by referring to the principles enshrined in the Soviet constitution and international agreements such as the 1948 UN Declaration on Human Rights. The human rights organizations operated within the existing legal framework of the Soviet Union, and the groups took particular care to emphasize the legality of their actions. One important organization was the Moscow Human Rights Committee, founded in 1970 by Andrei Sakharov, Valery Chalidze and Andrei Tverdokhlebov. The Human Rights Committee was the first Soviet organization that dealt with the theoretical justifications for human rights as the basis for a program of action, as well as the first group to print the texts of a number of national and international laws and treaties on civil and human rights. Another key aspect of the Committee’s work was collecting evidence of violations of Soviet law and the UN Declaration on Human Rights on the part of state authorities.

The nascent human rights movement in the Soviet Union in the early 1970s included individuals and organizations who engaged in a variety of activities, from reading samizdat publications, to signing petitions, to quietly supporting the work of more vocal dissidents. All of these individuals and groups were linked by one common factor: the disproportionate response by the state authorities. As the human rights movement began to become active in the Soviet Union, the authorities responded with a broad palette of repressive measures, ranging from police and judicial warnings, humiliation and defamation of character, loss of employment, imprisonment, incarceration in psychiatric hospitals, internal exile, forced emigration, and the loss of Soviet citizenship. Soviet dissidents thus paid a high price for their struggle to achieve civil and human rights and the rule of law. By 1975, there were some 10,000 political prisoners in the Soviet Union.²⁰

A second commonality that united the Soviet human rights movement prior to Helsinki was its comparative invisibility abroad. Although leading dissenters such as Alexander Solzhenitsyn, Lev Kopelev and Andrei Sakharov were well known in Western Europe, they were only marginally successful in winning global attention

¹⁸ See Alexeyeva, 289.

¹⁹ Andrei Sakharov, *Memoirs* (New York, 1990): 289f.

²⁰ Bundesinstitut für ostwissenschaftliche und internationale Studien, ed., *Sowjetunion 1975/76. Innenpolitik, Wirtschaft, Außenpolitik: Analyse und Bilanz* (Munich, 1976): 75-82.

for their cause. It was not until the Helsinki Final Act that the human rights movement in the Soviet Union succeeded in becoming visible on the global stage.

The Helsinki Final Act and its Reception by Dissidents

The Conference on Security and Cooperation in Europe, which culminated in the signing of the Helsinki Final Act in 1975, was convened as a result of an initiative sponsored by the Soviet Union. Soviet proposals for an international conference dated back to the 1966 Bucharest Declaration. As a result of the different initiatives, delegations from 35 nations – including all European states with the exception of Albania, as well as Canada and the United States – convened to resolve a number of key issues. The foremost goal for the Soviet Union was the confirmation of the status quo in Europe, to be achieved via an agreement concerning the postwar national boundaries in Europe. In addition, the Soviet Union aimed to promote technological change with the West. To achieve these goals, the Soviet Union was willing to engage in discussions on human rights and the freedom of information, and even to permit these principles to be adopted into the Final Act.²¹

Although space does not permit a detailed description, the literature is unanimous in concluding that Leonid Brezhnev succumbed to a fatal miscalculation in the negotiations for Basket 3 and the Final Accords.²² According to Manfred Hildermeier, in Helsinki the Soviet Union committed “the gravest of errors,” while Marie-Pierre Rey described the Act as a “Pyrrhic victory.”²³ Stefan Plaggenborg asserted that the Soviet Union had “underestimated” the importance of Basket 3, while Vladislav Zubok concluded that the agreement ignited a “time bomb under the Soviet Regime.”²⁴ Indeed, Brezhnev had assumed that the principle of non-interference in domestic affairs would continue to hold sway even after the Final Act. Instead the international community and dissidents within the Soviet Union drew upon the principles of human rights under the Act to legitimize what became a fundamental shift in human rights activism and international negotiation. In contrast to the 1948 UN Universal Declaration of Human Rights, in which the issue of human rights was framed solely within the confines of the territorial state, the 1975 Helsinki Final Act created an unprecedented new scope for action. The text of the Act was reprinted in key Soviet newspapers, leading to a wide degree of familiarity among the general population with the terms of the agreement. This in turn gave human rights activists and dissidents in the Soviet Union a “quotable foundation” upon which to base their demands.²⁵

In the 1975 Final Act, therefore, human rights were linked to issues of international peace and detente. In this sense, human rights were no longer an issue of domestic jurisdiction but rather an established instrument of international relations. The essential human rights enshrined in the Final Act became a touchstone and a point of reference for dissidents, providing a new vocabulary and conceptual framework for human rights activism. The negotiations and signing of the Final Act were reported in detail, and the final text of the docu-

21 For reasons of space, I will not describe the history of the CSCE in greater detail. For further information, see Wilfried von Bredow, *Der KSZE-Prozess: Von der Zählung zur Auflösung des Ost-West-Konflikts* (Darmstadt, 1992); Vojtech Mastny, Christian Nuenlist and Andreas Wenger, eds., *Origins of the Europe an Security System: The Helsinki Process Revisited, 1965-1975* (London, 2008); and Peter Schlotter, *Die KSZE im Ost-West-Konflikt: Wirkung einer internationalen Institution* (Frankfurt a.M., 1997).

22 The Helsinki Final Act was divided into four “Baskets.” Basket 1 was concerned with questions relating to security in Europe; Basket 2 included the sphere of cooperation in the field of economics, of science and technology and of the environment; Basket 3 was concerned with cooperation in humanitarian and other fields; and Basket 4 concerned the follow-up to the conference.

23 Manfred Hildermeier, *Geschichte der Sowjetunion 1917-1991: Entstehung und Niedergang des ersten sozialistischen Staates* (Munich, 1998): 978-979; Marie-Pierre Rey, “The USSR and the Helsinki Process, 1969-75: Optimism, Doubt, or Defiance,” in Mastny, 65-81, see esp. 65.

24 Stefan Plaggenborg, “‘Entwickelter Sozialismus’ und Supermacht 1964-1985,” in *Handbuch der Geschichte Russlands: 1945-1991. Vom Ende des Zweiten Weltkriegs bis zum Zusammenbruch der Sowjetunion*, eds. Stefan Plaggenborg, Manfred Hellmann, Gottfried Schramm and Klaus Zernack (Stuttgart 2002): 319-517, see esp. 453; Vladislav M. Zubok, *A Failed Empire: The Soviet Union in the Cold War from Stalin to Gorbachev* (Chapel Hill, 2009): 238.

25 Wolfgang Eichwede, “Archipel Samizdat,” in *Samizdat. Alternative Kultur in Zentral- und Osteuropa: Die 60er bis 80er Jahre*, ed. Wolfgang Eichwede (Bremen, 2000): 8-19, see esp. 14.

ment was reprinted in *Pravda* for the edification of the Soviet citizenry.²⁶ The enormous publicity surrounding the Helsinki Accords was the first time many Soviet citizens had become aware of the Soviet Union's international obligations in the area of human rights. With their newfound knowledge of the human rights provisions of the Helsinki Accords, Soviet citizens obtained legitimacy for their negotiations with Soviet authorities on issues such as permission to travel abroad and similar demands.²⁷

However, at least initially, the Soviet human rights movement was divided in its assessment of the Helsinki Accords. Many activists believed the Final Act was a step back from the Universal Declaration of Human Rights and argued that the agreement represented a defeat of the demands of the West. In his memoir, Pyotr Grigorenko provided what was one of the most pointed expressions of this criticism:

August 1, 1975, will go down in history as a great victory of Soviet diplomacy and as the most shameful page in the history of Western diplomacy. What did the Soviet Union achieve by the Helsinki Conference? It sought confirmation by an international act of law of its right to hold on to territories it had seized by force during the war, and to maintain its own armies on those territories in any strength and in any disposition. All of this the Helsinki Final Treaty gave the Soviet Union. For the West everything remained precisely as it had been before Helsinki. ... To us it was evident that foreign policy successes now gave the Soviet government the opportunity to intensify its pressure against human rights inside the country. We were not impressed by the bombastic promises in the humanitarian area that were written into the conference's Concluding Act. We remembered previous international treaties in which the Soviet Union took upon itself obligations in regard to human rights but never carried them out.²⁸

In a statement issued upon joining the Moscow Helsinki Group, Malva Landa also criticized the Final Act for the "vague" and "unsatisfactory" formulation of its articles on human rights.²⁹

However, the majority of dissidents believed the provisions of the Final Act provided new scope and opportunity for action. Already on August 16, 1975, Larisa Bogoraz and Anatoly Marchenko issued an appeal to the US President Gerald Ford which cited the Helsinki Accords.³⁰ Both Orlov's and Sakharov's memoirs describe the Soviet dissidents' initial deliberations on the utility of the Helsinki Final Act. As Orlov described:

The accords moved human rights from the sphere of "internal affairs" and kind-hearted international desire to the sphere of concrete international politics, although this was a fact that the Soviet government did not admit, and Western governments did not exploit at the time. But appeals to the public world would not help. We had created our own committee and send expert documents to governments about USSR's violations of the political agreement it had signed.³¹

Sakharov similarly concluded that the Helsinki accords were fundamental in shifting the terms of human rights activism within the Soviet Union, even as this new scope for action was achieved at a cost:

The concept capitalized on the importance ascribed to the Helsinki Final Act by Soviet leaders, and on the Act's vital "linkage" of international security and human rights. The actions of human rights defenders who "piggybacked" on the Helsinki Act struck a sensitive nerve in the Soviet government

26 The Soviet press also covered the negotiations by the Soviet delegation in the weeks leading up to the conference, and reported on Brezhnev's trip to Helsinki, where he signed the Final Act. The front page of *Pravda* reprinted a photograph of Brezhnev signing the Final Act. See accounts in *Pravda* between July 29 and August 3, 1975 as well as in several other Soviet newspapers. The text of the Helsinki Final Act was reprinted on five pages which followed the account of the signing. The text included the signatures of the heads of state of the signatory states. See *Pravda*, Aug. 2, 1975, 2-6.

27 See Alexeyeva, 336.

28 Petro G. Grigorenko, *Memoirs* (New York, 1982): 433f.

29 See the statement by Landa upon joining the Moscow Helsinki Group; Archiv Samizdata No. 2635, Bayerische Staatsbibliothek, Munich.

30 See Cornelia I. Gerstenmaier, *Die Bürgerrechtsbewegung in der Sowjetunion* (Hannover, 1976): 100f.

31 Yuri Orlov, *Dangerous Thoughts: Memoirs of a Russian Life* (New York, 1991): 189.

and group members, especially in the provinces, were subjected to harsh reprisals. One can't overlook this negative, tragic side of the groups' very existence.³²

The Founding of the Moscow Helsinki Group

The Moscow Helsinki Group rushed to announce the founding of the group, hoping to preempt the anticipated move by prosecutors and the KGB against Orlov. Taking advantage of international publicity and contacts to Western journalists, on May 12, 1976, Orlov announced the foundation of the Moscow Helsinki Group at a press conference in Sakharov's apartment. According to the founding declaration, the group aimed "to promote the observance of humanitarian articles in the Final Act of the Conference on Security and Cooperation in Europe."³³ In addition, the Group intended to inform the heads of the signatory states as well as the world public "about cases of direct violations" of the Helsinki Accords.³⁴

The founding declaration was based on principle VII (Basket 1) and Basket 3 of the Helsinki Final Act:

1. Declaration on Principles Guiding Relations between Participating States: Article VII "Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief."
2. Co-operation in Humanitarian and Other Fields. 1. Human contacts (including point b, reunification of families). 2. Information. 3. Co-operation and exchanges in the field of culture. 4. Co-operation and exchange in the field of education.³⁵

In citing these provisions, the Moscow Helsinki Group signaled that its work would be focused on issues of civil and human rights. The eleven founding members of the group included Ludmilla Alexeyeva, Mikhail Bernsh-tam, Yelena Bonner, Alexander Ginzburg, Grigorenko, Alexander Korchak, Malva Landa, Anatoly Marchenko, Yuri Orlov, Vitaly Rubin, and Natan Sharansky.

The Moscow Helsinki Group urged activists in other nations and Soviet republics to follow their example. By April 1, 1977, Helsinki Groups had formed in the Soviet areas of Ukraine, Lithuania, Georgia, and Armenia. The Helsinki Groups in the other republics were all independent organizations, not mere satellites of Moscow. However, the groups were unified in their aim to monitor and enforce the Helsinki agreement. Several other organizations adopted the Helsinki principles to legitimize their work in monitoring human rights violations, including a number of other non-governmental organizations and religious groups. The Helsinki Groups in the former Soviet republics also included issues of national self-determination and national rights on their agenda.³⁶

The Work of the Helsinki Groups

What were the goals of the Helsinki Groups, and how did these organizations operate to promote the agreements reached by the Accords? These questions can in part be answered by turning to the founding declaration of the Moscow Helsinki Group, which set out the principles and goals behind its work. As described above, the members invoked several provisions in the Accords, including "Respect for Human Rights and Fundamental Freedoms" (Principle VII) and the provision for "Co-operation in Humanitarian and Other Fields." The

³² Sakharov 1990, 457.

³³ Kuzovkin, 23f.

³⁴ *Ibid.*, 23f.

³⁵ *Ibid.*

³⁶ For an example of the work of another Helsinki Group, see Lesya Verba and Bohdan Yasen, eds., *The Human Rights Movement in Ukraine: Documents of the Ukrainian Helsinki Group, 1976-1980* (Baltimore, 1980).

group was thus formed for the express purpose of monitoring and promoting compliance with the Accords. In order to monitor compliance, the group would accept written complaints of human rights violations submitted directly by Soviet citizens. After verifying the complaint, when possible, the groups would campaign internationally by publicizing the violations abroad and calling for intervention by the other signatory states. The complaints would also be forwarded for review at the follow-up meetings to Helsinki, including the 1977 Belgrade meeting and the 1980 meeting in Madrid.

By the beginning of 1977, Orlov's committee was challenging the regime as no dissident group had done before. Its documents were comprehensive and well chosen. The group did not try to report all the violations it learned of – that was the work of the *Chronicle* – but instead chose those that best represented the regime's failure to observe the Helsinki Accords...³⁷

The human rights complaints compiled by the Moscow Helsinki Group typically contained documentation in a number of key categories: 1. general declarations; 2. appeals to CSCE signatory states; 3. violations of the Soviet constitution or Soviet law; 4. trial transcripts and trial reports; 5. psychiatric abuses; 6. political prisoners and conditions of incarceration; 7. international contacts and the exchange of information; 8. statements on current events or anniversaries of special events such as the thirtieth anniversary of the Universal Declaration of Human Rights; 9. national issues; 10. religious freedom and associated issues of travel and emigration abroad; 11. persecution of dissidents; 12. reunification of families.

In what follows, I will describe the work of the Moscow Helsinki Group using the example of the first document of the Moscow Helsinki Group, which reported on the persecution of Mustafa Dzhemilev.³⁸ The documentation contained three sections. The first section presented the circumstances surrounding Dzhemilev's case and described his conviction under Article 190-1 of the Criminal Code of the Russian Federative Republic. As the complaint described, Dzhemilev had been charged with for his activities on behalf of the Crimean Tatars deported during the "Great Patriotic War." The key evidence in Dzhemilev's conviction was the coerced testimony of a witness who later recanted his statement. After serving his sentence, Dzhemilev was re-arrested and sentenced to a further two and a half years. The second section of the documentation comprised an analysis of the case against Dzhemilev, spotlighting the five points that violated the Helsinki Accords and Soviet law. The Moscow Helsinki Group focused its protest on the second conviction, arguing that Dzhemilev's poor health meant the second sentence was tantamount to his "physical extermination." The Group also argued that Dzhemilev's prosecution constituted a "violation of the fundamental rights of peoples" – in this case the Crimean Tatars. In the final section of the complaint document, the Moscow Helsinki Group arrived at two conclusions. First, they argued that the official justification for Dzhemilev's conviction violated the humanitarian provisions of the Helsinki Final Act. Second, the Group argued that the Soviet violation of the Helsinki provisions obviated the principle of international non-interference, which obligated the signatory states to intervene on Dzhemilev's behalf. The complaint document was signed by Orlov, Bernshtam, Bonner and Ginzburg on May 18, 1976.³⁹

This first complaint document set the pattern for later complaints submitted by the Group. The documents typically opened with a survey of the case, and then continued with a discussion of the human rights violations in the case and the relevance of Helsinki and other international accords as well as the Soviet constitu-

37 Joshua Rubenstein, *Soviet Dissidents: Their Struggle for Human Rights* (Boston, 1980): 228.

38 See Document 1 "O presledovanii Mustafy Dzhemileva – The Persecution of Mustafa Dzhemilev" of the Moscow Helsinki Group, reprinted in Kuzovkin, 24-26. In addition to the Moscow Helsinki Group, individuals like Lev Kopelev also attempted to intervene on behalf of Dzhemilev. See "Rettet Mustafa Dshemiljew," April 22, 1976, reprinted in Lev Kopelev, *Verboten die Verbote! In Moskau auf der Suche nach der Wahrheit* (Hamburg, 1977): 95-100.

39 See Kuzovkin, 24-26.

tion and law. Finally, the complaints closed with a summary analysis and a call for action by the signatory states. Many complaints also included additional documentation, such as the results of the local investigation to verify the complaint.⁴⁰ In some instances, the complaints included lengthy attachments such as lists of names of other individuals who had been harmed in the case. These lists could include, for example, the names of family members denied permission to emigrate, the names of persons whose telephones had been disconnected to prevent contact to Western organizations, and the names of associates unjustly incarcerated in psychiatric institutions. The Moscow Helsinki Group compiled a total of 195 complaints between May 12, 1976 and September 6, 1982, when the last three members who were not imprisoned announced the Group would discontinue its work. In the six years of its existence, the Group also compiled numerous appeals to the signatory states, trade unions in the United States, Canada, Europe, and the world public.⁴¹

In order to forward their complaint documents to the recipients abroad, the Moscow Helsinki Group often gave the complaints to foreign journalists or handed the documents directly to embassy staff of the 35 signatory states. In addition, the documents and appeals were also circulated via the samizdat. Many documents that reached the West were republished in periodicals such as the *Cahiers du Samizdat* and the *Samizdat Bulletin*. Within the operation of the Helsinki Groups, the role of the West was conceived as the mediator between the dissidents and the Soviet regime.⁴² “As formulated by Orlov, the group’s primary strategy was to raise an echo in the West, to use the Helsinki Accords as a bridge to Western governments and world opinion.”⁴³ The international dimension was a key aspect of the Group’s work. In order to “raise the echo” in the West, the Moscow Helsinki Group forwarded its reports and appeals to delegations from the signatory states, engaged in collaborative work with the US Helsinki Commission in Washington, and submitted documentation to the follow-up meetings to Helsinki. These efforts in turn served to underscore the central status of the Moscow Helsinki Group within the Soviet human rights movement. Indeed, the US Helsinki Commission was founded after a meeting by Yuri Orlov, Valentin Turchin and Veniamin Levich with the US congressional representative Millicent Fenwick in 1976. Upon her return from Moscow, Fenwick introduced legislation that culminated in the establishment of the Commission, which included six members of both houses of the US Congress. Alexeyeva, who had emigrated from the Soviet Union, also compiled several collections of documents on human rights violations under the Helsinki Final Act for the Commission as well as for the follow-up conferences in Belgrade and Madrid.⁴⁴

The State Response

The Helsinki Groups came soon under fire from Soviet legal authorities and the KGB. Although the head of the Moscow Helsinki Group, Yuri Orlov, had received a judicial caution only three days after the Group’s founding, no members had been arrested or convicted in the first months of the Group’s existence. In 1977, however, this would change. After the explosion in the Moscow subway on January 8, in which seven persons died and more

40 The local authorities and the KGB at times attempted to prevent verification of complaints. For example, in June 1976, Vladimir Slepak, Natan Sharansky and Sanya Lipavsky (who was not a member of the Moscow Helsinki Group) attempted to verify a complaint, but this was prevented by the local authorities. See Document 9 “O sud’be evreev sela Il’inka – The Fate of the Jews of the Village Ilinka” of the Moscow Helsinki Group, reprinted in Kuzovkin, 86f. This village reappears twice in the records, in Document 49 of April 30, 1978, and in Document 63 of Sep. 18, 1978.

41 See Kuzovkin and the documents collection of Moscow Helsinki Group edited by Khronika Press, *Sbornik dokumentov. Obshchestvennoy gruppy sodeystviya vypolneniyu khel’sinskikh soglasheniy. Vypusk perviy do devyatiy* (New York, 1977-1984).

42 See Alexeyeva, 338.

43 Rubenstein, 220.

44 On the founding of the U.S. Helsinki Commission, see William Korey, *The Promises We Keep: Human Rights, the Helsinki Process, and American Foreign Policy* (New York, 1993): 21-42; and also Amy Schapiro, *Millicent Fenwick: Her Way* (London, 2003): 162-183. Today the Commission includes nine members of both houses and three members of the executive branch.

than 40 were injured, the Soviet press attempted to link the dissidents to the attack. Andrei Sakharov and a group of organizations – including the Moscow Helsinki Group, Amnesty International and the Ukrainian Helsinki Group – issued statements which emphasized their adherence to the principle of non-violent protest and vehemently denied any participation in the attack. In their joint statement, the groups also called upon the Western media to apply the term “dissident” with greater care and precision, as actual Soviet dissidents had nothing in common with those who committed terrorist acts.⁴⁵ Two days before the joint declaration of the groups, Sakharov also issued a pointed statement which accused the KGB of deliberate provocation and an attempt to discredit dissidents as murderers and terrorists in order to pave the way for their persecution without interference from the West.⁴⁶

The first arrests of members of the Moscow Helsinki Group were carried out by Soviet authorities in early 1977. In the following year, a number of members were sentenced to prison camps, incarcerated in psychiatric institutions, and sent into exile.⁴⁷ Many memoirs and Helsinki Group documents also describe how homes of activists were searched. In more than a few cases, the authorities also planted incriminating materials in residences.⁴⁸ By the early 1980s, the regime had largely succeeded in shattering the human rights movement. According to KGB reports issued in 1981, nearly 500 dissidents had been arrested in the three previous years, “rendering harmless the ‘antisocial elements’ who agitate under the guise of human rights.”⁴⁹ Thus the movement that had flourished only a few years earlier foundered as its members were imprisoned, incarcerated in psychiatric institutions, and condemned to forced labor, internal exile, and emigration abroad. In January 1980, Sakharov was banished to the city of Gorky (renamed Nizhny Novgorod in 1990). Many other activists were arrested and exiled, with others emigrating to the United States and Israel. On September 6, 1982, Yelena Bonner, Sofya Kallistratova und Naum Meyman announced that the Moscow Helsinki Group was discontinuing its work.⁵⁰

The persecution of dissidents by the state authorities brought the violation of both the Soviet constitution and international treaties on the part of the regime into direct focus. The repressive measures inflicted upon the Helsinki Group were visible and blatant violations of the human rights provisions that the Soviet regime had pledged to uphold in signing the Accords. As Helmut Altrichter has noted, the response of the authorities was a striking demonstration that the “great, harmonious, and conflict-free Soviet society so often cited by state and party leadership existed only in weekly propaganda speeches and in fantasy. Only this could account for the extent of state repression, which had no qualms about violating human and constitutional rights.”⁵¹

45 See the Declaration of Jan. 14, 1977, “Po povodu vzryvov v moskovskom metro – Concerning the Explosion in the Moscow Subway” of the Moscow Helsinki Group, reprinted in Kuzovkin, 167f.

46 For Sakharov’s analysis, see Andrei Sakharov, *Mein Leben* (Munich, 1991): 545-548, and also Andrei Sakharov, *Furcht und Hoffnung: Neue Schriften bis Gorki 1980* (Munich, 1980): 88-118.

47 Heinz Brahm, *Die sowjetischen Dissidenten: Strömungen und Ziele* (Cologne, 1978): 35.

48 See Document 16 “Zayavlenie chlenov Obshchestvennoy gruppy sodeystviya voploneniyu Khel’sinskikh soglasheniy v SSSR po povodu obyskov, provedennykh 4-5 yanvarya 1977 g. u chlenov Gruppy, doprosov i drugikh repressiy – Statements of the members of the Public Group to Promote Observance of the Helsinki Agreements in the USSR concerning searches, conducted on January 4-5, 1977, at the residences of members of the Group, interrogations and other repressive acts” of the Moscow Helsinki Group, reprinted in Kuzovkin, 134-155, and also described in memoirs by Grigorenko, Sakharov (1990), and Orlov.

49 Quoted in Plaggenborg, 442.

50 See Document 195 “O prekreashchenii raboty Moskovskoy gruppy Khel’sinki’ – The End of the Activities of the Moscow Helsinki Group” of the Moscow Helsinki Group, reprinted in Kuzovkin, 555.

51 Helmut Altrichter, *Kleine Geschichte der Sowjetunion* (Munich, 2001): 164f.

The “Coalition” of Civil and Human Rights Movements

But there was another result no one had anticipated: the unification of the human rights movement with religious and national movements working toward the goal of the Moscow Helsinki Group – civic liberties enumerated in the humanitarian articles of the Final Act. The national and religious movements that seemed to be based on a common ground, while not united among themselves, were united, in many respects, in the human rights movement. A kind of coalition was formed under the flag of Helsinki.⁵²

The coalition, as described here by Ludmilla Alexeyeva, included a range of organizations active in the civil and human rights movement in the Soviet Union. Some of these organizations were also signatories of declarations and appeals issued by the Moscow Helsinki Group. For example, the statement issued after the Moscow subway explosion was also signed by the Working Commission to Investigate the Use of Psychiatry for Political Purposes, the Christian Committee for the Defense of the Rights of Religious Believers, Amnesty International of Moscow, the Ukrainian Helsinki Group, the Initiative Group for the Defense of Human Rights in the USSR, and the Initiative Group for the Defense of Human Rights in Georgia.⁵³

Within the loosely affiliated coalition of activist associations, the organizations continued to collaborate with joint documentations and statements, statements of mutual support, and joint appeals to authorities to release incarcerated activists. Many of these appeals were issued following defamatory attacks on activists in the Soviet press and arrests and convictions of dissidents by the authorities. Thus, for example, both the Moscow Helsinki Group and Lev Kopelev issued statements of support on behalf of Sakharov.⁵⁴ The organizations also undertook collaborative action following the wave of arrests of Helsinki Group activists, which Sakharov also protested in statements, appeals and open letters directed to the public at large.⁵⁵

Alongside the Helsinki groups, other activist organizations and unaffiliated dissidents increasingly invoked the Final Act and its human rights agenda, both within the Soviet Union and in other Warsaw Pact states. In Poland, the Workers’ Defense Committee (KOR), which later became the Committee for Social Self-Defense (KSS KOR), was established in 1976, and the Biuro Interwencyjne was founded in 1977. In contrast to the Soviet Union, the founding of Solidarity in 1980 spurred the Polish human rights movement to become a mass movement. In Czechoslovakia, the opposition movement, which had been violently suppressed in 1968, also began to reemerge. The Czech Charter 77 initiative, founded in 1977, drew direct inspiration from the human rights provisions of the Helsinki Final Act. The Czech organizations maintained close ties to the human rights movement in Poland and the Soviet Union. The organizations issued joint declarations of support and collaborated in signing reports and documentations of violations. Thus, for example, Charter 77 and KSS KOR sent letters of support to protest Sakharov’s internal exile.⁵⁶

Non-governmental Helsinki groups were also founded in Western states such as the Netherlands and the United States. The US Helsinki Group was originally designed to support the Helsinki Groups in the Eastern Bloc, but soon began to monitor violations of the Helsinki provisions in the United States.⁵⁷ In 1982, the Helsinki

52 Alexeyeva, 345.

53 Kuzovkin, 167.

54 See, for example, Document 90 “Novaya ugroza A. D. Sakharovu – New Threat against A. D. Sakharov” and Document 121 “V Zashchitu akademika A. D. Sakharova – In Defense of Academician A. D. Sakharov” of the Moscow Helsinki Group, reprinted in Kuzovkin, 373 and 442-444; see also the “Homage an Sacharov” by Lev Kopelev in Kopelev, 93f.

55 See the statements by Sakharov reprinted in Sakharov (1980): 208-233.

56 See, for example, the two statements of protest by the KSS KOR and Charter 77, reprinted in Andrei Sakharov, *Den Frieden retten! Ausgewählte Aufsätze, Briefe, Aufrufe 1978-1983*, ed. Cornelia Gerstenmaier (Bonn, 1983): 206f.

57 The US Helsinki Group was founded in February 1979 as a non-governmental organization.

groups joined to become the International Helsinki Federation for Human Rights.

Summary and Future Perspectives

The civil and human rights provisions in the 1975 Helsinki Final Act were not entirely new, nor were the norms which they enforced stricter than those put forth in the Universal Declaration of Human Rights. However, the Helsinki provisions spurred the formation of monitoring organizations that quickly took on a new, international dimension. This international dimension and the publicity generated by the organizations created a new set of possibilities for engaging in debate with the state. The Final Act issued by the Conference on Security and Cooperation in Europe fell on fertile ground, kindling new hopes among activists that pressure from international public opinion and the governments of Western signatory states would aid in wresting political freedoms from the state. This new scope for action was an unanticipated result of the wider dissemination of information about the human rights provisions contained in the Helsinki Accords to the general public, both in the Soviet Union and abroad.⁵⁸ This publicity opened up new possibilities for effective action, and helped monitoring groups recruit members among other organizations and individuals who had long been active in the struggle for human rights.

However, the Final Act was not the only foundation for activism among the organizations that emerged in the wake of the Accords. For example, on December 8, 1978, the Moscow Helsinki Group issued an appeal on the occasion of the 30th anniversary of the Universal Declaration of Human Rights. Over the following weeks, over 300 individuals signed the appeal.⁵⁹

The Helsinki monitoring organizations thus operated in a novel manner, issuing their appeals directly to a new and expanded audience. While Andrei Sakharov, Valentin Turchin and Roy Medvedev had earlier issued their statements and appeals directly to Brezhnev and the Supreme Soviet, the new activist movement shifted its focus away from the state authorities. Even before 1975, activist movements had directed appeals to international organizations like the General Secretary of the United Nations and the World Congress of Psychiatry. However, with the formation of the Helsinki monitoring organizations in the mid 1970s, the intended audience for human rights activism shifted even further away from domestic political authorities and towards the international political arena and the court of public opinion.

By the late 1970s, the repression of the human rights movement in the Soviet Union was well underway, peaking with Brezhnev's death in the early 1980s. Sakharov's 1980 exile to Gorky and the disbanding of the Moscow Helsinki Group in 1982 marked the decline of the visible human rights movement. However, as Hildermeier has noted, "there were neither winners nor losers in the conflict between the regime and the opposition."⁶⁰ Although the dissident movement had been largely dispersed, their demands were not forgotten. With the emergence of glasnost and perestroika, the human rights movement was once again able to resurface on the political scene. The Soviet regime would soon issue an amnesty, permitting Sakharov and other dissidents to return from internal exile. Sakharov went on to engage in political action until his premature death on December 14, 1989.

58 Looking back on the circumstances of 1975, Alexander Daniel noted, "The majority of samizdat articles display no awareness of contemporary European legal thought. Even as late as 1969, there was next to no mention of key international documents of law such as the pact on civil and political rights (UN Document of 1966) and the European Convention on Human Rights; it was apparent that almost no one was aware of their existence." See Alexander Daniel, "Wie freie Menschen: Ursprung und Wurzeln des Dissenses in der Sowjetunion," in *Samizdat: Alternative Kultur in Zentral- und Osteuropa: Die 60er bis 80er Jahre*, ed. Wolfgang Eichwede (Bremen, 2000): 38-50, see esp. 39.

59 See Document 69 "30let vseobshchey deklaracii prav cheloveka – Thirtieth Anniversary of the Universal Declaration of Human Rights" of the Moscow Helsinki Group, reprinted in Kuzovkin, 316-318.

60 Hildermeier, 979.

In 1988, the Ukrainian Helsinki Group formed once again and the Moscow Helsinki Group resumed its work. By 1989, a number of former protagonists of the civil and human rights movement – including, for example, Orlov and Alexeyeva – had rejoined the growing human rights movement.

In the mid- and late 1980s, the movement retreated somewhat from its unifying focus on civil and human rights. Instead a large number of informal organizations were formed to address the new proliferation of social and political agendas. As a result, the early years of glasnost and perestroika witnessed the rise of thousands of new committees, initiatives and groups – including the Memorial association (founded in 1987), the Soldier’s Mother Committee (1989), and the Russian-American Project Group. In addition, an immense number of periodicals on a broad variety of topics also commenced publication.

Over time, the organizations and their agendas became increasingly diverse. The dissidents of the 1970s had been largely apolitical, as they had themselves repeatedly emphasized. Over the course of the 1980s and beyond, human rights activists shifted away from monitoring violations and pressuring the government to live up to domestic and international human rights legislation and norms. Instead, the human rights movement became engaged in the search for concrete solutions for human rights problems within the now-crumbling Soviet empire. In the process, the human rights movement became increasingly politicized. Although human rights activists played only a modest role in state policy-making during the transition years following the upheavals of 1989, the human rights movement went on to regain a visible standing within post-Soviet Russia.

Flor Alba Romero

HUMAN RIGHTS EDUCATION BETWEEN NORMS AND PRACTICE: REFLECTIONS ON THE COLOMBIAN AND LATIN AMERICAN EXPERIENCE

This article examines the state of human rights education in Colombia. It begins by explaining the context in which human rights education takes place, including the difficult situation the country faces in this regard. It then considers the relationship between human rights education and international standards, and the corresponding legal framework in Colombia. The main part of the paper discusses several current and recent human rights education projects undertaken by Colombia's government and universities under the National Plan for Human Rights Education. It concludes by revisiting the current challenges for human rights education in Colombia.

Human Rights Education in the Colombian Context

Human rights education takes place in Colombia within a difficult context, one widely considered unfavorable to development in the field. The status of human rights and international humanitarian law in Colombia remains highly problematic. The state has not responded adequately to human rights abuses, but instead has maintained a high level of impunity while failing to enforce justice and apply the law. Nearly six decades of internal armed conflict – in recent years influenced by drug trafficking – has resulted in frequent breaches of international humanitarian law, which have done great harm to the country's civilian population. When human rights education was introduced in the early 1970s, the government still believed that human rights and human rights defenders were politically aligned with the insurgency movement. As a result, human rights educators were stigmatized and sometimes persecuted.¹

Influenced by Paulo Friere, early human rights educators in Colombia employed the methodological approach of popular education. In the early years, popular education efforts focused on the sphere of civil and political rights, but these efforts soon expanded to include social, economic and cultural rights. (Today, popular education initiatives in Colombia also embrace the rights of women, children and sexual minorities.) These efforts were grounded in the desire to strengthen the capacity of specific groups to demand recognition of their rights from the state. The human rights educators aimed to hold the government accountable for its actions, and compel the state to comply with international human rights instruments that it misused to repress the

¹ Despite the unfavorable conditions, in the early 1970s human rights NGOs inaugurated human rights education as a strategy to publicize rights and demand that the state comply with institutional and legal obligations and responsibilities. See Flor Alba Romero, "El Movimiento de Derechos Humanos en Colombia," in *Movimientos Sociales, Estado y Democracia en Colombia*, eds. Mauricio Archila and Mauricio Pardo (Bogotá, 2001).

demands of its own citizens, particularly under the presidency of Julio Cesar Turbay Ayala (1978–1982). In the early 1980s, non-governmental organizations began to obtain international funding to expand their activities in human rights defense and education. The first United Nations and Organization of American States missions to Colombia also commenced during these years. The government of President Belisario Betancur (1982–1986) inaugurated a shift in attitude toward human rights, acknowledging the existence of human rights abuses and initiating a peace process with leftist guerrillas. Despite this apparent shift, however, the number of human rights violations continued to rise. Under President Virgilio Barco (1986–1990), the Colombian government further incorporated human rights into the state agenda by establishing the office of the Presidential Counsellor for Human Rights, which began working with teachers. As a result, human rights education acquired an important official role and was disseminated throughout the educational system. Some years later, during the presidency of César Gaviria (1990–1994), the new 1991 Constitution incorporated political, social and collective human rights as central goals of the constitutional order, thus paving the way for Colombian citizens to demand their rights.² The Gaviria administration also broadened the scope of state protection of rights by establishing the National Office of the Public Ombudsman and by extending safeguards such as the *tutela*, which is a constitutional measure that allows individuals to seek protection of fundamental human rights in the courts.

As a result of the intercession of the United Nations, Colombian non-governmental organizations began to engage in open dialogue with the government in early 1992. This dialogue aimed also to jointly establish policies to defend, protect and promote human rights. However, human rights violations and the persecution of human rights defenders again increased under President Ernesto Samper Pizano (1994–1998). Even as the situation in the country deteriorated, however, the importance of human rights education, promoted by the national Ombudsman's Office and NGOs, continued to gain recognition from educational as well as governmental institutions. During the presidency of President Andres Pastrana (1998–2002), the human rights situation of the country remained worrisome. The armed conflict displaced the civilian population on a massive scale, and the persecution of social leaders, political activists and human rights defenders were everyday occurrences. During these years, the government also failed in its attempt to achieve peace with FARC guerillas. Today, the “democratic security” policy of Alvaro Uribe Vélez, now in his second presidential term, has also influenced the status of human rights and the rule of law in Colombia. While governments have a legitimate interest in maintaining the security of their citizens, most of the measures adopted under the “democratic security” policy have represented abuses of power and violations of the rights of the Colombian people. Widespread arbitrary arrests and the creation of informants' networks and “peasant soldiers” programs have torn at the social fabric and generated popular distrust. The situation has become an issue of concern for international institutions like the United Nations and the Organization of American States. Thus, although Colombia has achieved a number of important legislative and governmental advances in recent decades, the overall human rights situation remains of serious concern today, as the Colombia office of the UN High Commissioner for Human Rights has noted.³ It is within this complex context that human rights educators in Colombia operate.

2 Title III of the Colombian Constitution contains five chapters and 85 articles which refer to the protection, promotion and defence of human rights. These include Chapter I: Fundamental Rights (Articles 11 to 41); Chapter II: Economic, Social and Cultural Rights (Articles 42 to 77); Chapter III: Collective and Environmental Rights (Articles 78 to 82); Chapter IV: Protection and Enjoyment of Rights (Articles 83 to 94), and Chapter V: Duties and Obligations (Article 95).

3 United Nations High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia, A/HRC/7/39, February 28, 2008*, <http://www.hchr.org.co/documentoseinformes/informes/altocomisionado/2007/Report%20High%20Commissioner%20English%20ADVANCE%20EDITION.htm>, accessed Nov. 20, 2009.

Human Rights Education and International Standards

Human rights education is a state obligation under international human rights and humanitarian law. These obligations are specified in a number of key international instruments. For example, the preamble of the Universal Declaration of Human Rights states that education is necessary to promote respect on the part of “every individual and every organ of society” for the rights and freedoms established in the Declaration. Under Article 26 of the Declaration, this education “shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.”⁴ Numerous other international instruments establish human rights education as essential to the development of individual personality within a free and respectful society, and obligate the state to guarantee such education. Among the treaties and conventions that imply a right to human rights education are the 1989 International Convention on the Rights of the Child (Art. 26), the 1979 International Convention on the Elimination of All Forms of Discrimination against Women (Art. 5), the 1991 ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries (Art. 31), and the 1978 UNESCO Declaration on Race and Racial Prejudice (Art. 5), to name but a few.

A number of international organizations have called upon Colombia to solidify its efforts in the sphere of human rights education. For example, in 1997 the UN Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights, urged the Colombian government to ensure that:

All necessary measures be taken by the authorities to ensure that the gap between laws protecting fundamental rights and the situation of human rights in practice is reduced. To that effect, the Committee recommends that educational and training programmes be devised so that all segments of the population, in particular members of the army, the security forces, the police, judges, lawyers and teachers can develop a culture of respect for human rights and human dignity.⁵

The UN Commission on Human Rights has also called upon the Colombian government to give “the highest priority to developing concrete measures to integrate human rights education into the curricula of schools and universities throughout the country.”⁶ In addition, the UN Committee on Economic, Social and Cultural Rights recommended that the Colombian government provide human rights education at all levels of the educational system, particularly in primary education.⁷ The office in Colombia of the UN High Commissioner for Human Rights (UNHCHR) has also recommended that the Ministry of National Education adopt a working plan on holistic views of human rights in primary and secondary education. The national Ombudsman’s Office has made the same recommendations and has been working for some time on the construction of a National Plan on Human Rights Education.

4 UN Declaration of Human Rights, <http://www.un.org/en/documents/udhr/>, accessed Nov. 1, 2009.

5 UN Human Rights Committee, 52nd session, Document A/52/40, Par. 298), http://www.bayefsky.com/general/a_52_40_vol_i_1997.php, accessed November 1, 2009.

6 Statement by the Chairperson on behalf of the Commission on Human Rights (55th session), Geneva, 22 March - 30 April 1999. OHCHR/STM/99/3, [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/OHCHR.STM.99.3.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/OHCHR.STM.99.3.En?Opendocument), accessed Nov. 20, 2009.

7 “Observaciones finales del Comité de Derechos Económicos, Sociales y Culturales, Sobre el Tercer Informe Periódico Sobre Colombia-6 de diciembre de 1995,” ONU. EC.12/1995/18, Párr. 199. <http://www.hchr.org.co/documentoseinformes/documentos/html/informes/onu/cdesc/E-C-12-1995-18%200%20E-1996-22%200%20E-C-12-1995-12.html>, accessed Nov. 20, 2009.

The Legal Framework for Human Rights Education in Colombia

International provisions and recommendations for human rights education are extensive, and the national legal framework in Colombia is no less so. Article 67 of the Colombian Constitution of 1991 states: “Education is an individual right and a public service that has a social function. ...The Colombian citizen will be educated in the respect for human rights, peace, and democracy.”⁸ In addition, Article 282 of the Constitution states that it is the responsibility of the national Ombudsman’s Office to publicize human rights and recommend educational policies for human rights instruction.

The Colombian General Education Law incorporates these constitutional standards, establishing education as a permanent personal, cultural and social training process that is rooted in an integrated concept of human individuals and their dignity, rights and duties.⁹ The General Education Law defines the goal of education as respect for human rights, including the rights to life, peace, democracy, pluralism and the exercise of tolerance and freedom. Education in values such as justice, peace, democracy and solidarity is compulsory under Articles 5 and 14. Other instruments including Decree 1860 (1994), and the Ministry of National Education documents “Ethical and Values Education” and “Competency Standards,” reinforce the importance of human rights education.¹⁰ While the Ministry of National Education has aimed its human rights education efforts at student populations, other governmental entities have developed human rights training for professional groups. For example, the Public Ministry has created the National Program on Human Rights Training, aimed at local municipal ombudsmen. An initiative of the national Ombudsman’s Office facilitated the National Network for Human Rights Promoters project.

In response to the 1995 UN Declaration on the Decade for Human Rights Education, Colombia also formulated and implemented a National Education Plan on Human Rights (PLANEDH), which is based on the principles elucidated by the UN declaration.¹¹ The PLANEDH working group includes the Ministry of National Education and the National Ombudsman’s Office, with the permanent attendance of the Colombian office of the UN High Commissioner for Human Rights and the support of some non-governmental organizations. The working group drafted the PLANEDH initiative to include the four key spheres of human rights education, namely public policy, pedagogical development, educators and educational institutions, and pedagogical research.

Human Rights Education and Colombia’s Universities

Public universities have been at the forefront of efforts to promote human rights education in Colombia. But in a society characterized by grave injustice and persistent armed conflict, these efforts have entailed significant difficulty and risk. The following sections describe three experiences that illustrate some of these challenges and the potential of human rights education.

8 Constitution of Colombia, http://confinder.richmond.edu/admin/docs/colombia_const2.pdf, accessed Nov. 20, 2009.

9 Law 115 of February 8, 1994, or *Ley General de Educación*, in compliance with Article 67 of the Political Constitution.

10 Ministry of National Education, *Formación en Ética y Valores* (Bogotá, 1993); Ministry of National Education, *Estándares de competencias*, (Bogotá, 1993).

11 The UN Declaration on Human Rights Education states that “Human rights education shall be defined as training, dissemination and information efforts aimed at the building of a universal culture of human rights through the imparting of knowledge and skills and the molding of attitudes, and directed to: (a) The strengthening of respect for human rights and fundamental freedoms; (b) The full development of the human personality and the sense of its dignity; (c) The promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups; (d) The enabling of all persons to participate effectively in a free society; (e) The furtherance of the activities of the United Nations for the maintenance of peace.” See UN Declaration on Human Rights Education, Section I, Art. 2, accessed on Nov. 1, 2009 from <http://www.humanrightseducation.info/hr-materials/other-ressources/184-provisions-on-human-rights-education-in-international-instruments.html>.

Human Rights and the Homeless Population of Bogotá

In 1992, 50 students at the National University of Colombia at Bogotá representing several disciplines enrolled in a course on human rights and international humanitarian law.¹² The course focused primarily on the origins and historical evolution of human rights; the regional Organization of American States and the universal United Nations system; the Constitution of 1991 and human rights; governmental institutions that protect human rights; legal tools to defend human rights; and non-governmental organizations working in the field. Ten of the students were from the law school and wanted to complete their required legal clinic time by assisting in cases of abuse against the homeless. They encountered resistance to their proposal in the law school, where the director of the legal clinic questioned the quality of the human rights course because its professor was not a legal professional. They eventually overcame this resistance, and the Institute of Political Studies and International Relations (IEPRI, under whose auspices the course was offered) reached an agreement with the legal clinic of the law school.

The Joint United Nations Programme on HIV/AIDS (UNAIDS) defines “street people” and the homeless as follows:

They are men and women, minors and adults, whose socioeconomic conditions and in some cases, their mental health condition, has forced them to develop their everyday life in the streets, understood as a urban architectonic space that does not meet the minimum necessary standards to be considered a place to live in acceptable conditions for a human being’s welfare and quality of life.¹³

Street people have become an urban phenomenon and an expression of unequal social and economic living conditions. To live on the street implies a particular way of appropriating public space and negotiating the urban environment and human relations in order to survive. Strategies of the homeless include begging, picking pockets, and on occasion, participating in programs aimed at assisting the homeless.

According to the National Department of Statistics, the city of Bogotá has approximately 8,000 street people.¹⁴ While there are programs to assist them, street people are often treated with contempt and are the victims of widespread, sometimes violent, discrimination. Most have broken their family ties, and the *parche* (gang) becomes their surrogate family. The majority have a life story marked by childhood abuse, domestic violence, poverty, and lack of familial structure.

Initial Difficulties

Establishing contact between students and street people was not difficult. I had previously worked with this population with “street organizers” who had received training at the Training Center for Youth Advocacy. I was also a member of the organization’s academic board. The law students first proposed inviting street people to their offices, which were located on the university campus. But there was an obstacle: campus security would not allow the homeless onto university grounds. The guards regarded the homeless as “disposable” people with no reason to enter the campus.

To overcome this problem, we organized a briefing session with the guards. We explained that the homeless were not disposable, but human beings in unfortunate circumstances who had the right to enter the campus. However, street people did not attend the session for two reasons. The first had to do with the meeting time. The majority of street people were asleep while the legal clinic was open, as their main activities took place at

¹² The course was taught by the author of this article.

¹³ UNAIDS, <http://www.onusida.org/co/v10.htm>, accessed Nov. 20, 2009.

¹⁴ DANE, *Censo de habitantes de calle* (Bogotá, 2000).

night. They also stayed away because they had experienced rejection when they first tried to enter the campus. Because of these circumstances, the students decided to go to the street people, meeting them under bridges, at garbage dumps, and wherever they spent the day or night.

Discovering a Harsh Reality

The living conditions for people on the streets of Bogotá are subhuman. They lack adequate food; they lack shelter and are exposed to the elements; their environment is hostile; and their sources of support, if they have any, are scarce and unreliable. The students were shocked by the harsh reality of existence for the homeless. They also found the mental and physical health of street people severely compromised by chronic drug use. Drugs offer temporary escape from reality and blunt the effects of cold, fear and loneliness. Of the 35 street inhabitants that we worked with every week for a year, only one was able to quit using psychotropic drugs and restructure his life.

It was a particular challenge to discuss rights with the street people – to tell people who truly believed they were despised and rejected by society, “You have the right to health care, to housing with dignity, to have a family, to have a decent job.” It became clear that the homeless population could not change their lives without sustained, comprehensive institutional support. We established workshops to address this issue, which also enabled the homeless participants to express their desire to change their lives. The students also educated the homeless about programs and services available to them, including facilities where they could bathe, obtain clean clothing, eat and participate in recreational and educational activities.

During the project, the students were confronted with a tragic event: a neo-Nazi gang doused the site where four street children were sleeping with gasoline and set it on fire. Three of the children died in the attack. Only one survived. The students were able to assist the affected homeless people by gathering evidence and submitting the case before local tribunals. Moreover, the incident was documented and presented to the UN Special Rapporteur on Extrajudicial Executions, who was visiting Colombia at the time. Unfortunately, the case never reached trial because the witnesses feared reprisal and refused to testify. Nevertheless, the local press covered the case, bringing much needed public attention to the plight of this vulnerable population.

Violence and Aggression among the Homeless

One feature of homeless life that the students discovered was the degree of violence which street people use to survive. A street person might kill for a few pennies, and street people often use violence to relate to others. This state of affairs reflects both the brutal surroundings and constant survival mode in which the street people exist. They give little thought to the future, but live only in the present.

A workshop on family issues revealed that the overwhelming majority of the participants had suffered parental violence, and in some cases, sexual abuse. Some had been turned out of their homes when their mothers found new male partners; some were abandoned at an early age. Macho attitudes and abuse of women are common among the homeless. Because women represent only 25 percent of street inhabitants in Bogotá, sexual disputes occur frequently.

Lessons Learned

Homelessness is a human rights issue, and the complexity of the phenomenon merits a coordinated institutional response. This response should include voluntary treatment for drug abuse and the provision of services to meet basic and immediate needs, as well as longer-term therapies and support. It should entail early and

sustained intervention with at-risk families to keep children safely at home. In addition, it should endeavor to increase awareness and understanding among the general public. Any effective response and human rights education effort must engage with the different contexts that street people inhabit. Finally, the aim must be to make the homeless aware of their status as individuals with human rights and not just as victims. This includes respecting the rights of others who live under the same conditions.

Program for University Initiatives for Peace and Peaceful Living (PIUCP)

The Program for University Initiatives for Peace and Coexistence (PIUCP) of the National University of Colombia is an academic initiative. Since its inception in 1999, it has sought to create interdisciplinary spaces in which research, teaching and community outreach can unite with the shared goal of strengthening the university's commitment to the social reality of the country on a national level.

Courses offered through the program explore a range of human rights issues, such as sociopolitical violence and its impact on the social fabric, especially on specific ethnic, age, and gender groups; public policy as it relates to internally displaced peoples; and the causes, dynamics, processes, and ramifications of forced displacement. The program seeks to develop academic spaces for reflection on the problem of political violence in Colombia and to support educators concerned with human rights. Its interventions are based on an integrated perspective of teaching, research and community outreach that provides strategies and tools geared towards building peace.

Two courses, the Virtual Course and the Manuel Ancizar Course on Forced Displacement in Colombia offer similar content, but differ in methodology. As the name implies, the former uses state-of-the-art technologies to instruct its students in a virtual classroom. The second takes place in a traditional university classroom, and has now grown in size to approximately 900 university students and 450 external participants. PIUCP offers a range of additional courses, including an in-depth seminar on sociopolitical violence, a course on human rights and forced displacement, a workshop on emergency settlements, and many thematic seminars. PIUCP also envisions several key areas of research. First, it supports research into the issue of forced displacement and supports efforts to formulate policies that assist the victims of displacement. Second, it promotes work related to local and regional issues that benefit affected populations. Finally, it endeavors to forge and strengthen academic relationships and strategic cooperation with universities throughout the country that generate new human rights initiatives.

In the area of community outreach, PIUCP supports a similarly broad palette of projects. For example, it supports a project to provide psychological assistance to people who were internally displaced between 2000 and 2005. PIUCP also supports the land and property ownership rights of persons displaced due to violence. This project stems from the 2004 cooperation between the International Organization of Migration (IOM) and the National University of Colombia. The 2003 cooperation between the university and the Social Solidarity Network of the Presidency of the Republic paved the way to assisting several Colombian municipalities affected by political violence. And finally, PIUCP has provided support in the resettlement of displaced persons since it began cooperation with the Social Solidarity Network in 2002.

Post-Graduate Work on Human Rights at the Simon Bolivar Andean University in Ecuador

The Andean Program for Human Rights and Democracy (PADH) was created in 2001. Since that time, the Andean region has experienced a human rights crisis that has exposed the limits of human rights activism in

spite of important legal advances in the field. Activists have tended to prioritize civil and political rights in their work. Perhaps the most pressing challenge has been providing an integrated approach to human rights that can address the complexity of the diverse problems in the Andean region. Another challenge has been the generally informal nature of human rights education in the region. As a result, human rights professionals urgently require training in order to broaden their impact in their communities.

Overarching Strategies and Goals

Within this context, PADH was conceived as a “scholarly response to a social demand,” linking reflection, education, research and outreach to create a platform for the integration of academic approaches and social needs.¹⁵ PADH expected its impact to resonate on multiple levels. It sought a renewed emphasis on human rights and their emancipatory potential, and sought to help the professionals who had completed PADH’s post-graduate courses integrate what they learned into social practice. In terms of outreach, PADH promoted increased access to information for broad sectors of the population. All these activities contribute to democratization processes in Andean societies.

PADH has established five general strategies. First, it promotes an ongoing relationship between academic activities and society as a whole. Second, it develops an educational project based on an integrated conception of human rights. Third, it fosters relationships between the program and key stakeholders in order to shape opinion and decision-making. Fourth, it promotes the democratization of debates on human rights issues. Finally, PADH shares its approach with other institutions in an effort to create institutional synergies.

Creating a network of associated universities has been an integral part of work in the Andean region. This network has both strengthened efforts in the individual countries of the region and connected them across national borders. Currently, the network consists of multiple institutions, namely the Human Rights Center of the National University of Lanús in Argentina; the Human Rights Center of the Federal University of Bahia in Brazil; the Simón Bolívar Andean University in La Paz, Bolivia; the Institute for Political Studies and International Relations (IEPRI), National University in Colombia; the Gender Studies Program of the San Marcos University in Peru; and the Human Rights Centre of the Andrés Bello Catholic University, Venezuela.

The program’s website is one of its key channels for outreach, providing access to the online magazine *Aportes Andinos* (“Andean Contributions”), which is published three times a year.¹⁶ *Aportes Andinos* reflects on and publicizes human rights issues of the Andean region and Latin America in general. It occasionally also publishes articles that analyze other parts of the world. The PADH website attracts approximately 800 visitors each month.

Achievements of PADH

During the past seven years, PADH has developed a range of teaching, research and outreach activities, as well as fostering cooperation between different institutions. This cooperation includes the Andean Human Rights Network, consisting of universities and civil society organizations that provide training and information on human rights for the region. In the area of teaching, PADH offers a Masters Degree course on Human Rights and Democracy in Latin America; three post-graduate courses specializing in human rights, formulated by the entire university network and held at the Ecuador campus of the Simon Bolivar Andean University, with participants from the entire Andean region; a post-graduate course on human rights at the national level; four

¹⁵ Programa Andino, 2005.

¹⁶ The website can be accessed at www.uasb.edu.ec/padh.

courses on human rights education (40 hours) held in Colombia, Ecuador, Peru and Venezuela, with coordinated curricula; and more than 30 open courses and seminars on specific topics about human rights held in Peru, Bolivia and Ecuador. The professionals who have attended the post-graduate courses come from both state and private institutions. They make up a diverse group with backgrounds in law, education, psychology, anthropology, and social work and other fields.

In the area of research, PADH has established a research fund that has supported the publication of 13 monographs and six Master's theses on topics relating to human rights, involving such issues as migration, women's rights, and access to justice. PADH also boasts an impressive array of publications, including 19 electronic magazines on diverse human rights issues; an internet information center, created and maintained by the Andean Human Rights Network; ten human rights publications; and a dictionary of human rights. There is also a documentation center with approximately 4,000 codified collections and a database containing approximately 1,500 records pertaining to organizations and institutions that work on human rights.

Significantly, the educational process includes a phase of practical work undertaken through training workshops. PADH has thus become a center for human rights training, reflection and action for the Andean region and continues to expand across Latin America.

Guiding Criteria

PADH established several criteria to guide its teaching, research and outreach activities. Teachers and students gradually enrich these criteria as they engage with and reflect on the topic of human rights. Broadly speaking, PADH courses emphasize themes relevant to Latin America. They highlight the importance of the links between social and historical contexts and the forms of knowledge that try to interpret and explain those contexts.

PADH's concentration on Latin American themes and its rigorous contextualization has several important consequences, including an emphasis on attracting Latin American students into the program. For example, the program endeavors to include male and female authors from the entire region while recognizing the importance of maintaining a dialogue with authors outside Latin America. At the same time, the program organizes students into groups based on nationality in certain cases in order to engage with national particularities and compare approaches across national borders. Conversely, the program organizes working groups with students from several countries and disciplinary backgrounds in order to foster intercultural perspectives.

Towards an Integrated Vision of Human Rights

One of the challenges identified at the outset of this essay involved the development of an integrated view of human rights. An integrated approach to human rights would support a range of rights, including political, social, economic, and cultural rights, and strengthen the links between these rights.

Human rights is a rich field of activity. It remains permanently under construction, and its meanings are constantly discussed and debated. New rights are identified, but on occasion these new rights come into conflict with existing ones, so their emancipatory potential may be difficult to distinguish at first glance. An integrated approach to human rights comprises the legal recognition of rights as well as the effective guarantee of human rights for all.

Thus, an integrated approach is not limited to the legal dimension of human rights. It emerges from an interdisciplinary space and does not focus exclusively on the state. As such, ethics and values are not only the responsibility of the state, but are forged and enacted by individuals as they learn to respect the rights of other

individuals in everyday life. PADH incorporates these considerations in its research, teaching and outreach. The complex realities that we face demand broad approaches and flexibility with respect to concepts, methods and overarching strategies. Interdisciplinary approaches are critical in this respect. They facilitate linkages and debates between different disciplines in a way that develops conceptual, methodological and practical bridges. The interaction between such disciplines as sociology, history and political science helps deconstruct hegemonic discourses and unearth subaltern perspectives in order to cultivate a human rights perspective. Similarly, interpretations of historical and social contexts would not be possible without interdisciplinarity. So-called “critical reading” is another key component of the integrated approach to human rights. Critical reading involves three interrelated processes: the interrogation of theoretical production and knowledge by students and scholars; the recognition of non-scientific modes of thought; and the articulation of critical theories that question not only pseudo-sciences, but also the supposed neutrality of science. These three interrelated processes are oriented towards social transformation, which is embedded in the struggle for freedom and social justice. Critical reading must incorporate tendencies in a range of disciplines, for example the feminist critique of gendered inequality. Simultaneously, human rights discussions cannot exclude the myriad social and political actors struggling for recognition, including social movements, civil society organizations, individual victims and their families, state representatives, and domestic or international bodies that promote and defend human rights.

Traditionally, theory and practice have been regarded as distinct or even antithetical. Yet in spite of their differences and their relative autonomy, theory and practice must inform and redefine each other. The relationship between theory and practice is political to the extent that it is not merely implicated in the interpretation of social reality, but also attempts to transform that reality. Linking theory and practice in human rights through case studies of concrete situations, including some that have been brought before international courts, has helped us make significant progress in this field. These studies facilitate the formulation of strategies for conceptual, methodological or practical solutions.

Finally, the integrated approach to human rights incorporates diversity based on gender, ethnicity, generation, or class as a basic requirement. Situating diversity at the core of the integrated approach thematizes both universal and specific rights, as well as the tension between them. It also helps us interpret the Latin American context, and above all highlights critical problems like inequality, exclusion, exploitation, discrimination, subordination and the ongoing polarization of societies that abuse the rights of large sectors of the population. The emphasis on diversity bolsters the relationship between theory and practice and facilitates intercultural and democratization processes.

The Challenges of Human Rights Education in Colombia

An important legal and conceptual development in human rights education is currently emerging from international institutions, such as the United Nations and the Organization of American States, as well as from universities and other educational institutions. In addition, states have ratified several legal instruments that obligate them to comply with principles of human rights education.

Human rights education addresses not only the formal educational system, but also the organs constitutionally created to guarantee respect for human rights. Universities and schools are implementing important aspects of human rights education, as are informal and non-traditional channels (such as educating homeless people about their rights). A particularly important program has been human rights education for public servants. To give human rights meaning in daily life, we must insist on this educational process within state institutions.

Human rights education therefore takes place on two levels. First, public servants must receive human rights education because they are responsible for guaranteeing the implementation of human rights. Second, human rights education must benefit ordinary citizens, encouraging them to respect diversity in their daily lives.

One of the goals of the National Plan for Education in Human Rights is to make human rights education the object of public policy. It may appear difficult to codify human rights education in a complex social context, especially in a country where human rights violations and breaches of international human rights laws are everyday events. However, we cannot postpone this task. We must insist on human rights education if we want to build a just, egalitarian and inclusive society.

Using the same framework, but within a difficult context of vulnerability and stigmatization, non-governmental organizations implement human rights education in their everyday practices and in the activities they plan. They work for civil and political rights; economic, social and cultural rights; and the rights of women, children, the elderly, people with disabilities, sexual minorities, ethnic minorities, religious groups, and others. The greatest challenge we face in Colombia is to narrow the growing gap between written norms and their application.

Monique Eckmann

THE ROLE OF HISTORY IN EDUCATION AGAINST DISCRIMINATION

How much history and historical learning is necessary and useful in anti-discrimination education? Answering this question requires a consideration of two separate fields and issues: first, the field of anti-discrimination education, and second, the issue of historical and political education. Particularly within the German and European contexts, the latter issue is inextricably associated with the history of National Socialism and the crimes committed by the Nazi regime, as well as its historical and political aftermath, both in terms of democratic education and the larger issue of human rights.

What is anti-discrimination education? First, anti-discrimination education entails learning to recognize discrimination, understanding discrimination as a violation of dignity and rights, and finally, learning how to take action against it. But although many anti-racism and anti-discrimination projects and initiatives strive to integrate elements of historical learning, doing so poses significant conceptual, pedagogical and theoretical challenges, not least due to the difficulty of drawing contemporary lessons from historical events. Moreover, as yet there is little evidence that studying the history of the worst human rights violations teaches students how to intervene against or prevent human rights violations in the present day.

Within the broad spectrum of anti-discrimination educational programs, some include little or no historical context, while others are strongly anchored in history. Each model has pitfalls and problems. For example, projects that strive to link historical learning with action against contemporary forms of discrimination must bridge the past and the present. Doing so involves relationships of memory, membership in communities of memory, membership in groups that have been the victims or perpetrators of past or present discrimination, and relationships to sites of historical significance. This is the case even if, or even precisely because the sense of community belonging is frequently riddled with ambivalence and requires an interrogation of historical memory.

In this essay, I will analyze these interrelated issues in three separate contexts: first, anti-discrimination and the role of personal experience; second, incorporating history and historical context into educational settings; and third, building bridges between historical learning and anti-discrimination education through personal experience and relationships of memory, belonging, and place.

Anti-Discrimination Education

Anti-discrimination education is one element in the broader area of education for democracy and human rights. This educational project includes anti-racism education as well as related initiatives for the rights of other minorities, such as disabled persons and gays and lesbians. Wilhelm Heitmeyer conceives the overarching syndrome of discriminatory attitudes as “group-focused enmity,” or the constellation of attitudes that share a core rejection of behaviors that deviate from the prevailing norm.¹

Who and what do we mean when we speak of anti-discrimination education? According to British educators, discrimination stems from a combination of power and prejudice wielded by dominant groups that wish to preserve or increase their position of power. Following Pierre Bourdieu, we can envision discrimination as disenfranchisement and disempowerment for its victims, both in material and in symbolic terms. Materially, victims of discrimination lose access to resources and rights, while symbolically they lose definitional and discursive power in the public sphere. Following Axel Honneth, we can say that discrimination leads to a loss of status, which in turn triggers a struggle for recognition, while with Avishai Marglit we must recognize the humiliation connected to this loss. In this sense, anti-discrimination education entails not only the attainment or restoration of human *rights*, but also the restoration of human *dignity* and empowerment.

But who is the appropriate audience for anti-discrimination education, and what are the best methods for these programs? The issue of discrimination of course a universal concern, but it is nonetheless possible to distinguish among different target audiences. When we look at our surroundings, we can ask who has been the victim of discrimination, and who has discriminated against others? Which of us have witnessed discriminatory acts? Which of us have fought discrimination – towards ourselves or others? Bystanders often comprise the largest group, and they too are an important target for anti-discrimination education.

Discrimination is part of our daily lives, an aspect of personal experience. We experience discrimination firsthand, even if “only” as bystanders. According to Albert Memmi, racism is a *lived experience* shared by two opposing agents within a specific social, historical and institutional context.² Memmi focuses on the subtle interactions between the perpetrator and victim, the colonizer and the colonized, the oppressor and the oppressed. In each instance, the encounter entails two opposing experiences. However, this binary opposition of perpetrator and victim fails to adequately capture the complexity of racism because racism as a lived experience also entails a crucial third position, the bystander perspective that more or less passively witnesses the discrimination.

For this reason, any analysis of racism must consider at least three positions: the perpetrators of discrimination, the victims of discrimination, and the bystanders. Each of these three positions represents an individual and collective lived experience of racism and discrimination. The victims, individually and collectively, are often demoralized by the repeated experience of discrimination, and may even begin to anticipate it. The perpetrators are typically convinced of their own righteousness and often portray themselves as victims. Though seemingly uninvolved, the bystanders are also important agents. Bystander attitudes are often mutable and

¹ Wilhelm Heitmeyer, ed., *Deutsche Zustände: Folge 2* (Frankfurt a.M., 2003).

² Albert Memmi, *Le racisme* (Paris, 1982).

inconsistent, depending on outside pressures and surroundings. Bystanders are often afraid to intervene. However, the role they play contributes decisively to the social construction of the situation, depending on whether they tolerate the discrimination or take a strong stand against it. From the point of view of the victims, the bystanders are decisive. As Martin Luther King Jr. aptly noted, “In the end, we will remember not the words of our enemies, but the silence of our friends.”

However, these three positions are not fixed. Their configuration is dependent on both situation and context. Depending on the historical and social circumstances, an individual or group may find itself in another position. In other words, the positions are not rigid *identity categories*, but rather *experiences* that require validation. It is precisely these experiences that define the target audience for anti-discrimination education and necessitate the formulation of nuanced objectives. Anti-discrimination education is supposed to help victims understand their own experience of discrimination, become aware of their rights, and recover their rights and dignity. It is also supposed to help perpetrators recognize and accept responsibility for their acts. They learn how to reflect on their actions and have an opportunity to express their regret. In extreme cases, anti-discrimination education explains the legal ramifications of their actions. Finally, the bystanders are supposed to learn how to recognize discrimination, actively intervene, provide support to victims, and demonstrate civic courage.³

In other words, anti-discrimination education should focus first and foremost on the victims and bystanders, and only secondarily on the perpetrators. Anti-discrimination education is most promising when it does not assign blame, but rather shows that it is always possible to intervene against discrimination. Anti-discrimination education thus aims to develop a capacity for action, which in turn presupposes a motivation to act. In addition, anti-discrimination education should teach us how to recognize discrimination and understand its impact. Too often, discrimination is overlooked, trivialized and ignored, in part because many acts of discrimination are subtle, and its victims often lack the discursive power needed to make their voices heard in social spaces. Like human rights education more generally, anti-discrimination education must address three different levels: the *cognitive* level, which entails the recognition of rights and their violation; the *emotional* and *ethical* level, which addresses the capacity for anger; and the *practical* level, which develops the capacity for action and engagement. Each level includes standing up for one’s own rights as well as those of others, as well as addressing the acts of discrimination that we or our society may have committed. Anti-discrimination education therefore encompasses both education about discrimination and, above all, education for the *protection and defense* of human rights.

In general, educational programs target individuals. However, discriminatory acts are committed not only by individuals, but by myriad private and public institutions and organizations as well. Because of the resulting “gap” between individual actions and institutional factors, anti-discrimination education must extend beyond the individual and personal dimension to include a structural effect. Since laws, governments, and bureaucracies provide the framework for a large amount of discrimination, discrimination has an institutional dimension and is rooted in power relationships. One of the central tasks of anti-discrimination education is preventing the abuse of power and maximizing the democratic possibilities of power.

For this reason, the purpose and content of anti-discrimination education also varies depending on whether it addresses the powerful or the powerless. For the powerful, anti-discrimination education thematizes dilemmas inherent in the exercise of power. For the disempowered, it helps them take action against complete

³ Monique Eckmann and Miryam Eser Davolio, *Rassismus angehen statt übergehen: Theorie und Praxisanleitung für Schule, Jugendarbeit und Erwachsenenbildung* (Zürich, 2003).

powerlessness. Both groups face a challenge, but this challenge is a different one for each. Not only majority groups, but minorities as well sometimes have difficulty acknowledging discrimination and understanding their rights. But these minorities should be the primary target group of anti-discrimination and human rights education initiatives.

Prejudice, Stereotype and Behavior

Discrimination is the product of power and prejudice. However, many anti-discrimination education programs focus solely on overcoming prejudice as a way to prevent the development of stereotypes and eliminate discrimination. This pedagogical approach is based on the assumption that our actions are primarily guided by representations or mental images. However, in recent decades social psychologists have demonstrated that there is not always a direct link between mental representation and action. People often do not act in accordance with their principles. Instead, our actions are determined by a variety of other factors such as peer pressure, conformism, cowardice, convenience and opportunism, and so on.

Educational programs that focus on overcoming prejudice often conceive of discrimination as the outcome of a multi-stage process. In the first stage, social and administrative categorizations give rise to the cognitive mechanism of stereotyping. This stereotyping creates prejudices, which can have either positive or negative emotional connotations that then lead to value judgments. These value judgments culminate in discriminatory behavior. Many anti-discrimination programs aim to intervene somewhere along this causal chain. Although not entirely wrong, such interventions in no way ensure changes in behavior. In many instances, the direction of causality is the reverse: mental image does not determine action, but rather new behaviors give rise to new attitudes, and a positive experience leads to a positive change in attitude and perspective.

At the same time, we must avoid reducing anti-discrimination education to the level of individual attitudes and actions, as this would significantly underestimate the situative component of discriminatory behavior. As Pierre-André Taguieff has noted, the most important element in racist attitudes and behaviors is the situation.⁴ In this sense, racism can be understood as a “crime of opportunity” rather than an intrinsic element of personality. For this reason, anti-discrimination projects must aim to change situations, not just individuals. One way to achieve situational change is by discursively redefining categories that are frequently laden with negative connotations, such as the illegal alien, the asylum seeker, and the homosexual. Another effective way to achieve situational change is when social actors, particularly institutions, send strong signals against discrimination.

Discrimination entails disempowerment and humiliation; anti-discrimination education restores power and dignity to its victims. For the victims of discrimination, this essential moment of empowerment results from understanding the collective aspects of personal experience, processing and understanding the experience of victimization, and developing alternate understandings and frames of reference for that experience. Anti-discrimination education should also thematize the power and influence of minority groups. As Serge Moscovici has argued, a consistent and outspoken minority can affect the opinions of the majority and challenge the status quo.⁵ This is most likely to be effective when the dissenting minority does not resort to guilt and recrimination. Finally, as already noted, anti-discrimination education should help the victims understand their own experience of victimization. However, in so doing, it should avoid the pitfalls of constructing *victim identities* that attribute any negative experiences to the experience of victimization. Victim identities can

4 Pierre-André Taguieff, *Le racisme* (Paris, 1997).

5 Serge Moscovici, *Social Influence and Social Change* (London, 1976).

have devastating consequences for empowering individuals and communities.

Anti-discrimination education thus addresses experiences that have an individual, a collective, and an institutional dimension. Discrimination is an aspect of experience for both the majority and minority groups, although of course with varying effects on self-perception and identity. These differences in experience should be addressed by open and thoughtful dialogue.

Learning from History? Historical References in Education

Are historical references necessary to anti-discrimination education? Do the cognitive, emotional, and practical dimensions of learning require a historical element in order to be effective? Among the many models of anti-discrimination education that exist today, some programs include no historical elements while others are strongly historical in method and content. All anti-discrimination educational programs can be situated somewhere along this continuum.

A number of very interesting and useful human rights education programs operate without any historical references. One example is the program devised by the American teacher Jane Elliot, who developed the “Blue Eyes/Brown Eyes” exercise after the assassination of Martin Luther King, Jr. In this exercise, participants are asked to separate into two groups based on the color of their eyes – blue or brown. Each group is alternately assigned the status of the superior group and given preferential treatment and encouraged to discriminate against children in the inferior group. The participants are labeled as inferior or superior based on purely arbitrary factors and the power of the instructor, with no reference to historical experiences of discrimination.⁶ In the exercise, the participants experience what it means to be a minority and gain understanding of the devastating consequences of authoritarianism and discrimination. When this program is conducted with adult participants, the lived experiences of discrimination inevitably come into play. However, even then historical aspects play only a minor role in the exercise. Anti-discrimination programs in the workplace often draw on a similar model. Most popular workplace programs, including ombudsmen programs, discussion groups, workplace quality programs, and staff training measures, for example, do not include a historical dimension. In addition, many programs based on models of democratic learning also include little by way of historical examples in their learning exercises.

Programs with a central historical component, which include Holocaust Education and related programs, focus on the historical dimension. Even though many instructors attempt to link history with contemporary issues and draw on the personal experiences of their students, the focus of these programs remains historical learning rather than direct and explicit anti-discrimination education.

Of course, many programs fall somewhere along a continuum of historical content, and many also attempt to incorporate elements of both models. However, nearly every program can be described as predominantly ahistorical or historical in orientation. Moreover, difficulties may arise at both extremes of the continuum. On the one hand, anti-discrimination programs that focus exclusively on the historical dimension may fail to teach students how to recognize and take action against current forms of discrimination. On the other hand, anti-discrimination programs and exercises that do not include any historical elements may obscure important historical connections. Programs that are completely ahistorical are also less likely to insert discrimination with the broader context of democratic education and tend to over-emphasize the individual and personal dimension. Although anti-discrimination education may be effective without a historical component, the historical dimension can be extremely powerful, especially when the program takes advantage of its nuances.

⁶ For a description of the “Blue Eyes/Brown Eyes” exercise and its impact, see William Peters, *A Class Divided* (New Haven, CT, 1987).

Anti-discrimination programs must avoid a number of common pitfalls and incorrect conclusions, several of which I describe below. First, individual behavior and state-led discrimination can be represented as a continuum. For example, a Jewish survivor describes his experience of the concentration camp. Afterwards, the children are asked to describe their own experiences with discrimination. As the children describe their own experiences, they make some interesting associations. However, these associations all too easily lead the children to conclude that such small discriminations are “how it all began.” In so doing, the students lose sight of the institutional dimension of discrimination, as well as the fact that genocidal crimes are not committed by individuals, but by the state. For this reason, anti-discrimination education must avoid establishing a simple continuum between individual prejudices and state-led crimes.

Another potential pitfall in anti-discrimination programs is the tendency to focus on superficial commonalities between events and draw simplistic conclusions about what the “lessons of history” can teach us about the present day. However, specific historical contexts have specific mechanisms of discrimination and the historically unique identities of the perpetrators and victims cannot be easily inserted into a different place and time. Effective anti-discrimination education must resist universal explanations and the instrumentalization of history.

This temptation is particularly common in educational activities which take place at memorial sites. In present-day Germany and Europe, for example, we must guard against drawing simplistic contemporary lessons from memorials to the victims of National Socialism and the victims of the Soviet regime. But memorial sites are not only sites for human rights education, they are above all burial sites where people come to mourn and reflect. Even the best educational programs cannot bring back the victims, and using memorials for contemporary moralizing may do a disservice to their suffering. For this reason, memorial work highlights the difficulties inherent in linking historical education to the goals of anti-discrimination. Memorial work includes both a historical dimension and a human rights component; prioritizing either dimension can make the other seem like an artificial afterthought.⁷

A final pitfall is that the history of the most terrible crimes may be cited as deterrents. In Europe, the history of National Socialism and the Holocaust constitute fixed point of cultural reference. This history and its aftermath is joined by numerous other great crimes, including the history of slavery, colonization and decolonization, and the crimes and human rights abuses committed by the Soviet state. But the very magnitude of these crimes raises questions about whether they are suitable subjects for human rights education. While I agree that historical knowledge of these crimes is essential, there is little evidence regarding the extent to which this historical knowledge is beneficial to anti-discrimination education that aims to promote the protection and defense of human rights.

Personal Experience as a Bridge between Historical Learning and Anti-Discrimination Education

Projects that attempt to link historical learning with learning about present-day forms of discrimination must establish a bridge between the past and current experiences. How can we establish a conceptual link between the past and the present, while also providing guidance for the future? I suggest that memory – one’s personal connection to the past – plays a central role in forging this link. In this context, two aspects of memory are especially important: first, *relationships between memory and belonging*, which are shaped by the participants’

⁷ This issue was also the topic of the summer 2007 conference to evaluate projects supported by the Stiftung EVZ; see Albert Scherr and Ulrike Hornel, *Evaluation des Förderprogramms “Geschichte und Menschenrechte” der Stiftung “Erinnerung, Verantwortung und Zukunft”* (Berlin, 2008).

sense of heterogeneous memberships in particular groups, as well as their familial, social and personal relationships to the past and present histories of groups that have been the victims or perpetrators of discrimination. Relationships of memory thus involve the many different “us – them” relationships that exist among different groups. And second, *relationships between memory and places* where we live our daily lives and participate in society, in other words, the territorial dimension.

Personal ties to the past are experienced as a member in a “community of memory,” a term coined by the philosopher Avishai Margalit. Margalit distinguishes between what he describes as “thin” and “thick” relationships and memories.⁸ Thick relationships are the relationships we have with our family, friends and other intimates. According to Margalit, these ties are based in part on shared memory and shared history. These relationships are akin to what Benedict Anderson has described as imagined communities, which draw on a common past and common future and conceive themselves as part of a common destiny. Members of a community of memory feel a sense of kinship to other members, even when they do not know each other personally. This sense of kinship defines a community of memory and can often be found in ethnic, national and religious communities. Membership in a community may be handed down through the generations, or may be adopted as a conscious choice.

Thin relationships are relationships with strangers, others with whom we share no common memory and no community of memory. Thin relationships do not obligate us to remember and commemorate the deaths of others. However, they are regulated by morality and respect for our common humanity, although this moral relationship lacks some of the emotional content that defines the community of memory.

Communities of memory thus share an obligation to remember. This obligation entails an ethical duty to remember and commemorate the members of one’s community; honoring their memory also creates a sense of cohesion within the community. This sense of cohesion emerges even when the sense of community belonging is marked by ambivalence and requires an interrogation of one’s historical memory, as is often the case. Margalit also distinguishes between *common* memory and *shared* memory. Common memory is the simple aggregate of the individual memories of an event. Shared memory, on the other hand, requires communication. A shared memory integrates the different perspectives of those who remember the event and, as described by Margalit, “calibrates” the different versions of the event to create a single version. Shared memories are thus “built on a division of mnemonic labor.”⁹ In other words, shared memory does not simply arise on its own, naturally, but is the outcome of a constructed process of dialogue, for example between groups which have differing perceptions and historical narratives of the past.

A single event can be remembered differently by different groups, and thus function as a divided memory. For example, the memory of victory for one group is the memory of defeat for another; the same event is assigned different meanings by different groups. For this reason, multicultural societies necessarily incorporate many different collective memories, which in turn forcefully shape the understanding of contemporary experiences of discrimination. From a didactic and pedagogical point of view, the educational process must integrate this multiplicity of memories to create a dialectic between the past and the present. However, the diversity of perspectives can also create friction when different groups of victims compete for primacy and demand sympathy for their suffering, sometimes without reciprocal understanding for the experiences of other victimized groups. For many students, recalling everyday experiences of invisibility and exclusion can serve as a bridge to active engagement with the topic of anti-discrimination. However, incorporating historical events into an-

⁸ Avishai Margalit, *Ethik der Erinnerung* (Frankfurt a.M., 2000).

⁹ See Margalit, 51-52, esp. 51.

ti-discrimination education may lead some students to over-identify with the victims or compete for victim status. At the same time, other students may feel that they are being attacked for their national or ethnic identity or that they are being equated with the perpetrators they are condemning. All these possible responses have to be addressed within anti-discrimination work. However, this challenge also has the potential to create a safe space for different memory cultures and each group's desire for social recognition.

Places of Memory and Territorial Belonging

Places and territories are burdened with history, but they are also the place where *citoyenneté* is practiced, as people derive their sense of territorial belonging from where they live and work. The idea of *citoyenneté* encompasses three dimensions: the legal dimension, which guarantees equality before the law; the participatory dimension, which enables participation in a political community; and the symbolic dimension, which encompasses the right to determine one's own cultural and social identity. This symbolic dimension of *citoyenneté* also means all persons who live in the local and national territory are included in the discourses of memory and memorization, not only the majority population or nationals.

Any pedagogical concept linked to a particular place or site will need to incorporate the pedagogical triangle, the link between the topic, the place, and the group.¹⁰ In our current scenario, the *topic* is history; the *place* is a site of memory, which includes the history of the site as a memorial (who chose the site, and why it was selected to become a monument or memorial); and the group is the often socially and culturally heterogeneous group who engages with the topic and the place.

The debate about memorials and their educational role has often been quite lively, with a number of interesting new approaches emerging in recent years. Memorial work is highly bound to place and location, and memorial work entails both commemorating the victims and conveying historical knowledge. In addition, memorial work is often expected to play a role in human rights and anti-discrimination education. Finally, memorial work must take into account different communities and their different historical memories of the site.

Conclusion

The issue of historical content and context in anti-discrimination education is complex. Although the history of human rights violations provides many instructive examples of resistance, moral courage and moral responsibility, historical understanding does not in itself teach how these crimes might have been prevented. Historical education that teaches students how to identify the causal factors in human rights violations and historical atrocities can certainly serve as a motivating force in anti-discrimination education. But historical content is not essential to successful anti-discrimination education and initiatives. When the pedagogical goal is the creation of a true *citoyenneté*, however, the educational content must include a historical dimension. This historical dimension, in turn, must include a territorial dimension, since democracy and *citoyenneté* are enacted within a specific (usually national) territory.

In addition, anti-discrimination education must establish a bridge between history and the personal experience. This link can be established through communities of memory or territorial allegiances. The site of memory need not necessarily be a memorial site – it can also be a street, a neighborhood, a village, or a territorial border. For example, one innovative educational model sets the remembered experiences of a com-

¹⁰ Monique Eckmann, "Intensivseminare als Erlebnisprozess zu Identität und Minderheiten in Europa," in *Faszination und Realität des Interkulturellen*, ed. Franz Hamburger (Mainz, 1998): 93-114.

munity or locality in dialogue with the experiences of immigrants or other minority groups. In many cases, the most fruitful dialogue results from the search for common solutions, rather than common experiences of victimization.¹¹

However, students will only learn the exercise of *citoyenneté* within an effective pedagogical process that incorporates the principles of *citoyenneté* on both a theoretical and practical level. Regardless of the absence or presence of historical content, anti-discrimination education requires an intense democratic engagement from the educators. Educators must be able to create a space for heterogeneous memory cultures and group allegiances without forcing them on any individual students or groups. By these means, memory may be engaged as a mode of access for historical learning and for the project of human rights.

¹¹ Kevin Haddad, Altay Manço and Monique Eckmann, *Antagonismes communautaires et dialogues interculturels: Du constat des polarisations à la construction des cohésions* (Paris, 2009).

Albert Scherr

THE ROLE OF HISTORICAL AND POLITICAL EDUCATION IN CONTEMPORARY HUMAN RIGHTS EDUCATION

This essay explores a number of key issues in the relationship between human rights education, historical education, and political education. Unlike many international and German commentators, my argument does not assume that there is an obvious and necessary connection between historical learning and human rights education. Instead I argue that studying the history of the Nazi regime and the Holocaust does not automatically confer an appreciation for human rights as fundamental principles and an understanding of their necessity. Nor does it automatically confer an understanding of the contemporary relevance of human rights norms, even within democratic societies. At the same time, however, I argue that historical and political education are indispensable for understanding human rights.

Human Rights Education as a Contemporary Project

Human rights education does not simply aim to teach students – whether children, adolescents, or adults – about human rights norms and laws. It also tries to promote appreciation for human rights as a fundamental ethical and legal basis of society and teach the value of human rights enforcement.

Today's immigrant societies are socially and culturally diverse. They are confronted with crises and conflicts linked to increasing globalization. Within this context, human rights education also aims to create a baseline consensus that enables students and citizens to engage with controversial social and political issues.¹ As a result of the heterogeneity of contemporary societies, traditional religious, philosophical, and national narratives can no longer guarantee a normative consensus. To the extent that human rights norms and principles achieve universal legitimacy, they might serve as a basis for creating consensus and bridging divergent cultural, historical, and national experiences.²

Is historical education necessary to convey the importance of human rights as a fundamental principle of society? Quite often, the audiences for human rights education programs are “ordinary” children, adolescents and adults rather than university students or academics in the field. Especially for these non-academic audiences, programs which emphasize the history of human rights and human rights violations may not be the best way to encourage critical engagement with contemporary human rights issues. For these audiences, a more effective pedagogical strategy often incorporates issues of immediate and personal significance to the

¹ See Ulrike Hormel and Albert Scherr, *Bildung für die Einwanderungsgesellschaft* (Wiesbaden, 2004): 131ff.

² Heiner Bielefeldt, *Menschenrechte in der Einwanderungsgesellschaft* (Bielefeld, 2007).

students, which can then help them explore the political, legal and ethical ramifications of human rights and their enforcement. Indeed, many contemporary human rights education programs focus almost exclusively on the personal experiences of students and contemporary social issues. These programs reference historical issues only when they shed light on contemporary dilemmas and the possibilities for political action. In this sense, historical context is a useful but not essential supplement to human rights education.

Several experts on human rights education have expressed doubt about the effectiveness of history, and especially the history of Nazism and the Holocaust, in conveying the current meaning and importance of human rights to children and youth.³ For example, Micha Brumlik has noted that focusing on the history of the Nazi regime and the Holocaust can make other human rights violations appear less serious and worthy of consideration:

The experiences of the last century and threats of the new century confirm the inadequacy of any educational program that above all says “never again” to Auschwitz. “Auschwitz” marks a unique low point in human history; if we succeed only in preventing another Auschwitz, we will have done little to prevent myriad other potential atrocities.⁴

In this sense, focusing on the history of Nazism and fascism may have the paradoxical effect of desensitizing students to contemporary human rights violations. However, when the Holocaust is taught in depth, many students experience significant emotional distress as they confront the history of organized mass murder; in turn, this distress may cause some students to develop significant resistance to the topic. Indeed, it is often quite difficult to walk the line between overwhelming and alarming students and sufficiently addressing the scope of historical atrocities.

On the other hand, educational programs that emphasize the human rights aspects of historical and political learning may appear to relativize the historical specificity of Nazism and the Holocaust by implying that the Holocaust is only the most extreme example of twentieth-century genocides. Finally, integrating historical examples into human rights education often unintentionally causes students to draw contemporary analogies from the examples of the past. Human rights education models that use historical events as examples rather than encouraging a nuanced engagement with history may obscure the historical contexts and specificities.

Human Rights Education as a Response to the Nazi Regime?

By the same token, the issue of human rights is only one of many aspects of historical education. In the case of the Nazi regime, for example, the issues of power and domination are tremendously important topics. Drawing moral lessons from the history of the Nazi regime does not necessitate a specific focus on human rights, since Nazi persecution and annihilation violated the most basic principles of morality. The issue of human rights extends far beyond the political and ethical lessons that can be learned from the history of the Nazi regime.

For all of these reasons, the history of Nazism and the Holocaust are not uniquely suited to human rights education.⁵ As a result, we must consider whether it makes sense to integrate historical learning into human rights education programs. In a similar vein, we must ask whether memorial sites help link historical learning with human rights education. While some have argued that memorials are uniquely suited to the project of

³ Bodo von Borries, “Lernen und Lehren zum Nationalsozialismus 2004,” in *Erinnern ist mehr als Informiertsein: Aus der Geschichte lernen*, vol. 2., eds. Wilhelm Schwendemann and Georg Wagensommer (Munster, 2004): 48-74; and Micha Brumlik, *Aus Katastrophen lernen? Grundlagen zeitgeschichtlicher Bildung in menschenrechtlicher Absicht* (Berlin and Vienna, 2004).

⁴ Brumlik, 142.

⁵ For reasons of space, I have considered only several of the many issues which have been raised regarding the history of Nazism and the Holocaust in human rights education programs.

human rights education, memorial sites are not simply educational institutions. They also provide opportunities for remembrance, mourning, and commemoration that are distinct from and go beyond the educational role. Moreover, the idea that memorials are uniquely “authentic sites,” which is influential in German discourse, has contributed to an additional misunderstanding about their role in human rights education. The defining feature of memorials – and other historically meaningful sites – is the visible trace of the site’s history. The sensory aspect of the memorial experience, which can also have a powerful emotional component, derives from the way these traces recall the events that occurred there. But the visitor has no direct or immediate access to the historical event, even when the buildings, rooms, and artifacts elicit a direct and powerful response, and their past function is obvious – for example, as jail cells or execution sites. Understanding the true historical significance of such memorials inevitably requires additional information. As such, historical sites are “only” meaningful as educational sites when they serve as a departure point for additional learning. In this sense, they are not necessarily more effective than monuments, works of art, photographs or other artifacts. Furthermore, more than 60 years after the end of the Nazi dictatorship, these sites are no longer truly “authentic.” They are restored and staged, their meaning no longer connected to the direct or immediate experience of the original historical topography. Both the buildings and topographies of historical sites have undergone changes over time. Memorials are therefore by definition staged sites, not least due to their re-creation as sites of memory.

Nevertheless, memorial sites can make a unique contribution to social and historical education. They combine information and intellectual engagement with the emotional response and visual immediacy elicited by the experience of viewing places, buildings and objects. However, it is impossible for visitors to emotionally relive the suffering of the victims, nor can they experience history directly through the documents, relics and artifacts on display. The emotional meaning attributed to these objects, and their ability to contribute to an intellectual understanding of the historical period, greatly depend on the prior attitudes and knowledge of the viewer and the didactic design of the memorial. In this sense, we cannot rely on the “effects of place” and assume that the site itself will elicit the desired response. Rather, we have to clarify the purpose of memorial visits within the broader framework of historical and human rights education.

The Historical Perspective and Human Rights Education

The attempt to define inalienable human rights includes an attempt to establish irrefutable moral and legal norms that provide a solid basis for differentiating between acceptable and unacceptable conditions and actions. Yet despite the claims of natural rights advocates, no single, universally valid definition of human rights can be derived from human nature.⁶ The definition of human rights is inevitably and inextricably linked to social conflicts and debates. For example, the Universal Declaration of Human Rights was the outcome of a process of negotiation and occasionally heated debate, as was the case with the right to free expression contained in Article 19.⁷ I examine the debate surrounding the definition of universal and inalienable human rights and the concrete demands that could legitimately derive from these rights. This examination also requires an examination of the definitions and interpretations of human rights and human rights enforcement in different historical eras.

In addition, we must address the complexities of historical perspectives that deepen our understanding of and

⁶ For reasons of space, I cannot examine the debate on the capability approach and its relationship to older understandings of natural rights; for a discussion of the topic, see Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA, 2006).

⁷ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia, 1999).

engagement for human rights in both human rights education and political discourse more broadly. Our understanding of history is shaped by our own social location and point of view, which cause us to remember the past differently from others. Such “conflicts of memory” may lead to competition between different groups of victims. Educational programs must adopt a reflexive stance that interrogates different perspectives while recognizing that they cannot simply be explained away.

Human rights themselves are historical in nature. For example, the codification of the right to asylum under Article 14 of the 1948 Universal Declaration of Human Rights was a direct response to the fact that many victims of Nazi persecution, especially those who were persecuted as Jews, could not escape their fate because other nations denied them asylum. In response, Article 14 provided a right of asylum, but limited it to victims of political persecution. Moreover, Article 14 does not define the conditions under which states are obligated to grant asylum, nor does it address the situation of so-called economic refugees. In this sense, the inalienable right of asylum under Article 14 is the outcome of a specific historical situation, rather than an eternal human right. Furthermore, the history of the right to asylum has not been one of linear progress and expansion since 1948. For example, Article 16 of the German Basic Law originally envisioned a binding individual right to asylum for victims of political persecution. This right has been significantly curtailed in recent years, as demonstrated by the 1993 amendment of Article 16 in Germany and the shift within EU asylum policy since the mid-1990s.

The expansion of “Fortress Europe” has thus been accompanied by a restriction of the right to asylum, with at times fateful consequences for refugees. The discussion about human rights in Europe today must also take into account the fates of refugees who perish as a result of the increased danger of entry into the European Union. These consequences, however, have not elicited wide-scale ethical condemnation within Europe, nor have they prompted substantial debate about the European Union’s concept of itself as a community of values. Contemporary human rights education cannot ignore this silence.

Similarly, the global media also makes it impossible to ignore the reality that events such as war and genocide continue to violate the most basic human rights, while asylum policies provide little relief. As human rights educators, we must ensure that the gap between expectation and reality when it comes to human rights does not overwhelm students with feelings of cynicism, resignation, or anger that cannot be usefully channeled into political action.

The development of the principle of non-discrimination also evinces the historical nature of human rights. For example, discrimination on the basis of sexual orientation and disability was not included in the 1948 Universal Declaration of Human Rights, but has since been included in more recent anti-discrimination conventions. In the area of anti-discrimination, this progress has meant an expansion of human rights.⁸ However, debates on human rights continue to skirt the issue whether unequal treatment on the basis of nationality also constitutes a form of discrimination. In light of the vast disparities in living conditions across the globe, nationality is a potentially important human rights concern, and the 1948 Universal Declaration on Human Rights cited national origins as potential sources of discrimination. However, a recent EU anti-discrimination directive explicitly states that it “does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation.”⁹ In this sense, there is no linear progress towards a greater understanding of human rights.

⁸ See Heiner Bielefeldt and Petra Follmar-Otto, *Diskriminierungsschutz in der politischen Diskussion* (Berlin, 2005).

⁹ Article 13, Council Directive 2000/43, accessed on Nov. 23, 2009 from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>.

As such, human rights education must avoid presenting human rights as timeless, eternal, and uncontested. In order for students to properly understand human rights and human rights violations, they have to explore social conflicts and their history and understand how contemporary definitions of human rights emerged. History is not simply an enhancement, but an essential component in the project of human rights education. A historical perspective on human rights concepts and issues not only benefits students, but can help to shape a broader social and political discourse on human rights.

Discrimination: Who is the Subject of Human Rights?

Most serious human rights violations occur because dominant ideologies establish a boundary between those who are considered equal and worthy, and those who are not. Ideologies have excluded and continue to exclude some groups as the legitimate subjects of human rights. For members of these discriminated groups, ordinary moral norms and compassion no longer apply. Richard Rorty touched upon this issue in his description of Thomas Jefferson, the key author of the United States Declaration of Independence: “The founder of my university was able both to own slaves and to think it self-evident that all men were endowed by their creator with certain inalienable rights. He had convinced himself that the consciousness of Blacks, like that of animals, ‘participate[s] more of sensation than reflection.’”¹⁰ In Rorty’s conceptualization, the ideology of racism gradually dehumanizes persons who are constituted as members of an inferior race. This process of dehumanization is not limited to racist ideologies; ideologies of nation, religion and ethnicity also construct outsiders as less than fully human and less deserving of moral concern. As a result, human rights education must grapple with and deconstruct stereotypes embedded in dominant ideologies in both the past and present, since these stereotypes have limited and continue to limit the scope of human rights.

The 1948 Universal Declaration of Human Rights already contained an explicit prohibition on racial discrimination. However, this did not end segregation in the United States. It was not until the 1960s that the civil rights movement finally succeeded in slowly transforming structural and institutional racism in the United States. Human rights education must also analyze how these kinds of social movements challenged ideologies that dehumanized entire classes of individuals.

Finally, effective human rights education stresses that the concept of human rights did not come to encompass the universal rights of all humans in a linear or logical fashion rooted in rational argumentation. Rather, the universalist concept of human rights had its origins in social movements and conflicts. Oppressed minorities had to vigorously demand the rights that were allegedly already universally recognized. A critique of power and ideology must therefore accompany the historical perspective of human rights education.

The history of the social movements that have helped advance human rights is also important because it highlights the options for active engagement, even in the present day. By incorporating this history, we help ensure that teaching students about human rights violations of the past and present does not lead to complacency or cynicism.

¹⁰ Richard Rorty, *Truth and Progress: Philosophical Papers* (Cambridge, UK, 1998); 167.

Hasko Zimmer

MEMORY WORK AND HUMAN RIGHTS EDUCATION IN AN IMMIGRANT SOCIETY

Germany has become a nation of immigrants. In the past decades, migration has transformed the demographic landscape of Germany and national, ethnic and cultural diversity have become the norm. The enduring myth of cultural homogeneity and national identity in Germany has begun to erode, while the majority population has been forced to confront this dramatic social transformation and adapt to a new national and cultural identity. Today and in the future, our task will be to negotiate the terms upon which this now irrevocable development is understood, and how it will continue to shape German society. This process is and will likely remain fraught with tension and controversy, as is evident in the ongoing discussion about integration and assimilation, the debate on the existence of a German *Leitkultur*, or dominant German cultural identity, and the persistence of xenophobic and openly racist attitudes among segments of the “native” population.

The international debate on human rights has long been concerned with the issue of minority cultural rights and their relationship to democratic principles of equality, as well as the underlying principles which should guide our attempts to address the contentious issues of difference and heterogeneity in immigrant societies.¹ As this debate has shown, multiethnic and multicultural societies are inevitably confronted with what Charles Taylor calls the “politics of recognition,” but at the same time must grapple with the tendency for such cultural politics of identity to subvert the ideal of universal and inalienable human rights. This multifaceted debate has nonetheless reached the broad consensus that a key challenge facing democratic and human rights policies is the need to recognize ethnic and cultural diversity while simultaneously ensuring the full and equal participation of immigrants in the host country. This challenge requires us to understand integration as a reciprocal process in which the majority must also make accommodations. Our willingness and ability to undertake this task is both an educational and a political issue, and its success requires a long-term commitment to social learning and social change.

The dilemmas confronting multicultural and immigrant societies in the area of human rights have much to do with the preservation and transformation of historically determined forms and understandings of identity. For this reason, history and collective memory are important and contentious issues, both in terms of the struggle of minorities for recognition of their cultural identity and right to self-determination, as well as the majority’s reaction to this demographic and social change. Immigrant and multicultural societies necessarily

¹ This debate was spurred by the publication of Charles Taylor, *Multikulturalismus und die Politik der Anerkennung: Mit Kommentaren* (Frankfurt a.M., 1993); see also Seyla Benhabib, *Kulturelle Vielfalt und demokratische Gleichheit: Politische Partizipation im Zeitalter der Globalisierung* (Frankfurt a.M., 1999).

encourage the proliferation of diverse historical narratives and collective memories. As a result, the majority must come to terms with the breakdown of formerly transparent and universal representations of the past in public institutions and discourses. These issues create clear challenges for the “politics of recognition” in immigrant societies. In what follows, I describe challenges facing memory work and human rights education in Germany from three perspectives. My understanding of memory work is not limited to the issue of memorial education and the pedagogical confrontation with National Socialism and the Holocaust. Instead, I conceive of memory work as an aspect of historical and political education embedded within a social and educational context, as well as within the politics of memory in Germany. I analyze three key debates to explore the dilemmas confronting Germany as an immigrant society. First, I examine the debate on the establishment of a German museum of migration and its implication for the politics of memory. Second, I examine the debate over the development of a concept for intercultural history instruction. Finally, I consider the problems and perspectives associated with “education after Auschwitz,” which is central to pedagogical issues of memory and remembrance in Germany. The issue of human rights and the link between historical and political education and human rights education play a prominent role in this educational discourse. Consequently, I examine the opportunities and the difficulties associated with this innovative and promising approach.

Inclusive Memory: The Debate on a Museum of Migration for Germany

National cultures of memory can be described as the collective or cultural memory of a nation, which are anchored in institutionalized forms and practices.² Once established, these national cultures of memory are usually quite durable. However, to the extent that national cultures of memory are also the outcome of debates on the politics of memory and the contemporary understanding of the past, they are also subject to change. The durability of a national culture of memory thus depends on its ability to secure collective identity and understandings of the past and ensure a collective framework for social action. Moreover, the stability of national cultures of memory also depends on the ability of historical and political actors to successfully call for change. One example of the potential for transformation within a national culture of memory is the ongoing call for a national museum of migration that has accompanied Germany’s transformation to a nation of immigrants.

The debate on the national museum of migration originated in the realization that the nearly 50-year history of migrant labor, which has closely followed the development of the Federal Republic of Germany, has passed largely “without a trace.” Unlike the German refugees and expellees who came to West Germany from the former eastern provinces after 1945, the millions of former *Gastarbeiter* (literally, “guest workers”) and their families have been unable to secure a place in Germany’s national memory. As this absence has become more visible in recent years, a number of projects and exhibits have emerged to examine the history of immigration in Germany.³ These projects in turn prompted calls for a national museum of migration, first by second-generation immigrants from Turkey, and then by a broadly based alliance of cultural and immigrant organizations.⁴ This alliance project understands itself as a reaction to the exclusionary tendencies within the German cul-

2 The term “cultural memory” was coined by the Egyptologist Jan Assmann; see Jan Assmann, *Religion and Cultural Memory: Ten Studies* (Palo Alto, 2006).

3 See especially Jan Motte and Rainer Ohliger, “Einwanderung – Geschichte – Anerkennung: Auf den Spuren geteilter Erinnerungen,” in *Geschichte und Gedächtnis in der Einwanderungsgesellschaft: Migration zwischen historischer Rekonstruktion und Erinnerungspolitik*, eds. Jan Motte and Rainer Ohliger (Essen, 2004): 17–52, as well as the other contributions in the volume. Recent projects and exhibitions on the history of migration include “Fremde Heimat: Eine Geschichte der Einwanderung aus der Türkei” in Essen, Germany; “MigrationsGeschichten” and “Geteilte Welten” in Berlin; “Einwanderer in Hamburg” in Hamburg; and “Zuwanderung und Integration in Niedersachsen 1945 bis heute” in Hannover.

4 Aytac Eryilmaz, “Deutschland braucht ein Migrationsmuseum,” in Motte and Ohliger, 305–319.

ture of memory, which attempts to claim national validity for its own cultural memories while marginalizing the history and memory of immigrants in a way that creates a national culture based solely on the majority ethnic German population. The permanent exhibition of the Haus der Geschichte der Bundesrepublik museum, which opened in Bonn in 1994, embodies this tendency. The permanent exhibition mentions the history of labor migration only fleetingly and focuses only on the economic aspects this history, which typifies the dominant social viewpoint on migrant workers. The need for a new perspective was highlighted by the important exhibition “Fremde Heimat” (literally, “The Foreign Homeland”), which opened in Essen in 1998. By including both the German and Turkish perspectives, the work and living conditions, as well as the “sites of memory” that played an important role, the exhibition set a new standard for the representation of the lives of the first generation of immigrants.⁵

These initiatives confirm that immigrant societies must make an active effort to recognize and incorporate the memory of immigrants if they are to do justice to the principles of recognition and equality in the sphere of public cultures of memory. From the perspective of immigrants, what is important in this respect is whether and how the social majority will grant them the capacity for self-determined cultural representation. In contrast to classical immigrant nations like Canada, the United States and Israel, until the late 1990s Germany continued to uphold the political fiction that it was not a nation of immigrants, and adhered to the model of “non-representation.” The reform of the citizenship law, which took effect in 2000, improved the conditions for the cultural self-representation of ethnic minorities.

The increasingly forceful calls for a museum of migration express the growing self-confidence of the new cultural elite among Germans with an immigrant background, who are no longer prepared to accept a “politics of cultural exclusion.”⁶ Their self-confidence has informed a policy of memory that does not envision the demand for a museum of migration as a particularistic issue, but rather as a “key cultural policy task for state and society.”⁷ As Aytac Eryilmaz and Martin Rapp have noted: “Germany is a nation of immigrants. ... The task before us is no less than the expansion of a historical consciousness that incorporates immigrants ... and abandons the myth of the nation.”⁸ As a repository of cultural memory, the museum of migration would situate this development within its historic context. By creating the conditions for a shared understanding of their common history for both migrants and the majority society alike, the museum would “secure the historical memory of the immigrant society.”⁹

It remains to be seen whether the project to create a new German museum of immigration will come to fruition. However, the sociopolitical significance of the project and its importance to the national politics of memory has been confirmed in both academic debates as well as in the international development of museums of immigration, leading examples of which can be found in the United States.¹⁰

The example of the United States also underscores what is absent from the German project. Unlike Ellis Island or the Lower East Side Tenement Museum in New York, the German project does not have access to authentic sites of memory that can be used to tell the history of the nation as an immigrant society. Also, the German

5 Aytac Eryilmaz and Mathilde Jamin, eds., *Fremde Heimat: Eine Geschichte der Einwanderung aus der Türkei* (Essen, 1998).

6 Rainer Ohliger, “Kulturpolitik und Migrationsgeschichte in der Einwanderungsgesellschaft,” paper presented at the conference “Ein Migrationsmuseum in Deutschland” at the Kunstverein in Cologne, October 2003.

7 Aytac Eryilmaz and Martin Rapp, paper presented at the conference “Ein Migrationsmuseum in Deutschland” at the Kunstverein in Cologne, October 2003.

8 *Ibid.*, 2.

9 *Ibid.*

10 Gottfried Korff, “Fragen zur Migrationsmusealisierung. Versuch einer Einleitung,” in *Migration und Museum: Neue Ansätze in der Museumspraxis*, ed. Henrike Hampe (Munster, 2005): 5–15; see also the other essays in Henrike Hampe, ed., *Migration und Museum: Neue Ansätze in der Museumspraxis* (Munster, 2005).

project is unable, or not yet able, to draw on the resources of a society that, despite its ethnic and cultural heterogeneity, can understand these sites within a “community of memory and narrative that is shared as a common heritage.”¹¹ However, it is undeniable that the demand for a national museum of migration has identified Germany’s urgent need to develop an inclusive public culture of memory that incorporates the history of immigrants.

Intercultural History Education

Intercultural education has long been concerned with the pedagogical effects and consequences of social change. The consensus within intercultural education is that ethnically and culturally plural societies can no longer maintain educational policies that support a national self-understanding of education closely tied with the homogenizing function of schools in modern nation states. The reality of an immigrant society makes it necessary to rethink the entire sphere of education from the perspective of heterogeneity, interculturality, recognition and inclusion; in other words, from the perspective of “education in an immigrant society.”¹² Doing so requires abandoning the principle of monoculturalism, which has a demonstrably negative effect on students from immigrant families. Instead, we must adapt our pedagogy and methodology to the reality that intercultural education has become a key qualification in multiethnic and multicultural societies.

These debates are linked to the didactic discussion about the consequences of immigrant society on the schools and within the school curriculum.¹³ For the purpose of my argument, the concept of intercultural history education is particularly useful, since it has attempted to reconfigure the tasks and learning goals within historical education in accordance with changed social conditions and educational requirements.¹⁴ In a society in which interculturalism has become a daily fact of life, intercultural history education and learning have become obligatory and essential tasks. The focus of the critique has been the idea of a *national perspective* on history. In immigrant societies, the traditional function of history instruction as an aid to the formation of national identity is anachronistic and dysfunctional because it fails to take into account the declining significance of the nation-state within the process of globalization. Moreover, the national perspective by definition excludes the significant percentage of students who are not German citizens, or whose parents are not citizens. The concept of intercultural history instruction instead assumes that historical education must integrate the principles of recognition and inclusion, the basic right of immigrants to have a meaningful connection to the past, and the need to have the history of migration included in the larger historical narrative. However, the theory of recognition creates multiple challenges for intercultural approaches. Historical education must rigorously engage with the cultural interpretive frameworks of students with immigrant backgrounds, as well as the ways they view history, to avoid the tendency for cultures to become fixed or for immigrants to essentialize their own ethnic identities or have fixed ethnic identities ascribed to them. At the same time, to prevent intercultural learning from descending into cultural relativism and indifference, it must engage with these issues with reference to the normative principles that underlie democratic societies, or within the framework of universal human rights. Intercultural historical learning aims to overcome

11 Korff, 9.

12 For a discussion of the current status of this debate, see Georg Auernheimer, *Einführung in die Interkulturelle Pädagogik*, 5th rev. ed. (Darmstadt, 2007); Marianne Krüger-Potratz, *Interkulturelle Bildung* (Munster, 2005); and the comparative international study by Ulrike Hormel and Albert Scherr, *Bildung für die Einwanderungsgesellschaft: Perspektiven der Auseinandersetzung mit struktureller, institutioneller und interaktioneller Diskriminierung* (Wiesbaden 2004).

13 H. Reich et al., eds., *Fachdidaktik interkulturell* (Opladen, 2000).

14 In what follows, I draw upon Bettina Alavi and Bodo von Borries, “Geschichte,” in H. Reich et al., 55-91; and Bodo von Borries, “Interkulturalität beim historisch-politischen Lernen – Ja sicher, aber wie?” in *Interkulturelles Geschichtslernen*, ed. Andreas Körber (Munster, 2001): 73-96.

ethnocentric, nationalist and racist attitudes. It has to highlight the connection between historical education and human rights, which should be a core topic in intercultural history instruction. To fulfill its function within Germany's immigration society, history instruction must become historically informed human rights education.¹⁵

These points raise questions about the status of national history in intercultural history instruction. In light of the tension between heterogeneity and belonging, and the need for the recognition of cultural difference and the acceptance of immigrants in the host country, Bodo von Borries has argued for a compromise model that would link an introduction to the history of the German nation with the issue of human rights. This revised curriculum, which von Borries conceives as a new form of historical and political nation building, could promote a sense of affinity among immigrants with Germany's national history while establishing human rights as the normative foundation necessary in a multiethnic and multicultural immigrant society.¹⁶

“Education after Auschwitz” in an Immigrant Society

The debate surrounding a museum of migration in Germany and the call for an intercultural reconceptualization of history instruction demonstrate the social, political and educational importance of history and memory for recognition and inclusion in immigrant societies. In this section, I examine whether these debates can or should apply to memory work in the field of education in Germany, and specifically to the memory of the crimes committed under the Nazi regime.

The issue of “education after Auschwitz” necessarily recalls Theodor Adorno's imperative in the wake of the Auschwitz trial in Frankfurt from 1963 to 1965. Adorno directed his argument that the “premier demand upon all education is that Auschwitz not happen again” against the tendency to repress the reality of the past.¹⁷ In the decades that followed, this imperative became one of the central themes of memorial education and work. Adorno's demand and the educational concepts derived from it were formulated under the specific historical conditions of the 1960s, which focused on the issue of Germany as a “society of perpetrators” and descendants of those perpetrators. Today, that imperative must be reformulated in light of decades of social and demographic change that have produced a multinational, multiethnic and multicultural community.

This debate is particularly difficult and compelling because of the central importance of the memory of National Socialism and the Holocaust to Germany's self-conception and politics. In contrast to other topics in historical education, the profound normative judgments connected to Germany's past are not negotiable, despite the changes in Germany's societal makeup. The programmatic duty of memory to which all Germans are more or less obligated, which is the result of a long process of confrontation with Germany's national memory, and the underlying the concept of a German community of memory and responsibility, almost necessarily conflicts with the pedagogical imperatives of an immigrant society, which many commentators argue must also be incorporated into the project of memory work. Different positions in this debate have generated a wide range of responses to this issue.

If we emphasize the call to recognize and incorporate historical issues that are of particular interest to immigrants, then it becomes difficult to adhere to a memory project in which the genocide of the Jews has clear priority. This emphasis inevitably leads to the fact that the memory of other violations of human rights of the

15 Alavi and von Borries; for an earlier study, see Jörn Rüsen, “Menschen- und Bürgerrechte als historische Orientierung,” in *Menschenrechte im Prozess der Geschichte*, eds. Klaus Fröhlich and Jörn Rüsen (Pfaffenweiler, 1990): 1-30.

16 Bodo von Borries, “Was geht uns eure Geschichte an?” *Sowi 2* (2004): 72; see also von Borries (2001).

17 Theodor Adorno, “Education After Auschwitz,” in *Can One Live after Auschwitz?: A Philosophical Reader*, ed. Rolf Tiedemann (Stanford, 2003): 19-33, esp. 19.

20th century, which are anchored in the collective memory of immigrants, refugees and asylum seekers, appear to be less worthy of remembrance. If we wish to avoid competition among victim groups and also make clear to young people from a non-German background why they must engage with the topic of the Holocaust, then, as the educational researcher Micha Brumlik argues, we must also address the topic of other genocides. This can only be accomplished within the framework of historical and political education that does not base definitions of the nation on ethnicity, but rather on human rights. “Education after Auschwitz” would have to become human rights education and commemorate the victims of all genocides in order to promote the dignity of all.¹⁸

However, this option is controversial in debates about “education after Auschwitz,” since it could result in a change of the status of the Holocaust within memory work. Those who argue in favor of this form of human rights education claim that it is a necessary risk. We might usefully build on the desire of adolescents from immigrant families for a sense of belonging within German society, which for some of these youth is linked to an interest in the topic of National Socialism and the Holocaust.¹⁹ Some commentators argue that the solution entails creating the conditions for an “inclusive, moral community of memory” that avoids all exclusionary tendencies within memory work. Doing so would open the door to participation in the collective memory of German society, “to which all people who live in Germany in principle have access.”²⁰ As Viola Georgi notes, “education after Auschwitz” would remain open to contemporary issues within human rights and continue to incorporate the agenda of intercultural and historically founded human rights education.

An alternative viewpoint on these issues insists on a more or less normative demand for integration. In light of Germany’s Nazi past, this demand is construed as obligatory for anyone who is or desires to become a German citizen. According to Bodo von Borries, it is impossible to be a member of German society without entering the German community of responsibility. Immigrants cannot be excluded from this community of responsibility, but also cannot exclude themselves from it. Anyone who has not accepted this reality, according to von Borries, “has not fully ... comprehended the interdependence of the process of integration.”²¹ Wolfgang Benz, director of the Center for Research on Anti-Semitism at the Technical University of Berlin, takes this one step further, arguing that the unwillingness of some Muslim students in Berlin schools to study the topic of the Holocaust tests the limits of tolerance: “We must insist that the social and cultural consensus of the host society, which includes issues from human rights to the proper attitude towards the Holocaust, is shared by everyone in this society, regardless of their ethnic or cultural background.” Immigrants have a right to demand respect for their collective memories, but the host country also has the right to expect that immigrants know about “its history and the significance of the defining elements of its national memory.”²² The German immigrant society must be able to make room for a variety of memory cultures, but the prerequisite for integration and citizenship must be the acceptance of the German conception of human rights, which has become fundamental to any engagement with National Socialism and the Holocaust.

Although these positions proceed from the same basic assumptions, they arrive at very different conclusions, which illustrate the difficulty inherent in the attempt to find a convincing conceptual response to the changed

18 Micha Brumlik, “Erziehung nach ‘Auschwitz’ und Pädagogik der Menschenrechte,” in *“Erziehung nach Auschwitz” in der multikulturellen Gesellschaft*, eds. Bernd Fechner et al. (Munich, 2000): 47-58; and Micha Brumlik, *Aus Katastrophen lernen? Grundlagen zeitgeschichtlicher Bildung in menschenrechtlicher Absicht* (Berlin, 2004).

19 See the important empirical study by Viola B. Georgi, *Entliehene Erinnerung: Geschichtsbilder junger Migranten in Deutschland* (Hamburg, 2003).

20 Georgi, 311.

21 von Borries (2004), 71.

22 Wolfgang Benz, “Über den Holocaust müssen alle Bescheid wissen,” *Frankfurter Rundschau* (Mar. 7, 2007): 7.

preconditions and demands of memory work. Both sides of this debate assume that remembering the crimes of National Socialism must be taken as a given, but they differ in how they locate and justify this remembrance in the context of Germany's immigrant society. The differences become apparent depending on whether they stress the educational needs of the subjects of this memory work, or whether they pragmatically or normatively stress the conditions of integration and citizenship. For this reason, the two positions also differ in their approach towards the role of human rights. The "educators" assume that historical learning in a multiethnic and multicultural society requires a dialogic process of education in which confrontation with the past first requires an understanding of the universal validity of the principles of human rights. The "historians," on the other hand, assume that the principle of human rights was a hard-won historical lesson that German society learned from the experience of National Socialism. As a foundational principle of the German nation, this historical lesson is non-negotiable and is thus "decreed" even in today's immigrant society. This historically-based argument highlights the ways in which intercultural learning and human rights education partly fail to engage critically with the attitudes toward history and politics common to some young immigrants.

On the other hand, those who argue that immigrants are obligated to engage with National Socialism and the Holocaust base their arguments on assumptions that are pedagogically dubious and do not withstand empirical analysis. Equating citizenship with the consciousness of membership in a German "community of responsibility" implies a surprisingly optimistic judgment of the historical and political consciousness of the mainstream German population. It also overestimates the effectiveness of the project of historical "education after Auschwitz," which the ongoing trend toward far-right extremism and anti-Semitism in Germany would seem to contradict. Finally, the assumption that classroom instruction on National Socialism and the Holocaust can make a direct and significant contribution to human rights education ascribes a quality to history instruction that is more the exception than the rule. Such divergent conclusions despite similar starting points mean we must look more closely at arguments in favor of linking memory work with human rights education.

Memory Work and Human Rights Education

The hopes placed in linking memory work and human rights education within the debate on "education after Auschwitz" should not obscure the conceptual problems inherent in this promising and innovative project. For one, not all conceptualizations of human rights education are equally suited to this project. Nor can we assume that the conceptual link between historical learning and contemporary human rights education is unproblematic, much less self-explanatory.²³

Even a cursory glance highlights the unfavorable conditions in Germany today for increased attention to human rights. The German population does not display particular awareness of human rights and their meaning. Human rights education is not an integral and institutional aspect of the German school curriculum, despite the corresponding recommendation by the Standing Conference of the Ministers of Education and Cultural Affairs. With the exception of some locations, such as the city of Nuremberg (which has fashioned itself as the "City of Human Rights" with public sites of memory and learning), German memory culture makes little reference to human rights. This is true even on the anniversaries of the proclamation of the German Basic Law, which cannot be understood apart from the Nazi past, and the 1948 General Declaration of Human Rights. These lacunae exemplify the separation of the remembrance of the crimes of National Socialism and the issue of human rights. This separation continues to shape German cultures of memory and hinders the

²³ Albert Scherr and Ulrike Hormel, *Evaluation des Förderprogramms "Geschichte und Menschenrechte" der "Stiftung Erinnerung, Verantwortung, und Zukunft"* (Berlin, 2008); and Hasko Zimmer, "Erinnerung im Horizont der Menschenrechte – Perspektiven der Erinnerungsarbeit im Rahmen der Globalisierung," in *Jahrbuch für Pädagogik 2003: Erinnerung, Bildung, Identität* (Frankfurt a.M., 2003): 247-269.

project of linking historical learning with human rights education.

In addition to these social conditions, we must also acknowledge the inevitable tensions that underlie the attempt to link history with human rights education. There are obvious conceptual and methodological problems. The demands of historical learning and the engagement with concrete historical events can clash with normative principles and the universal claims of laws and rights, just as the learning habits of historical thought and understanding can conflict with promoting active engagement with human rights. Simply adding the two different thematic areas and topics of learning cannot therefore be an intellectually defensible and sustainable position. This would also not bring us far beyond the well-intended but rightly criticized practice of using human rights questions as a morally accentuated appendix to historical processes of learning, or to using history as an arsenal of largely context-free examples for violations of human rights.

A conceptually convincing link between the two fields can only succeed if we overcome the lack of references to contemporary issues within history education and the tendency towards ahistorical argumentation within human rights education. Both fields will also have to adapt their methodology and curriculum to the learning demands of an immigrant society. This requires a precise understanding of human rights education, as well as a precise understanding of human rights, which cannot be fully understood apart from their historicity and contextual frame. The call for “historically informed human rights education” in which human rights are construed as “the answer to historical injustices,” for example along the lines of the drafting of the 1948 Universal Declaration, is a key precondition for a conceptually rigorous link to the sphere of memory work. Drawing on the example of Nuremberg under National Socialism, Rainer Huhle has convincingly demonstrated the fruitfulness of historical learning that engages with the issue of human rights.²⁴ From the perspective of historical pedagogy, the discussion about ahistorical and abstract human rights education depends on historical learning as the “elixir of life for human rights.”²⁵ Only by returning to the conditions of their historical and political creation and development can human rights be made concrete and accessible to the reality of students’ lives. Pedagogical concepts that conceive of human rights education as education for an immigrant society are also rooted in similar assumptions.²⁶ Human rights education can help students critically engage with the human rights problems that arise in immigrant communities, including discrimination against ethnic and cultural minorities, and especially against refugees and asylum seekers.²⁷ Given the diversity of understandings of morality and rights within immigrant societies, which are also reflected in the thoughts and actions of students, we cannot assume any social consensus about the universal validity of human rights. Instead, human rights education must work to achieve this consensus. The primary goal of human rights education thus should not be to act as a vehicle for conveying universal human values, as this would conflict with the historical understanding of human rights as the concrete outcome of a process of struggle. Rather, human rights education should convey that human rights are not a universal end point, but the historical outcome of a development that is still underway. For this reason, any attempt to inscribe human rights as the normative foundation of society, and to assert that proper engagement with the history of National Socialism and the Holocaust is proof of adherence to this normative foundation, is somewhat problematic. This is true even when these assertions come from educators and activists working to address the challenges posed by immigrant com-

24 Rainer Huhle, “Menschenrechtspädagogik an einem Erinnerungsort des Nationalsozialismus: Ein Beispiel aus Nürnberg,” *GedenkstättenRundbrief* 109 (2002): 3-10.

25 Rüsen, 28.

26 Hornel and Scherr; and Hasko Zimmer, “Menschenrechtsbildung – eine Aufgabe der Schule: Über Grundlagen, Konzepte und gesellschaftliche Herausforderungen,” in *Menschenrechtsbildung in der Einwanderungsgesellschaft: Grundlagen und Impulse für die Schule*, Münster, 2008): 11-56.

27 Heiner Bielefeldt, *Menschenrechte in der Einwanderungsgesellschaft* (Bielefeld, 2007).

munities to historical and political education. Indeed, human rights “can only serve an integrative function within debates about multicultural coexistence when the majority society does not assert the validity of human rights in order to quash dissent.”²⁸

In order to encourage students to reflect on the importance of human rights principles, human rights education in immigrant societies must avoid the temptation to assert a universally valid definition of human rights. What might first appear to be a weakness of human rights education in immigrant societies – the diversity of students and the apparent absence of pre-defined understanding of human rights – is in fact its strength; it is this diversity which creates the conditions for an educationally fruitful dialogue about the meaning and importance of human rights. Moreover, human rights education that integrates the experiences of immigrants, refugees and asylum seekers in Germany and in their countries of origin can help advance communication among groups with different religious affiliations, cultural backgrounds, and world views. This learning is best accomplished within self-reflective dialogue about the injustice of human rights violations, including discrimination against minority groups. It can also help students understand the importance of human rights for the organization of society and the law. Historical education is a crucial element within this learning process, since the study of history shows that all human rights advances, whether in the past or present, have been achieved through contestation and struggle. Indeed, the fact that human rights remain an ongoing project today ensures the credibility of human rights education and empowers students to engage in the critical self-reflection that is central to the conceptual link between human rights education and memory work.

²⁸ *Ibid.*, 55.

K. Peter Fritzsche

HISTORY AS RESOURCE: HUMAN RIGHTS EDUCATION AS HISTORICAL AND POLITICAL EDUCATION

A historical perspective on human rights can play a key role in promoting public awareness about human rights and clarifying the contemporary significance of human rights for both the individual and society. Human rights education can incorporate the historical perspective in two ways: first, by remembering and reconstructing the occasionally neglected link between experiences of injustice and the protection of human rights; and second, by illuminating the potential for future progress in human rights. In what follows, I will briefly sketch ten thematic aspects of a historically informed human rights education.

1. History of Origins: Although the topic of human rights has a long history, its origins are disputed. It may be tempting to locate the emergence of the concept of human rights in the distant past in order to bolster its lineage and authority. However, the Copernican moment in the emergence of human rights was the Enlightenment. Indeed, it was the Enlightenment conception of the autonomous individual governed by reason that facilitated the emergence of an ideal of individual, egalitarian and inalienable human rights with a claim to universal validity.

2. History of Protest: The development of human rights is founded on the experience of persecution, discrimination and oppression, which came to be construed as injustices. Historically, advances in human rights have emerged when the experience of injustice encounters moral opposition (“enough!”) or defiant resistance (“never again!”) in conjunction with a political vision of change. Both the Universal Declaration of Human Rights and the European Convention on Human Rights were founded in this vision of change.

3. History of Development: The multifaceted concept of human rights that exists today is the outcome of a long process of definition and elaboration. Scholars of human rights have employed a number of different frameworks to describe this incremental process of consolidation and redefinition. For example, the generational model plots human rights along a trajectory from first-generation civil and political rights, to second-generation economic, social and cultural rights, and ending with third-generation solidarity rights. In other words, the concept of human rights moves from negative liberties (or the right of freedom *from* the state), to participatory rights, and culminates with positive rights. An alternative framework regards the advancement of human rights as an incremental progress from ethical and moral claims, to political demands, and finally to juridical claims anchored in the law. In both of these explanatory frameworks, however, the

development of human rights remains an ongoing process. Indeed, epistemological and political debates over the rights that deserve protection under the heading human rights still persist.

4. History of the Struggle for Recognition: The history of human rights is a history of conflict and the struggle for the recognition of vulnerable groups. Disadvantaged and oppressed groups have often imagined a utopian and egalitarian future in order to mobilize their social and political movements. Although critics charge that multiple forms of discrimination persist in spite of human rights, the ideal has become a permanent rallying point within struggles for equal rights and human dignity.

5. Institutional History: The history of human rights can also be interpreted as the history of its institutionalization, or the establishment of sustainable institutions to set standards for, monitor and implement human rights. In the process, these institutions have themselves become “learning institutions,” adapting and advancing in conjunction with the evolution of the ideal of human rights. The evolution of the Commission on Human Rights to the Human Rights Council is one example of this process of institutional learning and transformation.

6. History of NGOs: The work of non-governmental organizations has been essential to the protection of human rights. Indeed, the development of NGOs illustrates that the UN and its member states are not the only conduits for protecting human rights. Non-governmental organizations were advocates for the 1948 Universal Declaration of Human Rights, and in the intervening decades they have increased dramatically in scope and number. By working to create a national and international public sphere, NGOs represent civil society “from below” in the struggle for human rights. At the same time, NGOs have become an indispensable partner in international efforts to protect human rights “from above.”

7. History of Opposition: The ideal of human rights quickly met with sustained opposition. The principles of self-determination and equality met with resistance from a variety of individuals and groups mobilizing in defense of privilege and domination. Historically, the ideal of human rights met with particularly fierce opposition under classical fascism in the first half of the 20th century, which categorically rejected the core principles of the French Revolution of 1789. Along similar lines, National Socialism sought to systematically negate the very concept of human rights. This opposition to human rights was in turn countered by the enactment of the Universal Declaration of Human Rights, which in dialectic fashion has itself encountered resistance from new (and old) ideologies and policies of inequality.

8. History of Universalization: In the struggle for universal recognition, human rights as defined by the UN have met with substantial political resistance as well as culturally sanctioned counter-proposals, ranging from so-called “Asian values” to the religiously based interpretation enshrined within Islamic law. Whether the Enlightenment ideal of human rights will obtain universal recognition remains an open-ended process.

9. History of Progress and Retreat: Taking a historical perspective on human rights always implies the question: To what extent has the development of human rights been a story of progress and success? While ongoing human rights abuses across the world may suggest that human rights are a “toothless tiger,” it is worth asking how the world would look today if human rights did not exist. Above all, the history of human rights underscores the impermanence and reversibility of advances in human rights. As the historical evidence makes clear, under conditions of great instability and perceived threat, even human rights that were perceived as inalienable can be abandoned.

10. History of Human Rights Education: The historical perspective can also be applied to human rights education itself. The 1948 Universal Declaration of Human Rights emphasized the importance of human rights education in strengthening the commitment to human rights. The Declaration even enshrined the principle

of human rights education as a basic human right in Article 26 (2). Nevertheless, nearly half a century passed before the 1993 World Conference on Human Rights in Vienna brought human rights education to broad public awareness. In the intervening fifteen years, human rights education has expanded across the globe. Even though the implementation of human rights education continues to lag behind the goals envisioned by international human rights programs and initiatives, human rights education has assumed an unprecedented importance on both the national and international level. Moreover, human rights education itself is now recognized as a fundamental human right. Human rights education strives to overcome the lack of understanding and awareness of the importance of human rights. At the same time, human rights education serves as a reminder. Somewhat paradoxically, where the ideal of human rights has made the most progress, the danger of human rights abuses have receded or disappeared from public awareness. Human rights education sheds light on the important protections achieved by human rights, and documents the tragic outcome when the ideal was largely absent or abandoned.

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THE FOUNDATION “REMEMBRANCE, RESPONSIBILITY AND FUTURE”

In remembrance of the victims of National Socialist injustice, the Foundation “Remembrance, Responsibility and Future” works to promote human rights and understanding between peoples. It also upholds its commitment to the survivors. The Foundation is thus an expression of the continuing political and moral responsibility of the state, industry and society for the wrongs committed in the name of National Socialism.

The Foundation supports international projects in the following areas:

- **A critical examination of history**
- **Working for human rights**
- **Commitment to the victims of National Socialism**

The Foundation “Remembrance, Responsibility and Future” was established in 2000, primarily to make payments to former forced laborers. The payments programs were completed in 2007. The Foundation’s capital of EUR 5.2 billion was provided by the German Government and German industry. A total of EUR 358 million was set aside as Foundation capital in order to finance project support. The Foundation finances its long-term funding activities out of the income generated by this capital.

The Universal Declaration of Human Rights and the Genocide Convention of 1948 were promulgated as an unequivocal response to the crimes committed under National Socialism. Human rights thus served as a universal response to concrete historical experiences of injustice, which remains valid to the present day. As such, the Universal Declaration and the Genocide Convention serve as a key link between human rights education and historical learning.

This volume elucidates the debates surrounding the historical development of human rights after 1945. The authors examine a number of specific human rights, including the prohibition of discrimination, freedom of opinion, the right to asylum and the prohibition of slavery and forced labor, to consider how different historical experiences and legal traditions shaped their formulation. Through the examples of Latin America and the former Soviet Union, they explore the connections between human rights movements and human rights education. Finally, they address current challenges in human rights education to elucidate the role of historical experience in education.