

# The Universal Declaration and the Conscience of Humanity

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## I

In the opening clauses of the Universal Declaration we meet with what I shall call the doctrine of inherent human rights. We find this doctrine in the first recital of the Declaration, which speaks of “the *inherent* dignity and of the equal and *inalienable* rights of all members of the human family” and in Article 1’s assertion that “all human beings are *born* free and equal in dignity and rights.” The use of words like “inherent”, “inalienable” and “born” reminds us of the natural rights tradition of the eighteenth century. The UD drafters only and simply wanted to affirm the inherence of human rights in the human person, by which they meant that people have these rights by virtue of their humanity and on account of their birth into the human family, *and for no other reason*. I call this the metaphysics of simple inherence.

We now face the challenge of how to square this doctrine of inherent rights with what most contemporary human rights theorists tell us a human right is. For these two definitions of a human right --the one given by the Declaration and the one given by most theorists today-- do not fit well together at all. In fact, they clash. These theorists trace the origin of human rights to the drafting chambers of international conferences that are often organized under the auspices of the United Nations and attended by international lawyers, diplomats, and international civil servants. These conferences have produced some 200 human rights texts that include declarations, treaties, covenants, protocols and various other instruments that aim to deliver the

enjoyment of human rights to persons around the globe. This post World War Two whirlwind of normative activity has, of course, been a very human activity, staffed as it was by representatives and delegates who attended hundreds of meetings and were asked to cast thousands of votes. It is no wonder then that so many people in the human rights movement think that from this very human process of proposing, debating and voting only a human and man-made product could emerge. Since these instruments and texts that make up an entirely new branch of international law are so clearly man-made, theorists have yielded to the temptation of supposing that human rights themselves (and not just the instrument instruments that codify and implement them) are also man-made. Since the process of writing up and codifying human rights norms in the 1950s, 60s and beyond was and still is a very human process, human rights have come to be thought of as universal not because they are seen as moral riders on our biological births, but because the international community has created them to better serve international peace and good relations among nations.

There is therefore a crucial gap here between what the Universal Declaration --which is the founding document of the human rights movement-- says a human right is (that we have them as moral birthrights) and what many contemporary theorists tell us a human right is (that it is a man-made product of international legal conferences). While the UD drafters meant their language of inherence and inalienability quite literally, our media and the theorists on whom they report often mean it only symbolically and often merely rhetorically. The human nature to which they link human rights, if they do make that connection, is a man-made and communal creation, ever changing and moldable by the tides of history and the fluctuations of culture. We might compare the UD drafters to certain Sixteenth-century theologians who believed that the body of Christ at communion was *literally* present in the Eucharist. Rejecting this UD approach, most

contemporary theorists think of human rights as *factitious* or constructed and invented; they do not think of these rights as inherently present in human beings, waiting to be discovered like the structure of our DNA. However, most of the Declaration's drafters did not think of the Declaration's rights as derived from or legitimated by the just or fair procedures that (we hope) have been used to write up the many international texts that capture human rights norms. We must remember that when the Declaration of human rights was adopted in 1948, most of the international conferences that encoded these rights had not yet taken place. Instead of going to such UN sponsored conferences, the UD drafters looked out of their 1940's drafting chambers, saw the horrors of the Holocaust, and *for that reason alone* were driven to write up a list of internationally accepted human rights. The minutes of their meetings reveal a correspondence between the rage these drafters felt when they found out what went on in the concentration camps and the rights they as a result felt compelled to declare. It is my contention that notions of procedural justice that are so popular in the postwar theoretical literature cannot explain the writing of the Universal Declaration and the subsequent birth of the human rights movement.

The standard objection to the drafters' idea of birth-based human rights is that that kind of metaphysical universality cannot be reached from where we stand in this world of flux. If someone were to describe to us an island of abundance with no scarcity of any kind, we would interrupt that speaker and insist that she tell us how we might travel to that enchanted place. It is this kind of skepticism about how to get to this domain of inherent rights that has led theoreticians to ignore the deep roots of words like "inherent", "inalienable" and "born" that the UD drafters used in their opening clauses. You cannot get to that metaphysical domain of inherence from where we stand in this multicultural world of ours, critics of real inherent universality say. I respond to this challenge by adopting Barack Obama's slogan: "Yes, we

can!” The drafters of the Universal Declaration did see a way into that domain of inherent rights, which many contemporary critics and skeptics say is unreachable. To put it bluntly: the UD drafters found their way to that metaphysics of inherence the moment they passed the gates of Auschwitz and did not turn their heads. What Emile Fackenheim wrote of the great theologians of the latter half of the twentieth century may well be true of some of the great Anglo-American political theorists also writing at that time. Fackenheim accused these theologians of passing by the gates of Auschwitz in silence, and averting their theoretical gaze as they constructed their pristine theological systems. He said that they did not help us mend “the total rupture” of our world that the Holocaust has presented.<sup>1</sup> Many theorists of human rights have done the same thing. They have passed by Auschwitz with an averted theoretical gaze. For I do not see how their almost exclusively procedural accounts of justice and their consistent denial of inherence help us mend the total and partial ruptures of our moral and political worlds. It is not that theorists deny that the Holocaust happened or that they have averted their personal gaze. It is that they have learned too few theoretical lessons from what went on in the camps.

The UD doctrine of inherent human rights has two parts to it, a metaphysical part that says that all human beings have these rights inherently by virtue of their humanity, and an epistemic or knowledge part that says that all human beings can come to know that this is so by virtue of their own natural epistemic (or knowing) equipment. These two parts of the doctrine bring with them two different conceptions of the universality of human rights. First, there is *metaphysical universality* which says that human rights are inherent in people on account of their membership in the human family. Second, there is an *epistemic universality* according to which all of us can come to know about this first kind of metaphysical universality by our own unaided epistemic powers. It is this second epistemic universality that I have in mind when I suggest in

the title of my talk that there is or might be a connection between the Universal Declaration of Human Rights and “the conscience of mankind.” This appeal to the conscience of mankind has found its echo in the Statutes of the Yugoslavia and Rwanda Tribunals, as well as in the Rome Statute of the International Criminal Court. We must now do some exegesis.

## II

In the second sentence of the first Article of the Declaration, the drafters mention two epistemic routes (reason and conscience) into the domain of inherent rights. They there tell us that all human beings “are endowed with reason and conscience and should [therefore] act toward one another in a spirit of brotherhood.” Upon the suggestion of Chung Chang, the Chinese representative, the route of what he called “two-man-mindedness” --which his colleagues translated into “conscience”-- was without opposition added to the route of reason. This route of conscience is also mentioned in the second recital of the Preamble with its suppressed reference to the Nazi horrors: “Whereas disregard and contempt for human rights have resulted in barbarous acts that have outraged the conscience of mankind....” These two routes work in tandem. We can say that reason (or its most popular embodiment, the Golden Rule) supplies the framework for our moral intuitions or we can say that our conscience (or moral intuitions) supplies the necessary background for a correct use of the Golden Rule. Different theorists stress different parts of this tandem arrangement. I maintain that Rawls and Habermas have stressed the route of reason at the expense of conscience. They in turn would charge the account that I give below with a gross neglect of reason as the preferred route into the territory of human rights.

Epistemic universality is the idea that the people (who have these human rights) must by their own powers know, or be able to come to know, that they have them. 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. Here there is at least the presumption of their togetherness. The exposition that I give here of our moral sense is to the human rights in the Universal Declaration what the idea of promulgation is to the rights and duties in positive legal systems. A law is not a just law unless (among other things) it is somehow made known to those to whom it is addressed. Usually, this is done by printing the new legal ordinances in the Congressional Record (in the United States) or in a town's local paper. Analogously, it would have made no sense for the drafters of the Declaration to assert that every human being possesses the rights they list, and yet for there to be no normal or natural way that the human beings who have these rights could come to know that they have them. Since the having of these rights requires nothing other than that one is a human being, so the knowing that one has them must be just as easy or natural. The first kind of universality implies and requires the second.

This is why the authors of the Declaration did not address their document to jurists, scholars, international lawyers, diplomats, or to any other kind of expert. They were not even thinking of intellectuals in general. Throughout their deliberations their intended audience consisted of ordinary men and women in the streets of any of the world's cities or villages. Whenever they worried about their text becoming too long, they would cut it back because, as Mehta, an Indian delegate, said, "It was to be understood by the common man" (E/CN.4/SR.50/8). At one point the French delegate proposed that certain articles be merged because he felt the time had come for the Drafting Committee to "shorten and clarify the Draft Declaration" (AC.1/SR.35/2). This was not a desire for brevity's own sake, but to make sure the masses would understand the document. Chung Chang, the Chinese delegate to the Commission, agreed that the Declaration "should be as simple as possible and in a form which was easy to

grasp"(SR.50/7). Michael Klekovkin, their colleague from the Ukraine, had also been worried that the document had become too long, "with the result that it would be difficult for the ordinary people to understand it" (SR.50/7). More than once, Eleanor Roosevelt, as chair, felt it necessary to remind "the representatives of [the need for] a clear, brief text, which could be readily understood by the ordinary man and woman"(SR.41/9). The Declaration, she often said, "was not intended for philosophers and jurists but for the ordinary people" (*Third*. 138 and 609). In the midst of some troublesome discussions on Article 1, De Alba, the Mexican representative, did not want it to be "forgotten 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" (*Third*. p.162). Most of these comments were made in the debates of the Third Committee early in the fall of 1948. Similar ones were made in the General Assembly debates later that December.<sup>2</sup>

An important title change of the document fits well with this supposition of epistemic universality. Because it was being referred to as an International Bill of Rights, the Haitian delegation got the Third Committee to adopt a resolution affirming "the universal character of the Declaration of Human Rights" (A/C.3/373). This led to a French proposal that the title of the document be changed to read "Universal Declaration of Human Rights" (*Third*.775). This title change (from "international" to "universal") shifted the attention from the international delegations that did the proclaiming to the peoples of the world being addressed and spoken about. As a result, the term "Universal" in the title of the document captures both the metaphysical and the epistemological universalities that make up our doctrine of inherence. In his defense of the title change Cassin, the French delegate, noted that "the chief novelty of the declaration was its universality. Because it was universal, the declaration could have a broader scope than national declarations and draw up the regulations that were essential to good

international order. It was for states to conclude conventions between themselves for the preservation of that order; otherwise it would establish itself over their heads, for men could not be indefinitely deprived of the necessary protection of their rights" (*Third*. 866). States did indeed do this when they drew up the two International Covenants in the 1960s and 70s. Cassin repeated this theme of universality in many of his later essays and speeches because he was of the opinion that the Declaration was "the first document about moral value adopted by an assembly of the human community." On the tenth anniversary of the Declaration he wrote that it formed "the basis for a list of minimal, common right[s] and offer[ed] a common moral code to each member of the human community."<sup>3</sup>

The moral epistemology of human rights is one that wells from the bottom up. We human beings are repulsed by gross violations of human dignity and (to use Albert Camus' terminology) in that very rebellion we discover the birthrights of all of us as the brothers and sisters that we are. Our commitment to human rights (whoever we are) comes from our encounter with gross wrongs 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" (par/4). Most of the articles and rights in the Declaration were adopted as a direct and immediate reaction to the horrors of the Holocaust. The minutes of the sessions show that the drafters went straight from having witnessed or heard about some gross human rights violation to the adoption of the right in question, without even the intervention of the Golden Rule or the principle of reciprocity. In their discussions they went straight from the cruel deaths of millions in the camps and on the trains to "the right to life, liberty and security of person" of UD Article 1, straight from the virulent Nazi racism to the Declaration's strong condemnation of all kinds of non-discrimination in Articles 2, 7, 16, and 23 explicitly, and implicitly in the litany



of the words “everyone” and “all” that we find at the start of all the articles.

They went straight from Nazi theft of women and men from the East to work in officers’ homes and camp factories to UD Article 4’s right not to be “held in slavery or servitude...in all their forms,” and straight from the horrible medical experiments to the right not to be subjected to “torture or to cruel, inhuman or degrading treatment and punishment” in Article 5. Behind UD Article 6’s simple right “to recognition as a person before the law” lies (among other things) the fact that in the Third Reich Jews were declared legally dead. The drafters also went straight from the 1933 Nazi marriage laws to Article 16’s reiteration of the prohibition of discrimination and its demand that marriage be based on “the full and free consent of the intending spouses”, and straight from the suspension of civil liberties after the Reichstag’s fire to the political rights enunciated in Articles 18, 19, 20 and 21. The cruel working conditions in the camp factories led them to amplify the human right to work with the rights to “favourable conditions of work” in Article 23 and to “rest and leisure” in Article 24. They also went without hesitation from the Nazi brainwashing of German youths to the claims in Article 26(2) that education “shall be directed to the full development of the human personality” and in 26 (3) that parents have a “prior right to choose the kind of education that shall be given to their children. And so on, for most of the rights in the Declaration.

The principle of reciprocity that plays such a key role in most other areas of international law played no role in the adoption debates on the rights in the Universal Declaration. It was replaced by the doctrine of inherent rights that I am here expounding. The drafting delegations did not say that they would vote for a certain human right only if the other delegates also voted that way. This principle of reciprocity or the Golden rule, which is its popular expression, was not used to create the necessary consensus to get the Declaration adopted. That consensus was

created by the drafters shared revulsion against the Holocaust. Taking no philosophical detours, the UD drafters went straight from the horrors of World War Two to the need for a bill of universal moral birthrights. This connection between experiencing or seeing an injustice done and the realization that people everywhere have a certain human right, helps us answer charges of Western ethnocentrism that are so often leveled at the Declaration. The delegates represented nations from all four continents. They were to a person repulsed by the Nazi horrors and wanted to forestall a repeat of that kind of abuse of state power. The success of the Universal Declaration that we celebrate today is due to the fact that (unless blocked) people's consciences and moral sentiments everywhere seem to be similarly enraged and engaged by the evils they encounter.

The second half of the twentieth century resembles Enlightenment thinking more than just in the metaphysics we borrowed when we translated their notion of *natural* rights into our own notion of *inherent human* rights. Professor Lyn Hunt has shown how in the eighteenth century the idea of natural (or human) rights became a political and juridical item in the consciousness of peoples around the North Atlantic and was for that reason written into several of the domestic constitutions of that time.<sup>4</sup> Our own moral sentiments have been stirred in similar ways. The Holocaust has shocked the moral consciousness of all civilized peoples into an increased awareness of the inherent dignity of every man, woman and child. The use of the phrase "the conscience of mankind" in the second recital of the UD Preamble reflects the general view in the late 1940s that the horrors of the war were an affront to the human conscience. The 1946 UN General Assembly condemned the crime of genocide because the "denial of the right to existence of entire human groups ... shocks the conscience of mankind ... and is contrary to moral law"<sup>5</sup> This "moral law" is not the moral code of any one particular group, nation or state, but a

universal moral law that informs the conscience of mankind. One of the UD drafters, Carrera Andrade from Ecuador, spoke for many of his colleagues when he said that the Declaration of human rights “was the most important document of the century, and indeed ... a major expression of the human conscience” (*Third*, 36). Ever since, friends of the Declaration have described it in this way.

Our media have on a regular basis been flooded with images of massacres and incredible sufferings all over the globe. These images draw on an ever expanding range of our moral sentiments, which expansion in turn has made the human rights movement into the mass movement it has become. This movement is fed and sustained by millions of people who find their moral sentiments enraged and engaged by their discovery of one or several rights as enunciated in the Universal Declaration. Our consciences might be triggered by images that call to mind the abolition of “slavery or servitude...in all their forms” (Art.4), the “right to a nationality” (Art.15), “the right to peaceful assembly and association” (Art. 20), or the right “to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized” (Art. 28). Since there are thirty of these Articles, many of which enunciate more than one right, the international order envisioned by the drafters is a highly complex one. To further support my claim that the 1948 adoption of the Universal Declaration was an expression of the conscience of humanity, I touch on two related subjects: 1) the relatively small United Nations membership in the 1940s and 2) the eight abstentions in the final December Assembly vote on the Declaration.

### III

*1) The Small United Nations Membership in 1948.* At the time the Universal Declaration was being drafted --between January 1947 and December 1948-- the membership of the United

Nations was about a fourth of what it is today in 2008 when it is close to 200. Philippe de la Chapelle 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 27%, Asia with 14 countries 24%, Africa with 4 countries a mere 6% and the South Sea Islands with 3 countries 5%.”<sup>6</sup> Only four of the now more than 50 African nations voted on its Articles. It is obvious that Africa and Asia were grossly underrepresented in this process. From Africa only Egypt, Ethiopia, Liberia and South Africa were represented, and of these four only the Egyptian and South African delegations played an active role. India, China (with the Chiang Kai-shek regime still clinging to power), Siam (today’s Thailand) represented the peoples on the Asian continent, with the Siamese delegation being totally inactive. These facts can be used to launch an attack on the alleged universality of the Declaration, and --since this document is the moral backbone of the movement-- on the idea of human rights generally. From this perspective the title of the document seems a misnomer, for it is hard to see how any international document can lay a claim to universal applicability if it was adopted before the collapse of the colonial empires in the 1950’s and 60’s. It is hard not to assume that the 37 nations of Western Europe and the Americas (which had 63% of the votes) imposed their own value system on the Declaration. Critics have used this representational imbalance to charge the Declaration with an ethnocentric bias (AAA), with being “based on Western cultural and philosophical assumptions” (An-Na’im) and with imposing on the rest of the world “an alien values system” (Pollis/Schwab) and “a Western imprint” (Dundes Renteln). The literature on human rights is replete with comments like these.

Our response to this charge of ethnocentrism is that the Declaration is the result of a genuinely international effort that drew on far more than just Western perspectives. The

delegations came from nations with very different political, cultural, religious, ethnic, economic and legal traditions. The fact that they nevertheless adopted this international bill of moral rights shows that when atrocities or gross violations are clear enough, moral outrage against them will also be clearly shared. It is this shared revulsion that gave birth to the Declaration and that today still feeds the fantastic growth of the human rights movement worldwide. The discovery of the Nazi horrors is the reason why the Human Rights Commission (which is the only commission that is mandated by the UN Charter) was given as its very first task the drawing up of an international bill of rights.

At the first meeting of the Drafting Committee (set up by this Commission) Geoffrey Wilson, the United Kingdom delegate, reminded his colleagues “of the historical situation in which the Committee met. It was one he said 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” (E/CN.4/AC.1/SR.7/5.). Two years later, in the fall of 1948, that very view had shaped a consensus on 30 Articles. Lakshmi Menon from India told the Assembly that the Declaration had been “born from the need to reaffirm those rights after their violation during the war” (GA., 893). 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” (GA., 879). Ernest Davies, another United Kingdom delegate, sounded a note of warning: “It should not be forgotten,” he said, “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 (GA., 883). This shared,

humanity-wide-revulsion helps explain why the criticisms leveled at the Declaration as a Western ethnocentric document are shortsighted and often plain wrong, for that revulsion affected all the delegations and not only those that had experienced Hitler's biological and cultural genocides in their own countries. All morally healthy people are repulsed by what the Nazis did to their victims. This explains how a human rights consensus could and did develop among delegations from a great variety of cultural, economic and religious traditions. The obvious wrongs of the camps elicited from the delegates a moral reaction that transcended local cultural and ideological frameworks, and made them declare a list of rights that they looked upon as equally transcendent and universal. The violations of human dignity being so blatant, they had no problem subscribing to the idea of inherent universality.

What now is 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") comes to us as the compromise that grew out of earlier drafts that were far more explicit about the connection between the war and the Declaration. In the Third Session of the Commission René Cassin, the French delegate, who had a Nazi arrest warrant posted on his Paris apartment door, had gotten accepted the claim 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...*" (AC.1/Add.3). This straightforward connection between the barbarities of the war and the rights being articulated ran into trouble in the Third Committee in the fall of 1948 when the Berlin airlift had been reactivated and the Cold War was intensifying. The delegates could no longer agree on what the real cause of the war was. The communists blamed Western capitalist impulses, while the allied powers blamed the suspension of democratic governments by

totalitarian types of regimes. The French delegation proposed to tighten the connection between the war and the Declaration with the addition of “Nazism and racialism” to the text that had been accepted. It would then 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;..”(A/C.3/339). The Australian proposal that won in the vote went in the other direction in that it weakened the connection between the Declaration and World War Two. It deleted the phrase “before and during the Second World War,” leaving us only the general claim that “disregard and contempt for human rights [have] resulted in barbarous acts which have outraged the conscience of mankind” (A/C.3/314/Rev.1 and A/C.3/257). The time and the place of the outrage are left unspecified, but the minutes of the meetings and the dates involved make it abundantly clear what specific “barbarities” lie underneath and feed into the text of the Universal Declaration.

I must report on one other vote that goes to the heart of the concept of epistemic universality. The second recital now begins with a reference to “disregard and contempt for human rights...” In the Third Committee the word “disregard” was put in and the word “ignorance” was taken out. At first the British delegate asked that the word “of” be inserted after the word “ignorance because he wanted it to be clear that it had been ignorance of human rights and not a more general kind of ignorance that had led to these barbarous acts (ECN.4/SR.785/5). This suggestion made the delegates realize that the word “ignorance” was not at all 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 because they did not know they were violating human rights. This was, he said,

“the most serious error in the whole paragraph.” “There had been no ignorance on the part of the aggressors,” he said, “but a natural development of a system which had led to war. Public opinion had been shocked by the measures which the Fascists had taken, first in their own countries and later during the war in occupied countries” (*Ibid.* 7)

Chung Chang, of China agreed. He thought that “it was true 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”(*Third,7*). Since the military discipline in both of these nations was notoriously strict and even cruel and, as the war progressed, involved increasingly younger soldiers, this is a remarkable statement. In the military law of most civilized nations we find what is called the doctrine of “manifest illegality”. According to that doctrine a defendant must disobey orders when he is told to do an act that is “manifestly illegal” or grossly immoral and which for that very reason could not possibly be a legal order. This doctrine of manifest illegality was used in the Nuremberg and Tokyo Trials, it plays a role in the cases that have come before the Yugoslav and Rwanda Tribunals and it has also been incorporated into the Rome Statute of the ICJ. Article 33 of the ICC applies responsibility “equally to all persons without any distinction based on official capacity.” This pulls Heads of State, Government officials and Military Commanders within reach of the Court. The same Article deals with the question of whether or not someone who commits a gross violation of human dignity “pursuant to an order of a Government or of a superior, whether military or civilian” can use that as a defense. The answer is that such superior orders will “not relieve that person of criminal responsibility” unless several conditions hold, one of them being that “(c) The order was not manifestly unlawful.” Some orders are so obviously immoral that it does not matter who gave it, whether an imposter or the defendant’s legal superior. The second paragraph reiterates that “orders to commit



genocide or crimes against humanity are manifestly unlawful". The only way the international community can make a claim like this and cover all natural persons in a great diversity of cultural settings is if it operates with the presumption that people everywhere have a moral sense or a conscience which tells them when they are faced with one of these kinds of crimes. This conscience (or inner voice, or moral intuition, faculty or sense) tells them that the act they are about to commit is "manifestly illegal" which it can only be if it is obviously immoral.

Chang echoed this doctrine when he made the point that even though the German and Japanese soldiers who perpetrated the horrors that inform this second recital had no doubt that they acted under "higher orders," that knowledge did not exculpate them. Even though they had acted under higher orders (as Eichmann also claimed he had done) these soldiers were still guilty and culpable. A member of the French delegation pointed out that the word "disregard" fits much better with the French word "meconnaissance" which carried the meaning of "intentional ignorance"(Third,7). Considerations like these led to the change from "ignorance" to "disregard" in the second recital, the vote being 10 for, 1 against, and 5 abstentions (Ibid.).

A vote like this supports my thesis that the drafters of the Declaration worked with the idea that (unless blocked) human beings have an operative moral conscience that tells them when they are about to engage in a gross violation of human dignity or when others have done so or are about to do so. This conscience puts us in touch with a realm of moral values and inherent rights the contours of which the drafters traced in their thirty Articles. This realm is an objective one in that ordinary people from all walks of life and from any of the worlds cultural milieus can (unless blocked) enter it with their own unaided epistemic equipment. If the systems of military discipline of the German and Japanese armies were not thought strong enough to wipe these truths from the hearts and minds of their young soldiers, the same can be said about the

perpetrators of gross human rights violations before and since that time. Even though the final text makes no specific reference to the horrors of World War Two, or to the Holocaust by name, or to the ideologies that fed into that abomination, the travaux préparatoires that I cited make it abundantly clear that it was the outraged consciences of the peoples they represented that more than anything else gave the drafters a common drafting platform. They were so confident in their own reactions and so sure of how the persons and peoples they represented felt that they generalized these feelings of outrage over the rest of mankind, which is what they did when they used the phrase “the conscience of mankind”. It is this moral confidence that makes the UDHR such a powerful moral beacon in our world. When I show my classes tapes of the liberation of the Nazi death camps my students invariably share the reactions of the drafters. They cry or are stunned into silence, after which they no longer doubt that people’s human rights are inherent in them because they are members of the human family. 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 into insensitivity. As a rule, they do not. We do, however, need to guard against viewings of 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.<sup>7</sup>

It is not true, as the charge of Western ethnocentrism suggests, that Western delegations imposed their ideological perspectives on non-Western delegates and peoples. The disagreements among the delegations were as big within regional blocks as they were between regions. The largest block was that of 36% of the votes made up by the 21 representatives from North and South America. However, these countries had quite different views on the scope of

human rights. While the American delegation swung back and forth between wanting and not wanting social, economic and cultural rights in the Declaration, the Latin American nations consistently fought for the inclusion of these rights. There was nothing libertarian or conservative about the Latin position since it was heavily influenced by the socialist and catholic traditions of Central and South America. In their second recital the UD drafters decided to honor the deceased US President Franklin's Roosevelt by repeating his call for a "world in which human beings shall enjoy freedom of speech and belief and from fear and want." Unfortunately, the honor of this reference did not keep the United States from being extremely reluctant about accepting the second generation of human rights into the Declaration. The Canadians generally stayed out of these debates, which placed the United States closer to some of its European allies.<sup>8</sup>

But the Europeans also did not speak with one voice. The French delegation was frequently rebuffed in its desire to give the new United Nations organization a prominent place in the Declaration.<sup>9</sup> Since human rights belong to persons on account of their humanity and not on account of their place of birth or residence, it made sense to have the United Nations involved in the implementation of these rights. The United Kingdom was not successful in its continued lobbying to have its own version of the draft Declaration (which was in the form of a convention) adopted as the main text for discussion. It was the Belgian and French delegations which in the Third Session undercut the British (and Australian) approach for an all (a declaration *and* a convention) or nothing approach.<sup>10</sup> The Dutch delegation (in cooperation with the delegation from Brazil) was not able to garner sufficient votes for a religious reference in the Declaration.<sup>11</sup> Through its representation on the Commission on the Status of Women, the Danish delegation had enormous positive influence on the shape of the Declaration, cleansing it of most of its sexist language. In doing so it frequently clashed with the American delegation

(headed by Eleanor Roosevelt) and with some of its European neighbors. This woman's lobby cut across blocks of votes and imposed an agenda that drew on delegations from Latin American (especially Bolivia) and Asia (especially India).<sup>12</sup> All these disputes cut across the Western block of votes and presented deep intellectual challenges that are still with us today.

It makes therefore no sense to say, as some critics have done, that the Western powers imposed their own view of human rights on the rest of the delegations. There was no such thing as *the* Western position on either the main structure of the document or on many of its details. There were, of course, the usual diplomatic alliances that a man like Humphrey, who was the first Director of the Secretariat's Division of Human Rights, describes in his memoirs.<sup>13</sup> But there was no pre-set plan to impose a Western agenda. Humphrey was asked to write the first draft, which was then streamlined by a small group of drafters headed by René Cassin, the French delegate. Humphrey used as the raw material for his first draft numerous proposals and a collation of relevant articles drawn from all of the then extant domestic constitutions. The shared revulsion against Hitler's horrors provided the energy both to Humphrey and to the delegates he served to chisel a crisp bill of rights out of the material he had gathered for them. The process of writing the Declaration was one that went from the bottom up and then --in the process of postwar international implementation-- down again to the domestic contexts from which Humphrey first drew it. Drafters had very little difficulty voting to internationalize and universalize rights they knew were in their own domestic constitutions. Their challenges came when they were asked to vote to universalize and thereby pronounce the inherence of the rights to asylum, to movement between countries, to citizenship and to access to information and an international order friendly to the age of inherent human rights. 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 delegation as its main author. None of the disagreements I mentioned can be labeled as a case of the West versus the rest. Other than the numbers of delegations from various regions of the globe that I already mentioned there was nothing particularly western about this drafting process.

Since it is part of my argument that an imbalance among regional representations does not undercut the metaphysical and epistemic universalities of the Declaration, I should mention the fact that thanks to the nondiscrimination campaign waged by the communist delegations the peoples of the colonies were given two spots in the text of document. One is the last clause of the operative paragraph, which declares that the Declaration applies to “the peoples of the territories under the ... jurisdiction.” This clause was expressly put in to draw the peoples then still living in the colonial empires of the metropolitan powers under the protective web of the Declaration. The same holds for the second paragraph of Article 2, which asserts that in a person’s enjoyment of the rights in the Declaration “no distinction shall be made 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 and in which they live their lives. This is a ringing endorsement of the idea of human rights as inherent in the human person and of their not being the result of any kind of political or jurisprudential procedures.

[[We have no time for more details now, suffice it to say that the metropolitan powers and their friends (Australia, Belgium, Canada, Chile, the China of Cheng Kai Check, Costa Rica, Dominican Republic, France, Honduras, Netherlands, Paraguay, Sweden, United Kingdom, United States of America) felt that the first sentence of Article 2 (with its long list of

nondiscrimination items) was sufficient to protect the rights of millions of people living in colonial empires that were about to crumble but had not yet done so. These countries felt that the colonial peoples did not need to be singled out for special mention in the Declaration. The communists, who were at this time engaged in organizing resistance movements around the world, thought these benighted peoples did need to be singled out. Their article to this effect was adopted in a close Third Committee vote of 16 for (New Zealand, Pakistan, Peru, Poland, Saudi Arabia, Syria, the UKSSR, the USSR, Yemen, Yugoslavia, the BSSR, Czechoslovakia, Ethiopia, Haiti, India, and Iran) and 14 against with 7 abstentions that came mostly from South American delegations (*Third*, 746). The Cold War was, which through the integrity of Eleanor Roosevelt had been kept at arm's length, was now starting to have an impact on the deliberations. Luckily, by that time most of the text was already in place. In a General Assembly motion the United Kingdom proposed that this separate article on the colonies be demoted to being just a second paragraph of what is now our Article 2. This UK motion passed narrowly and it reminds us of the fact that in law as in poetry separate lines (or articles) do matter.]]

2) *The Eight Abstentions*. It should now be clear that the disagreements that existed among Western delegations created ample room for non-Western contributions to be made. With this question in mind, let us take a look at the eight nations (South Africa, the USSR, the UKSSR, the BSSR, Czechoslovakia, Yugoslavia, Poland and Saudi Arabia) that abstained in the final vote of 48 for and 0 against that was taken on December 8, 1948.

*The South African Abstention*. In 1946 the Union of South Africa was asked by the General Assembly to bring its treatment of Indians “in conformity with ... the relevant [human rights] provisions of the Charter.”<sup>14</sup> The Union was the first Member to be censured by the General Assembly because it refused to place its South-West Africa territory under United

Nations trusteeship. During the drafting procedures the Union took a conservative stance, one that is quite respectable, except that it sought to pay for it with racist coin. Appealing to the UN Charter, E. H. Louw, the country's delegate to the Third Committee, argued that by "fundamental rights and freedoms" the Charter had meant only those rights that were connected to human dignity and that were "indispensable for physical and mental existence as a human being." He then added that he did not see "how that dignity would be impaired if a person were told that he could not live in a particular area" (*Third*, 39). As he made this observation his country was in the process of establishing its infamous system of Apartheid with the separate homelands for black workers and their families. His government's view was that "[w]hat the [UN] 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" (E/CN.4/82/Add.4/25). In its second recital the Declaration also appeals to the "conscience of mankind", but that appeal covered a great deal more than South Africa's short list of the "freedom of religion and speech, the liberty of the person and property and free access to courts of impartial justice" (*Third*. 40).

The lack of integrity of the South Africa abstention does not come from its defense of a short list of rights, but from the weak rationale it gave for that list. People's dignity *is* affected when they are discriminated against in their government's official housing policy. Louw admitted the racism of his country's position when 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" (*Third.*, 39) 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” (E/CN.4/82/Add.4/15). 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 country “was not universal; it was conditioned not only by nationality and country, but also by the qualifications of franchise” (*Third.*, 39). These qualifications could, of course, be tinkered with, which the Union's Constitution in force at that time did by openly stating that “only a person of European descent” could have a seat in the House of Assembly or the Senate” (E/CN.4/82/Add.4/43). The race factor was also woven into the observation that sometimes “the inability of convicts, aliens, and some cases absentee voters” in homelands kept them from participating in elections. Nor could any person vote “who cannot comply with property and literacy or educational qualifications where such ... are in vogue” (*Ibid.* 23). Like the Jim Crow laws in the United States, these measures effectively barred the black population from participation in government. 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 Union on the one hand and any other section of the inhabitants of the Union on the other hand” (*Ibid.*, 19). We conclude that this abstention lacked integrity.

*The Six Communist Abstentions.* The six communist delegations struggled with the idea of transcendent and inherent rights. Since according to Marxist doctrine morality is an epiphenomenal reflection of whatever social group happens to be in possession of the modes and means of production in a given society, there can be no such things as *inherent* human rights that are not the result of social or legal practices. This philosophical stance probably should have



made them vote against the document. But just as moral relativists can change their minds when brought face to face with the Nazi ovens, Bosnian woods, Cambodian killing fields, or Rwandan courtyards, so delegates to international conferences can ignore party doctrine and vote their own and their nations' consciences instead. This is what I think happened with the communist delegations. These delegations (from the USSR, Czechoslovakia, Poland, Byelorussia, the Ukraine and Yugoslavia), could have safely voted against the Declaration and not have lost any money, for the opportunity to participate in the Truman Doctrine had already passed. For communists, too, there was too much at stake that went beyond politics as usual. They were just as eager as any other delegation to formally condemn what the Nazis had done. In spite of their party doctrine, they were tempted by an international code of ethics that would openly and objectively condemn the Nazi atrocities. To that end they had insisted on the adoption of very strong anti-discrimination language in the document,<sup>15</sup> had attended all the meetings, and had submitted (unsuccessful) amendments that would have kept freedom of association and free speech rights from Nazi groups.<sup>16</sup> In short, the communists wanted to join the rest of the world in its formal condemnation of Nazi atrocities, from which they themselves had suffered a great deal, probably more than had their allies who were now in the forefront of drawing up this universal moral code.

The communists' desire to condemn gross violations of human rights overruled their theoretical scruples. Their delegates did what we ourselves constantly do when we let our emotions overrule more or less abstract doctrines we have been taught and to which we tend to cling against the better intelligence of our emotions. Our emotions tell us to stop radical evil when we see it happen. I am not suggesting that the Marxist ideology is compatible with the idea of inherent human rights, for it probably is not. My point is that the communist delegations

cooperated from the start and stuck 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, which fits the pattern of what Martha Nussbaum has described as “upheavals of thought” that are caused by the independently operating intelligence of our emotions.<sup>17</sup> I have not yet verified Jonathan Glover report (in his book *Humanity*) that in 1941 Himmler, who was Hitler’s right hand man, “watched a hundred people being shot at Minsk. He seemed nervous and during every folly he looked to the ground. When two women did not die he yelled to the police sergeant not to torture them.”<sup>18</sup> Similar testimony to the power of conscience in overruling ideological commitments comes from the willingness of communist delegations to work on the “practical application” of human rights while theoretical differences were being debated. 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 against the human rights norms that had for the first time been openly allowed behind the Iron Curtain when the Helsinki Agreements were signed in 1975. Since then all the post-communist states in Eastern Europe and in Eurasia have joined the United Nations and in that act of joining they have consented to being judged by the human rights standards of the Universal Declaration and its offspring. Many of them have enshrined human rights norms in the new constitutions they have drafted. As if they were prescient of things to come, the 1948 communist delegations forgot to abstain (as was their custom) when the first recital (containing the phrases “inherent dignity” and “inalienable rights”) was adopted “unanimously” in the Third Committee (*Third*, 786).

*The Saudi Arabia Abstention.* In the late 1940s there were ten Member nations in the UN which 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

UDHR draft, while just one, Saudi-Arabia, abstained. Of these ten Arab delegations only Egypt and Lebanon had been members of the Commission that oversaw the drafting of the text. 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 make their views heard in what have come to be called “the great debates” in the Third (humanitarian, social and cultural) Committee of the General Assembly. The Saudi delegation took the lead in representing Islamic objections to the text that had been passed on from the Human Rights Commission to the Third Committee. These objections focused on the texts of Articles 14 (on asylum), 16 (on marriage) and 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 it now only says one has a right to ask for it and to enjoy it once it has been given. This unfortunate success was followed by two setbacks that involved the secular character of the document, and for that reason led to the abstention.

The Arab delegations were split between wanting to see the Shar’ia prevail over international human rights and not feeling that there was a deep contradiction between the two systems. This conflict still has not been resolved, with this difference that in the late 1940’s nine of the ten votes were of the accommodationist kind, while today that tally might go in the other direction. 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” (*Third*. 49). This left the door open for a positive vote on the document. However, during the course of the debates the implications of the

text were drawn out, which led the Saudi delegation to abstain in the final, crucial vote.

The more liberal Islamic position was articulated for the Arab delegations by the Pakistani delegate Shaista S. Ikramullah. She “said 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 behaviour 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” (*Third*. 37). The 1948 vote of these nine 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. Susan Walz has shown that active Arabo-Muslim support for internationally accepted human rights continued at least through the 1960s and 70s when the two International Covenants were written and adopted by the United Nations membership.<sup>19</sup> That means that the Islamic fundamentalist challenge we read so much about today did not rear its head till long after the international bill was well on its way to universal acceptance.

#### IV

*Conclusion.* In the Preamble of the Rome Statute the State Parties to the International Court of Justice tell us that in establishing this Court they 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.” I have argued that this same conscience informed the drafting of the Universal Declaration. Its drafters shared a moral revulsion to the horrors of the Holocaust, which revulsion they generalized over the human race when they used the expression “the conscience of mankind.” With that phrase they captured the moral epistemology of human

rights, according to which basic human rights are discovered from the obvious wrongs we encounter in our experience. Their wrongs were the ones of the Holocaust, while ours are those plus the ones we have encountered since, such as the genocides in Bosnia, Cambodia, Rwanda, and (as we write) Darfur, to name just four. It was the experience of radical evil that made the drafters agree on a list of rights that belong to people as their inherent birthrights and not merely as the result of any kind of judicial, governmental, or legislative procedures, whether these be on a domestic or on an international level. The various ideological stands of different delegations and their abstentions in the final vote do not negate or undercut this idea of epistemic universality. Because they all had encountered the radical evil of the Holocaust no delegation voted against the document. The wrongs having been so obvious, they had no doubts about the rights they articulated. In the words of the Preamble of the United Nations Charter, they set about to “reaffirm [their] faith in fundamental human rights” and “in the dignity and worth of the human person.” The thirty Articles of the Declaration are the authoritative interpretation of the seven human rights references in the UN Charter, and just as the United Nations Charter is not usually thought of as a Western ethnocentric document, so too we should not look upon the Declaration as being that sort of thing. There was right after World War Two a remarkable consensus on a list of radical wrongs that came to light with the discovery of what had gone on in the concentration camps. These agreed upon gross moral wrongs gave birth to a list of human rights that it is hard for us even more than sixty years later to improve upon.

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1. Emil Fackenheim, *To Mend The World Foundations of Post-Holocaust Jewish Thought* (Bloomington, Indiana: Indiana University Press, 1940), 250.

2. See the comments by Bernadino, the representative of the Dominican Republic, at UN Gen.

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Ass., Third Session (1948), 93; by Abdul Rahman Kayala of Syria at Gen. Ass. 922; by Geoffrey Wilson, the UK representative at ECN.4/SR.50/8; by Lindstrom, the Swedish delegate, at Third, Art. 16/ 403); by the Ukrainian Socialist Republic at Third. Art.3, 175; and by Chung Chang of China at ECN.4/SR.50/17.

3. René Cassin, “Historique De La Declaration Universelle De 1948” in *La Pensee et L’Action* (Paris: Lalou 1972), 118

4. Lynn Hunt, *Inventing Human Rights A History* (New York: W.W. Norton & Company, 2007).

5. UN DOC No. 96 (1) (1946) and E/CN.4/46/ 7 (1948).

6. Philippe de La Chapelle, *La Déclaration Universelle Des Droits De L’Homme Et Le Catholicisme* (Paris: R Pichon et R. Durand-Auzias (Librarie Générale de Droit et de Jurisprudence, 1967), 44.

7. See the last sections of Susan Sontag’s *Regarding the Pain of Others* (New York: Farrar, Straus and Giroux, 2003), where she discusses the importance of the settings in which atrocity photographs are displayed.

8. See *Origins*, chapters 5 and 6.

9. See *Origins*, section 2.5.

11. See *Origins*, section 1.3.

11. See *Origins*, section 8.1.

12. See *Origins*, section 3.5.

13. John P. Humphrey, *Human Rights & The United Nations: A Great Adventure* (Dobbs Ferry, New York: Transnational Publishers, INC. 1984).

14. See *Origins*, section 1.4.

15. See *Origins*, section 3.1.

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16. See *Origins* 2.4.

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

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

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