

## THE STRANGE TRIUMPH OF HUMAN RIGHTS, 1933–1950\*

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**ABSTRACT.** *This article explores the origins of the UN's commitment to human rights and links this to the wartime decision to abandon the interwar system of an international regime for the protection of minority rights. After 1918, the League of Nations developed a comprehensive machinery for guaranteeing the national minorities of eastern Europe. But by 1940 the League's policies were widely regarded as a failure and the coalition of forces which had supported them after the First World War had disintegrated. German abuse of the system after 1933, and the Third Reich's use of ethnic German groups as fifth columns to undermine the Versailles settlement were cited by east European politicians as sufficient justification for a new approach which would combine mass expulsion, on the one hand, with a new international doctrine of individual human rights on the other. The Great Powers supported this because they thereby escaped the specific commitments which the previous arrangements had imposed on them, and which Russian control over post-war eastern Europe rendered no longer practicable. But they also supported it because the new rights regime had no binding legal force. In respect, therefore, of the degree to which the principle of absolute state sovereignty was threatened by these arrangements, the rights regime of the new UN represented a considerable weakening of international will compared with the interwar League. But acquiescing in a weaker international organization was probably the price necessary for US and Soviet participation.*

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‘Who can bad-mouth human rights’, asked an American writer in the *New Republic* in 1977. ‘It is beyond partisanship and beyond attack.’ To many people, they are honoured in the breach, an ideal which statesmen pay lip-service to but flout in practice. Critics argue that they represent a western attempt to ride rough-shod over diverse cultural sensibilities, or yet one more imposition of the tyranny of enlightenment values. Whether rhetoric or reality, human rights are a global phenomenon. Yet all this is little more than half a century old. The language of rights as it emerged at the time of the French and American revolutions at the end of the eighteenth century had had only a minor impact on diplomatic practice. Between the two world wars, talk of rights was far less common than it would subsequently become, and not even groups like the National Council for Civil Liberties or the French League for the Rights of Man were much concerned with human rights in the broad sense we have come today to

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associate with the term. Some far-sighted international lawyers formulated noble declarations and tried to pressure the League into adopting them: almost no one, at the time, took any notice. How then, in the space of just a few years, between the Atlantic Charter in 1941 and the UN's 1948 Universal Declaration, did the language of human rights come to occupy such a prominent part in international diplomacy that the new world order would be built upon a commitment to their advancement?<sup>1</sup>

We will look in vain to scholarship to shed much light on this question. Lawyers, especially in empiricist Britain, shy away from any hint that the origins of legal regimes lie in a set of cultural, political, and ideological struggles; their practice is to interpret texts, moving from document to document, rather than to soil themselves with the dirty laundry of backstage diplomatic shenanigans. Political theorists have been good at unravelling the complex ancestry of ideas about rights, and dissecting such conceptual questions as whether there are such things as universal values, or how to measure social against civil rights. Once again, however, the ideas are disembodied and plucked from their historical context. Historians have allowed the vagaries of intellectual fashion, and a perhaps well-founded fear of treading on lawyers' toes, to turn the history of law into a ghetto in historical studies while the history of how law has been deployed in international politics remains a ghetto within a ghetto.<sup>2</sup>

Yet the basic question remains puzzling. Given that the protection of human rights implies a curtailing of the state's power over its citizens or subjects, how do we explain why the states grouped together in the United Nations Organization came to commit themselves to the defence of human rights? To this question, two kinds of answers are usually given. One – we might term this the 'Eleanor Roosevelt' version – says it happened because a number of noble and heroic individuals shamed the Powers into action by their tireless advocacy of the cause. It all came down in the end to the power of a vision and its visionaries. Recent studies of Roosevelt herself, Raphael Lemkin, and others all provide highly personalized accounts of key activists. The other – the 'Adolf Hitler' version? – argues that widespread revulsion at Nazi wickedness galvanized the world into action. Both offer history as morality tale: good triumphed through the acts of a selfless few or out of the depths of evil.<sup>3</sup>

<sup>1</sup> R. Steel, 'Motherhood, apple pie and human rights', *New Republic*, 4 June 1977, p. 14, cited by K. Sellars, *The rise and rise of human rights* (Stroud, 2002), pp. xiii–xiv.

<sup>2</sup> Only in the last few years have a handful of historically nuanced studies started to address this issue. Far wider than its subtitle suggests is the comprehensive work of A. W. Brian Simpson, *Human rights and the end of empire: Britain and the genesis of the European Convention* (Oxford, 2001). Sellars, *The rise and rise of human rights*, is a journalistic account based on considerable archival research which presents the story of human rights in the post-war era as a tale of Great Power hypocrisy.

<sup>3</sup> Emphasis on visionary individualists marks P. Lauren, *The evolution of international human rights: visions seen* (Philadelphia, 1998), and M. A. Glendon, *A world made new: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York, 2001); on Mandelstam, see J. Herman Burgers, 'The road to San Francisco: the revival of the human rights idea in the 20th century', *Human Rights Quarterly*,

Neither version, however, is satisfactory. There have been many tireless advocates for human rights in the past: some, like the émigré Russian lawyer, Andre Mandelstam, laboured in vain; others, like the architect of the Genocide Convention, Raphael Lemkin, or Eleanor Roosevelt herself, were somewhat more successful. Yet the latter succeeded only because states heeded them. It was President Truman, after all, who appointed Eleanor Roosevelt to the UN Commission that was ultimately responsible for drafting the 1948 Declaration of Human Rights. Why did *he* do so? What is significant here, then, is *not* the fact that heroic individuals made a difference but rather that international human rights turned out – rather unusually – to be an area of post-war politics in which individuals on the fringes of political life found they had a certain scope for action. As for Nazi evil, we know now that the Holocaust as such was much less central to perceptions of what the war had been about in 1945 than it is today. And we still have to explain how those hard-bitten state bureaucrats, from the Kremlin to Whitehall, who had successfully resisted the siren-call of moral feeling in the past should now have succumbed. In fact, while the post-war rise of human rights can be told in the optimistic mode *in part* as the triumph of civilization over realpolitik and barbarism, it cannot, in justice, be fully explained unless we are aware that it was, at the same time, a triumph, and one imbued with its fair share of cynicism, for state interest too.<sup>4</sup>

## I

It was only after the defeat of Napoleon that the Great Powers began intervening in the affairs of other states in the name of humanitarian ideals and civilization. Through the nineteenth century, the Concert of Powers evolved a set of constitutional principles, including a commitment to freedom of worship, and the abolition of religious and civil disabilities, which they tried to impose on new states seeking to join the European ‘family of nations’. Hence they forced reform on the Ottoman Empire, and made international recognition of newcomers like Romania, Bulgaria, and Serbia conditional upon their pledging themselves to the fair treatment of their religious minorities. During the First World War, the importance of these cases was magnified as the old multi-national empires finally fragmented and exploded in a welter of inter-religious and inter-ethnic violence: the mass murder of hundreds of thousands of Armenians in 1915–16 was but the extreme example. To news of this, the Entente Powers responded with an appeal to the Ottoman authorities to stop the killing, deploring these ‘new crimes of Turkey against humanity and civilisation’ (the word ‘humanity’ replaced an

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14 (1992), pp. 447–77; on Lemkin and his revulsion at Nazi crimes, Samantha Powers, *A problem from hell: America and the age of genocide* (New York, 2003).

<sup>4</sup> A. Moravcsik, ‘The origins of human rights regimes: democratic delegation in postwar Europe’, *International Organisation*, 54 (2000), pp. 217–72, is the most theoretically stringent attempt to explain the rights of post-war human rights discourse, but does so in terms which apply to the European Convention on Human Rights rather than the preceding UN initiatives.

earlier draft's reference to 'Christianity') and threatening the post-war prosecution of those involved. But the bloodletting against civilians did not stop there: in 1918–19, there were pogroms in eastern Europe, and huge flows of refugees streamed westwards to escape fighting and revolution.<sup>5</sup>

Meeting to draw up a peace settlement in Paris, the war's victors were committed to recognizing the successor states in eastern Europe on the basis of the Wilsonian principle of self-determination. The difficulty was that, as the news coming in from eastern Poland suggested, these new states could well contribute to destabilizing the region by the harsh handling of their minorities. To tackle this the Powers drew on pre-war precedents and made international recognition of Poland, Czechoslovakia, and the other states of the region conditional upon their guaranteeing their minorities certain collective rights. What was unprecedented in this situation was that the monitoring and guarantee of these provisions was entrusted to a new international organization, the League of Nations, rather than to the Great Powers themselves. It was this system, for the organized international protection of group minority rights – not individual human rights as we conceive them – which formed the subject of public concern and discussion in the interwar era, and we cannot understand the turn to human rights after 1945 properly unless we do so against the background of this historical experience.<sup>6</sup>

Although organizationally the League was a radical departure from the past, in other ways it fitted squarely into an earlier Victorian tradition of Great Power paternalism, a paternalism that coexisted comfortably with both liberal Christianity and racism. A Japanese proposal that the League commit itself to racial equality was unceremoniously and improperly blocked by the major Powers, despite the support it had attracted from other states. At the same time, the idea of making the minority rights regime universal rather than specific to the new states of eastern Europe was dismissed early on, and henceforth kicked into touch every time it was raised. So far as Whitehall was concerned, the League was not going to be allowed to pontificate about racial segregation in the USA, nor about the English treatment of Catholics or Chinese in Liverpool. And because Germany was not put under any obligation either, there would be almost no way after 1933 for the League to protest against the Nazi treatment of German Jews.<sup>7</sup>

In the event, the League's foray into minority rights pleased no one. The Great Powers increasingly disliked being required to pass judgement on how Poles, Romanians, or Czechs – their client states – were behaving towards their minorities. As Germany and the USSR regained strength, the British and French lost

<sup>5</sup> M. Kohler and S. Wolf, *Jewish disabilities in the Balkan states* (Philadelphia, 1916); on the Armenian massacres, Simpson, *Human rights and the end of empire*, p. 95.

<sup>6</sup> M. Levene, *War, Jews and the New Europe: the diplomacy of Lucien Wolf, 1914–1919* (Oxford, 1992). General accounts of the interwar minority rights regime are contained in W. Rappard, 'The problem of minorities', *International Conciliation*, 222 (1926), pp. 330–43; O. Janowsky, *Nationalities and national minorities* (New York, 1945); I. Claude, *National minorities: an international problem* (Cambridge, MA, 1955), chs. 1–3. <sup>7</sup> N. Shimazu, *Japan, race and equality: the racial equality proposal of 1919* (London, 1998).

their appetite for anything which might weaken the east European states they had brought into existence. The latter for their part felt humiliated by the international obligations they alone had been forced to sign, and blamed their minorities for publicizing their grievances abroad and failing to assimilate. And the minorities themselves, as a result of these factors, gradually lost faith in the protection provided by international law, and their complaints to Geneva dried up. The largest ethnic minority in interwar eastern Europe was – though this is often forgotten today – the Germans – then to be found in Poland, Czechoslovakia, the Baltic states, as far south as Greece, and in the USSR to the east. Their fate was a huge issue in Weimar German politics with powerful lobby-groups with, in some cases, millions of members devoted to activities in their support. Among the numerous organizations militant in their cause was the fledgling NSDAP whose 1920 party programme began by demanding the union of all Germans to form a Greater Germany as well as ‘land and territories for the nourishment of our people and for settling our superfluous population’. Hitler’s priority was the greater German cause, and while the means and definitions he favoured were extreme, the goal itself was squarely in the mainstream of interwar German nationalist sentiment.<sup>8</sup>

During the Weimar Republic, German diplomats tried to defend Germans abroad by toughening up the League’s minorities clauses. German and Jewish lobby groups collaborated in the European Congress of Nationalities, a voice for the minorities, and Germany was the only country to offer to assume responsibility for minorities within its borders if the system of minority rights would be generalized. ‘It is precisely with regard to the protection of minorities’, declared the German foreign minister Stresemann in 1929,

that many countries have set their hopes on the League and have believed that the League would bring support to all whose religious and other sensibilities are not those of the State in which they live. The League must protect minorities and respect their rights. If it does not do so, these Powers may well ask themselves whether the League still represents the ideal which induced them to join it.

But Great Power support was very half-hearted, and a series of attempts and proposals made throughout the 1920s to generalize the minority rights regime was effectively squashed. Stresemann’s own effort in this direction was rejected by the League Council on the grounds that ‘constant supervision’ of the situation of minorities – as opposed to the case by case investigation of their complaints – was inconsistent with the provisions of the treaties.<sup>9</sup>

<sup>8</sup> A. Komjathy and R. Stockwell, *German minorities and the Third Reich* (London, 1980), ch. 1.

<sup>9</sup> E. Sutton, ed., *Gustav Stresemann: his diaries, letters and papers* (London, 1940), III, p. 445; H. B. Calderwood, ‘Should the Council of the League of Nations establish a permanent minorities commission?’, *American Political Science Review*, 27 (1933), pp. 250–9; idem, ‘The proposed generalisation of the minorities regime’, *American Political Science Review*, 28 (1934), pp. 1088–98. For the general background see C. Fink, ‘“Defender of minorities”’: Germany in the League of Nations, 1926–1933’, *Central European History*, 5 (1972), pp. 330–57.

Within just a few years of Stresemann's statement the League's authority had effectively collapsed, the Weimar Republic had vanished, and Hitler and the Nazis had begun to carve out a new foreign policy. This replaced Geneva's commitment to protection through international law and supranational co-operation with national expansionism, bilateral diplomacy, and the use of force. Speaking in October 1933, after the Nazis had come to power, and shortly before Germany withdrew from the League entirely, the German representative to the League told the General Assembly of the new approach being adopted in Berlin. Attacking the League's belief in the ultimate desirability of assimilation, he emphasized the importance the German government attached to the idea of nationality. Nazi thinking pushed the collectivism inherent in the very idea of minority rights to a new extreme:

The members of a nation or an ethnic group living in a foreign environment constitute, not a total number of individuals calculated mechanically but on the contrary the members of an organic community ... The very fact that they belong to a nation means that the nation in question has a natural and moral right to consider that all its members – even those separated from the mother country by state frontiers – constitute a moral and cultural whole.<sup>10</sup>

Within a short time, the implications of this approach were being drawn out in the legal and political science journals of the new Germany. Denying that international law had any validity, jurists in the Third Reich now argued that 'the nation comes before humanity'. Each racial group, according to some, possessed its own conception of law, making the idea of a global political society a nonsense. 'It is not thereby asserted', wrote one,

that the fundamental moral ideas of the German people are also to be considered as binding upon the so-called international community ... It should never, and shall never, be our function to convert by example to German legal notions the negro republic of Liberia, or Abyssinia, or Red Russia, in order to construct a genuine society of nations of universal character.

Uninterested in minorities in general, National Socialism was concerned above all else with the preservation of the Germans abroad in particular. Their racial identity was regarded as trumping whatever citizenship they might possess – 'blood is stronger than a passport' – and first politically and then militarily, the Third Reich strove to incorporate them within its confines.<sup>11</sup> Indeed the offensive Berlin waged from the time of Munich in the autumn of 1938 is best viewed as a war on behalf of a greater 'Germandom', which would solve the racial tangle of eastern Europe by a combination of territorial conquest and forced population movements. While Poles and Jews were expelled from the annexed territories of interwar western Poland, hundreds of thousands of ethnic Germans were ordered

<sup>10</sup> Calderwood, 'Proposed generalisation', pp. 1093–4.

<sup>11</sup> L. Preuss, 'National Socialist conceptions of international law', *American Political Science Review*, 29 (1935), pp. 594–609.

to leave the Baltic states, Italy and the USSR and to make their way into the welcoming arms of the Reich to be resettled eventually on the lands seized from Slav inferiors in the East.<sup>12</sup>

It was against the backdrop of these events that Roosevelt and Churchill met in August 1941 and, even before the USA entered the war, made the first of a series of programmatic statements intended to define more sharply what the fighting was for. Churchill himself, despite his notorious reluctance to get bogged down in talk of war aims, had stressed the need to defend the rights of the individual almost from the start. In January 1942, the twenty-six countries who signed the Declaration of the United Nations pledged not only to adhere to the principles contained in the Atlantic Charter, but to join in a crusade 'to preserve human rights and justice in their own lands as well as in other lands'. Thenceforth, in both official – and even more in unofficial – thinking and planning for the post-war era, the subject comes up again and again until gradually, it became an integral aspect of the new global security organization, initially unnamed, later termed the United Nations Organization, that was to take over from the discredited League.

Behind the trend of official policy lay the wartime intellectual ferment within the Anglophone world – and especially among frustrated Wilsonian liberals in the United States – which swiftly assumed vast dimensions. Liberals on both sides of the Atlantic, who had felt on the back foot through most of the 1930s, now took heart. In the United States, the American League of Nations Association among others stimulated a surge of neo-Wilsonian sentiment and set up a Commission to Study the Organization of the Peace under the chairmanship of the historian James Shotwell, formerly a member of the US delegation to the Versailles peace conference. The elderly H. G. Wells quickly penned *The Rights of Man*, which was dropped behind enemy lines in occupied Europe. More and more believed that the rise of Germany and its persecution of German Jews showed that such rights could only be defended internationally. Defending the need for a new international bill of rights, the American political theorist Quincy Wright observed that the problem before the war had been that 'it was a general principle that a State was free to persecute its own nationals in its own territory as it saw fit', and he insisted that 'effective international organisation [of the peace] is not possible unless it protects basic human rights against encroachment by national States'. To which perhaps the most distinguished international lawyer of the day, Hans Kelsen, added that this would require a court since 'a right consists only in the legal possibility to invoke a court'. In Britain, Hersch Lauterpacht, Whewell Professor of International Law, lectured on the subject and wrote *An international bill of the rights of man* in 1943.<sup>13</sup>

<sup>12</sup> R. Koehl, *RKFDV: German resettlement and population policy, 1939–1945* (Cambridge, MA, 1957); J. Schechtman, *European population transfers, 1939–1945* (Philadelphia, 1946).

<sup>13</sup> Both in World Citizens' Association, *The world's destiny and the United States* (Chicago, 1943), pp. 105–13. See also Simpson, *Human rights and the end of empire*, pp. 193–200, 205. The Foreign Office

This groundswell of public interest soon reached the corridors of power. In December 1942 a hushed House of Commons heard Anthony Eden denounce the Nazi atrocities against the Jews as a violation of 'the most elementary human rights'.<sup>14</sup> In the US the interest was stronger than in Britain and the official engagement more pronounced. Roosevelt, in particular, was determined to avoid a relapse into isolationism after the war. He authorized the establishment of an Advisory Committee on Postwar Foreign Policy whose examination of the feasibility of an international bill of rights probably constitutes the first serious effort by a governmental organization to address the issue. By the end of 1942, this group had secretly come down in favour of such a bill, even recommending that it should override any obstacles presented by the domestic law of ratifying states. But the recommendation had not been unanimous: Durwald Sandifer, legal adviser to the group, warned that the issue of implementation raised serious political challenges. Enforceability was obviously desirable, but not if it scared off potential signatories. 'The signature, by all states', he wrote, 'of a general convention of the rights of man would be at present unattainable if such a convention should include any sanctions.' Better, he suggested, to work towards a declaration in which 'reliance is placed primarily upon the good faith of the contracting parties'.<sup>15</sup>

It may be useful to consider the main reasons why human rights had suddenly and so unexpectedly attained such prominence in wartime discussions of the post-war world. In the first place, of course, there were the Nazis. They might have been unpleasant but they were not duplicitous, and their contempt for the rights of the individual could not have been clearer. They had made a mockery of the principle of minority rights by turning the largest minority in Europe into a fifth column for their own activities. For their part, both the British and the Americans wanted to reaffirm the principles of liberal democracy vis-à-vis fascist autocracy. The reassertion of the rights of the individual against the omnipotent state fitted smoothly into liberal political thought and seemed especially urgent to those people who felt that the war had started because of the inherent bellicosity of dictatorships. But an examination of wartime thought would suggest that the emphasis on human rights and 'the claims of the individual' stretched far further across the political spectrum, uniting such otherwise distant figures as the Catholic intellectual Jacques Maritain (whose *Les droits de l'homme et la loi naturelle* appeared in 1942) and E. H. Carr (whose *Conditions of peace* appeared the same year).<sup>16</sup>

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later refused to appoint Lauterpacht to the UN Human Rights Commission on the grounds that he was 'when all is said and done, a Jew fairly recently come from Vienna', and preferred to look for 'a very English Englishman imbued throughout his life and hereditary to the real meaning of human rights as we understand them in this country': Sellars, *The rise and rise of human rights*, p. 12.

<sup>14</sup> Lauren, *The evolution of international human rights*, p. 160.

<sup>15</sup> *Ibid.*, p. 163; Simpson, *Human rights and the end of empire*, p. 186.

<sup>16</sup> K. Loewenstein, 'Law in the Third Reich', *Yale Law Journal*, 45 (1936), pp. 779–815; Mark Mazower, *Dark continent: Europe's twentieth century* (London, 1998), pp. 194–206.



In addition there were many Americans – more and more as the war went on – who believed that isolationism no longer safeguarded them, and who felt the need to carve out a universal mission for themselves internationally. The starting point for this was Roosevelt's famous State of the Union address at the start of 1941 in which he defined freedom as 'the supremacy of human rights everywhere', and made it clear that he was referring to 'a definite basis for a kind of world attainable in our time and generation'. Despite racial segregation in the South, rights talk came more naturally to Americans, with their constitution, than it did to the British. But the British were content to go along with this because they desperately wanted the Americans at their side both in the war and after it. They tried to insist all this talk of rights was for European ears alone, not for the colonies, but the stakes for Whitehall were very high. Fearing lest the US 'leave Europe to stew in her own juice', after the war, the Foreign Office warned that 'we should have to go to all lengths in our efforts to prevent her from doing so'. Learning to live with human rights might be a necessary evil.<sup>17</sup>

But the third reason is simply that for many of those involved human rights offered an attractive and plausible alternative to minority rights. Of those who had pushed for the latter two decades earlier, few were left. The League and all it stood for were discredited by the time the war started, not helped by the notoriously pro-Nazi stance of its last secretary-general, Joseph Avenol, and the considerable wartime discussion of the way minority rights had worked under the League tended to start out from the premise that the system as a whole had failed.<sup>18</sup> No one much bothered now with what the Germans thought: indeed well before 1945 the Big Three had made it unmistakably clear to the Poles and Czechs that once the war was over they could go ahead and deport the ethnic Germans in their states: so far as they were concerned expulsion and 'transfer' were to take the place of the protection of international law. And so at the war's end, the largest single organized population movement in Europe's history took place, dwarfing even those Hitler and Stalin had organized in the preceding years, and between 10 and 12 million Germans were forced westwards from their homes.<sup>19</sup>

As for Jewish lobby-groups – so effective at Versailles – they had become deeply ambivalent about the minority rights system too for it had, after all, failed to protect German Jews from Hitler. There had been one attempt to use it in this

<sup>17</sup> G. Jebb, *The memoirs of Lord Gladwyn* (London, 1972), pp. 116–18.

<sup>18</sup> Public Record Office (PRO), FO 371/24440 C7545, 30 June 1940, contains a report that Avenol had been speculating about forming a new League based on the emergent New Order in Europe, with himself as secretary general. Wartime commentary includes J. Robinson et al., *Were the minority treaties a failure?* (New York, 1943); O. Janowsky, *Nationalities and national minorities* (New York, 1945); and P. de Azcarate, *League of Nations and national minorities: an experiment* (Washington, 1945); J. Schechtman, *Postwar population transfers in Europe, 1945–1955* (Philadelphia, 1955), comments that 'some students find explanations and extenuating circumstances for the ineffectual operation of these treaties; nobody, however, has tried to challenge the very fact of failure' (p. 3).

<sup>19</sup> Schechtman, *Postwar population transfers*; W. Benz, ed., *Die Vertreibung der Deutschen aus dem Osten* (Frankfurt a. Main, 1995).

way, the extraordinary Bernheim case in 1933, in which a certain Franz Bernheim, a German Jew, had taken advantage of the fact that there was one part of Germany – Upper Silesia – which was covered by the minority rights system, to publicize Nazi discrimination against Jews. This case had only got off the ground because in Upper Silesia, exceptionally, individuals were allowed to bring petitions on behalf of their group. When wartime analysts looked to see what they could salvage from the League, the Upper Silesia case was the one they viewed most favourably. Bernheim's petition itself did lead to compensation for himself and others. But to that extent it highlighted the limitations of the interwar system elsewhere in eastern Europe as well as suggesting that a more individualized approach to rights violations might be needed. By 1945 many Jews, if they had not turned to Zionism, felt that being singled out as a minority was itself inviting trouble: better to stand – as they had done in the nineteenth century – on their rights as individuals than as a group.

However it was, above all, representatives of those small east European states that had been forced to swallow the bitter pill of minority rights last time round, who came out most strongly against being forced to try it all over again. The Polish government in exile declared it would never accept another minorities treaty. As for the Czechs, President Eduard Benes wrote in *Foreign Affairs* in January 1942 that the Germans must never again be allowed to take advantage of the generosity of the Czech state. Convinced that Czechs and Germans could no longer live together, there must, he argued, be a transfer of population after the war. 'The protection of minorities in the future', he went on, 'should consist in the defense of *human democratic rights* and not of *national rights*. Minorities in individual states must never again be given the character of internationally recognised political and legal units, with the possibility of again becoming sources of disturbance'. In keeping with that logic he called for 'a charter of Human Rights throughout the whole world' after the war. Speaking at the University of Manchester in December 1942, he insisted that 'the real safety of a minority rests upon a clear enunciation and defence of *human* fundamental and democratic rights, and not of particular national rights. I should like to have the same solution of state and national questions in central Europe as you have in Wales.' For Benes to have sung so sweetly the song of human rights whilst plotting the expulsion of millions of Germans has struck some commentators as an example of hypocrisy. But whether or not there was hypocrisy, there was no inconsistency: his refusal to accept the continued existence either of the minorities treaties or of the German minority itself in his country underpinned both.<sup>20</sup>

Collapsing minority rights into individual human rights appealed to the Great Powers too. It had, after all, been British and French reluctance to give the

<sup>20</sup> E. Benes, 'The organisation of postwar Europe', *Foreign Affairs* (Jan. 1942), pp. 226–42; Lauren, *The evolution of international human rights*, p. 153; PRO, FO 371/34343, Benes, 'What would be a good peace?', 5 Dec. 1942; R. Luza, *The transfer of the Sudeten Germans: a study of Czech–German relations, 1933–1962* (London, 1964), chs. 9–11.

interwar system teeth that had doomed to frustration Weimar attempts to take it seriously. Now there was a new protagonist as well: with the Red Army sweeping all before it and likely to control much of post-war eastern Europe, it was obvious in Whitehall that resuscitating the old League system was never going to prove acceptable to the Russians, for who could seriously imagine Stalin allowing a new international organization the right to intervene on behalf of minorities in his sphere of influence? Worse still, the old League had been a basically European arrangement; its successor, given the heavy American involvement, would have a potentially global reach. So it was not just the Russians to worry about; what of the Colonial Office itself which was apoplectic at the thought of international meddling in the empire? Even before the war, a proposal to generalize the minority rights system had led one British Foreign Office official to note that though 'he did not wish to be quoted ... the acceptance of such a proposal by His Majesty's Government would be entirely impossible in view of our colonial empire'.<sup>21</sup>

And since a universal regime of minority rights must also raise the issue of the domestic racial policies of the USA as well, it is scarcely surprising that none of the Big Three showed the slightest desire for making them the centrepiece of the new rights discourse. Behind the smokescreen of the rights of the individual, in other words, the corpse of the League's minorities policy could be safely buried. The direction in which official thought was moving is illuminated by a Foreign Office memorandum on policy towards minorities after the war. Written in March 1945, shortly before the San Francisco conference was to meet to draw up the United Nations Charter, the memo noted that the minorities issue could probably be side-stepped for some time. The expulsion of Germans from eastern Europe – accepted in principle by the British government – was weakening the case for international protection, and Russian support for something like the League system was anyway regarded as 'inconceivable', since they were keener on expelling the Germans than the British were. Discussing whether the new UN Charter should make reference to minority as well as human rights, it argued that: 'It would hardly be possible to combine in a single declaration of principle "human rights" and "minority rights", and warned that "it is probable that a majority of states would refuse to subscribe to any special undertaking about minorities on the grounds that this was unnecessary and repugnant to the particular systems by which they solve the minority problem"'. Sir William Malkin, the vastly experienced Foreign Office legal adviser, summed up the dilemma. 'As a result of my experience at Geneva', he wrote, 'I do not believe that any system of minority protection on the lines of the existing treaties will work really satisfactorily unless there is a much more effective system of supervision and enforcement – a distinctly dubious prospect; yet having nothing to put in place of minorities treaties if they are terminated would also not look good.' Luckily human rights were there to fill the gap. To the British delegation at

<sup>21</sup> Lauren, *The evolution of international human rights*, p. 135.

San Francisco, the Foreign Office laid down the following guidelines: 'We should abandon the idea of a special international system on League of Nations lines for the protection of minorities and should rely for what it is worth upon action by the UNO and its members under the provisions of the UN Charter [the universal 'Bill of Rights']'.<sup>22</sup>

The minorities treaties themselves were not so much terminated as allowed to die an unlamented death. They did have a very small part to play in the post-war settlement in Europe itself, and references to the desirability of treating minorities properly found their way into several peace treaties. But all this was a far cry from the ambitions of 1919. In 1946, the Hungarians inconveniently tried to propose a revival of the old League system at the Paris peace conference in order to protect Hungarian minorities in neighbouring countries: but that this should not happen was one of the few things the British, the Russians, and the Americans could agree on easily. When Ferenc Nagy went to Moscow to consult Stalin before the Paris conference, 'Comrade Stalin' – to read from the recently published Soviet minutes – 'asks maybe the Hungarians would like to carry out an exchange of populations'. At Paris, the Hungarians were told firmly that inserting human rights clauses in the peace treaties ought to be sufficient, and recommended to make 'full use of the human rights clauses in the [UN] Charter in order to establish proper protection for everyone'. Despite the Hungarians' well-founded unhappiness with this argument, the basic point was that minorities issues were no longer to be treated as an issue for adjudication by the international community. Mention of minorities was excluded from the Charter and later even from the Universal Declaration too. Minority rights were shunted off into an obscure sub-commission which led a twilight and futile existence for the next few decades.<sup>23</sup>

Meanwhile, in an almost Kafkaesque development, the United Nations found itself obliged to examine the question of whether the League's minorities treaties were technically still in existence or not; after three years' deliberations, the Secretariat fortunately reached the correct conclusion, reporting that 'reviewing the situation as a whole, one is led to conclude that between 1939 and 1947 circumstances as a whole changed to such an extent that, generally speaking, the [League of Nations] system [of international protection of minorities] should be considered as having ceased to exist'.<sup>24</sup>

<sup>22</sup> PRO, FO 371/50843, 'Policy with regard to protection of minorities after the present war', 8 Mar. 1945, and *ibid.*, 'Brief for UK delegation', 11 June 1945.

<sup>23</sup> M. Fulop, 'The Hungarian draft treaty for the protection of minorities', in P. Stirk, ed., *Shaping postwar Europe: European unity and disunity* (London, 1991), pp. 68–77; Schechtman, *Postwar population transfers*, p. 18; G. Murashko and A. Noskova, 'Stalin and the national-territorial controversies in Eastern Europe, 1945–1947 (Part 2)', *Cold War History*, 2 (2001), pp. 145–57. On the UN Sub-Commission, see J. Humphrey, 'The UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities', *American Journal of International Law*, 62 (1968), pp. 869–88.

<sup>24</sup> Schechtman, *Postwar population transfers*, p. 18.

## II

Circumstances had certainly changed. But had they changed for the better? Benes's argument had won out and those concerned about the rights of minorities were henceforth firmly told that they would be all right so long as their basic human rights were respected. They were told to look to the United Nations Charter for their security. But what they found there was shrouded in ambiguity.

It was in the autumn of 1944 that serious preparatory work for the new international organization got underway when representatives of the sponsoring powers – the USA, the Soviet Union, Great Britain, and, later, China – met for confidential talks at Dumbarton Oaks to sketch out the framework for subsequent discussions. The British in particular regarded talk of rights as an unfortunate American obsession which must not be allowed to get out of hand. 'I suggest we agree to the Constitution of the International Human Rights Organisation', minuted the sceptical Gladwyn Jebb, who headed British planning for the new world organization, 'on condition that there is established a similar International Organisation for Human Duties'. His own 1944 drafts for a future organization said nothing about the rights of individuals. In fact at Dumbarton Oaks, human rights were scarcely mentioned, the priority being to agree upon the overall functioning of the organization and the extent to which the Great Powers would remain in control of its operations. However, as in 1919, there was an inconvenient voice from the East – on this occasion the Chinese delegation – which proposed that there should be a clear overarching commitment to the principle of racial equality, and to human rights in general. As in 1919, the British felt torn. As one memo noted: 'It would be against our interests and traditions to oppose the insertion in the Charter of a provision on racial equality.' On the other hand, such a provision might facilitate meddling by the new international body in the affairs of the empire. When the matter came up for discussion, the British found themselves in unholy agreement with the Russians:

Sir Alexander Cadogan expressed opposition to the reference to human rights and the fundamental freedoms, saying he thought such a provision would give rise to the possibility that the organisation might engage in criticism of the internal organisation of member states. Ambassador Gromyko said it was his personal opinion that the reference to human rights and basic freedom was not germane to the main tasks of an international organisation.<sup>25</sup>

The US delegation, however, suggested a different approach. President Roosevelt had let it be known privately that he was strongly in favour of some reference to human rights. The administration felt caught between the Scylla of isolationists, anxious to preserve the constitution of the US from outside intervention, and the Charybdis of internationalists who were inspired by Roosevelt's idealistic rhetoric and believed the administration should take seriously its mission of building a freer

<sup>25</sup> *Foreign relations of the United States, 1944*, vol. 1 (Washington, 1965), p. 789; Simpson, *Human rights and the end of empire*, pp. 212, 242, 244.

world. Hence the Americans proposed a formulation which would allow them to have their cake and eat it too, posing as defenders of *both* universal human rights *and* domestic state rights:

The International Organisation should refrain from intervention in the internal affairs of any state, it being the responsibility of each state to see that conditions prevailing within its jurisdiction do not endanger international peace and security and, to this end, to respect the human rights and fundamental freedoms of all its people and to govern in accordance with the principles of humanity and justice.<sup>26</sup>

But even this was too much for the nervous British and the Russians and in the end, it was decided to drop the matter for further consideration. In the *Proposal for a general international organisation* which was published by the four sponsoring powers on 9 October 1944, there was only one tiny and all but invisible mention of human rights at all.

It rapidly became clear, however, from the reactions to this document, that the Great Powers' attempt to brush human rights under the carpet would not work. The British and the Russians had failed to foresee the force of public opinion within the US, as well as the storm of criticism from governments across the world – from India and New Zealand to South America – which greeted the Dumbarton Oaks attempt to backtrack on the many wartime declarations promising human rights in the future. While neither Whitehall nor the Kremlin needed to take much notice of American public opinion, Washington certainly did. The State Department was extremely anxious to avoid a repetition of the debacle of 1919 when they had failed to get League of Nations membership through Congress. To this end, they were promoting and consulting with internationalist groups across the US, and monitoring the depth of public sympathy for the new world organization through a series of opinion polls which indicated a surprisingly widespread desire for the US to take a leading role in the coming world order. By the middle of the war even a weather-vane Republican isolationist like Senator Arthur Vandenberg had come round to accepting the need for post-war internationalism.<sup>27</sup>

For these reasons it had become clear by the spring of 1945 that the new Charter of the United Nations *would* have to make some reference to rights. Anxious to stay in step with the Americans, the Foreign Office began turning its attention to this unwelcome subject and defining the desired degree of commitment. Preparing a background briefing in March, one month before the San Francisco conference, one Foreign Office official wondered whether the UN Charter should include a principle guaranteeing human rights. This elicited a sharp reminder from the watchful Charles Webster, the historian who acted as Foreign Office adviser on these matters: 'Our policy', he wrote, 'is to avoid "guarantee of human rights" though we might not object to a declaration.' As

<sup>26</sup> Lauren, *The evolution of international human rights*, p. 168.

<sup>27</sup> J. Gazell, 'Arthur H. Vandenberg, internationalism and the United Nations', *Political Science Quarterly*, 88 (1973), pp. 375–94.

Britain shifted its position towards the Americans, so the latter, faced with the likelihood that the President would indeed get his human rights, now became conscious of the danger from Congress, and began to focus with new attention on the issue of domestic jurisdiction, or – in layman’s language – making sure the human rights provisions of the UN Charter would not be automatically applicable at home.<sup>28</sup>

The Covenant of the League of Nations had contained a domestic jurisdiction clause – put there at the initiative of the Americans – which had been a strong constraint on that body’s ability to act. Now, once again, it was chiefly the US which propelled this issue forward. The Dumbarton Oaks proposals contained a provision directly modelled on the wording of the League’s Article 15[8]. The higher human rights moved up the agenda, the greater the pressure for a *further* limitation on the new organization’s ability to intervene in the domestic affairs of member states. At San Francisco, John Foster Dulles, speaking on behalf of all the four sponsoring states, justified a toughened-up domestic jurisdiction clause on the grounds that it was necessary to ensure that the organization did not ‘go behind the governments to intervene directly to impose that pattern [of social order] which the Economic and Social Council might conceivably recommend on each one of the 50 member states’.<sup>29</sup>

The UN Charter that emerged from the San Francisco conference to be signed in June 1945 bore the unmistakable traces of these competing interests. On the one hand, it did highlight human rights in an entirely unprecedented fashion, both in the Preamble and in the main body of the Charter itself. Article 1, in particular, defined as among the purposes of the United Nations, ‘promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction to race, sex, language or religion’. But immediately following was Article 2 which contained the new stringent domestic jurisdiction clause. Moreover ‘promoting and encouraging’ was all very well; few people could object to that. But where were the means of implementation and enforcement? Where was the right of petition, or the body or court which might offer the individual recourse when standing up to the tyranny of the despotic state? Hans Kelsen, perhaps the pre-eminent legal theorist of the day, was scathing: ‘No other subject matter is so often referred to in the Charter as the human rights and freedoms. They were not mentioned at all in the Dumbarton Oaks Proposals. Nevertheless there is, from a strictly legal point of view, no difference between both documents with respect to this subject matter.’ As for the Preamble, whose rhetoric was particularly stirring in this respect, its words – according to Kelsen – ‘remain empty phrases’.<sup>30</sup>

<sup>28</sup> PRO, FO 371/50843, comment by C. K. Webster.

<sup>29</sup> M. S. Rajan, ‘United States attitude towards domestic jurisdiction in the United Nations’, *International Organisation*, 13 (1959), pp. 19–37.

<sup>30</sup> H. Kelsen, ‘The preamble of the charter – a critical analysis’, *Journal of Politics*, 8 (1946), pp. 134–59, at p. 148.

None of this had been accident. The co-operation between the American and the British delegations at San Francisco had been especially close. 'I generally sit next to the American', wrote Sir Alexander Cadogan, 'and we conspire together to whack obstructionists on the head ... I tell him he's our heavy artillery and I am the sniper. It works quite well [and we wiped the floor with a Mexican last night].' The conference might have allowed what he called 'the little fellows' their voice, but the resulting document reflected the Great Powers' keen interest in preserving their sovereignty intact. The former had some small victories – a new regime on the rights of indigenous peoples, for instance, and on trusteeship arrangements, while the General Assembly of the new organization won expanded powers. Nevertheless the Security Council remained in overall control of executive action and the human rights rhetoric was deliberately bereft of mechanisms that might have made it enforceable. As one scholar has noted, the resulting document, drawn up as it was in the final days of the Third Reich, would have been quite inadequate as the basis for any kind of action on behalf of the victims of Nazism.<sup>31</sup>

Nevertheless, Cadogan's breezy contempt for the 'small nations' was slightly misplaced. In the three years which stretched from the signing of the UN Charter to the proclamation of the Universal Declaration of Human Rights in 1948, Great Power co-operation became a casualty of the Cold War, and the General Assembly emerged as a forum in which the rights agenda could be pushed forward in ways unforeseen at Dumbarton Oaks. Much of history is, of course, the product of conspiracy or of policy-makers' deliberate shaping of events; but some is also the product of accident and an inability to foresee outcomes or control events, an inability which may just as well on occasions have happy as unhappy consequences. As the Soviet Union started to play to the gallery of the General Assembly, and the British and Americans plotted in their turn to 'dish the Russians', the 'small nations' found they were able to advance their own concerns, now often linked to the human rights agenda, in surprising ways.

One illustration of this was the proposal for a Genocide Convention which emerged in 1946 after the General Assembly resolved that genocide was a crime. The eventual success of what was in many ways a one man crusade clearly reflected not only horror at what had been revealed by the Nuremberg trials but also profound dissatisfaction with the legal approach followed by the prosecution there, as well as a consciousness that the abolition of the minorities treaties had left an important area of potential state oppression untouched by the new doctrine of human rights. Another was the publicity directed by the Indian government towards the policy of racial discrimination in South Africa, another issue which was debated extensively in the General Assembly in 1946 and became a test case for the UN over the next several decades. Jan Smuts, who had been

<sup>31</sup> Lauren, *The evolution of international human rights*, p. 186; Simpson, *Human rights and the end of empire*, p. 268; D. Dilks, ed., *The diaries of Sir Alexander Cadogan, OM, 1938–1945* (London, 1971), p. 746.



involved in the drafting of the Charter, now claimed the protection of the domestic jurisdiction clause to defend his country from criticism. In his view, the UN had no right of intervention. This position was supported by Britain, Canada, the US, and Australia. The American delegation agreed that while the UN's discussion of the question was not ruled out by the Charter, it 'was not a super-government and ... had no power to impose standards but only to proclaim them'. Needless to say, it took a slightly different view regarding violations of human rights in Bulgaria, Hungary, and Romania. Thus the Powers started to see human rights as a weapon to be deployed against each other, while the General Assembly began to emerge as a forum for – at the least – the publicizing of human rights abuses internationally.<sup>32</sup>

Whether the UN would ever be able to do more than this depended upon how far it would be able to realize in concrete and practical terms the aspirations embodied in the Charter and, in particular, bring into being the international bill of rights envisaged as far back as 1942. The General Assembly had voted to entrust this task to the new Commission on Human Rights. But almost immediately the UN was deluged by a huge wave of individual petitions complaining about a range of official crimes and misdemeanours. In October 1947, in the best-known case, an elderly W. E. B. du Bois – the distinguished black American intellectual – presented a long petition to the United Nations on behalf of the National Association for the Advancement of Colored People (NAACP) detailing the history of racial discrimination in the USA. Entitled an 'Appeal to the world: a statement on the denial of human rights to minorities in the case of citizens of negro descent in the United States of America and an appeal to the United Nations for redress', this was a brilliant propaganda coup which garnered the NAACP international publicity. It was also seized upon by the Soviet Union which happily brought it to the Commission to underline the problems which still existed in the USA. It was, in fact, a reminder of how easily governments might be put on the back foot if the right of petition was granted. As the group of eighteen members, chaired by Eleanor Roosevelt, began to put flesh on the bare bones of the Charter, the strength of official resistance to any enforceable regime of right protection manifested itself. Despite – or perhaps because of – the precedent of the 1933 Bernheim case, which had shown up Nazi behaviour internationally, the Commission was instructed in no uncertain terms to announce publicly that it had no power to take any action in response to charges by individuals about alleged human rights violations by governments.

Indeed the whole evolution of the Commission's discussions betrayed a resurgence of concerns about state sovereignty. The 'practical and effective measures' which had been recommended in May 1946 were blocked, as was the idea of an 'international agency of implementation', and it was agreed early on to separate the issue of a declaration of rights, from that of a covenant, which

<sup>32</sup> Rajan, 'United States attitude towards domestic jurisdiction in the United Nations', p. 24.

would have binding force, and from that of implementation. Eleanor Roosevelt herself was forced to follow strict instructions along these lines and was given a State Department minder to keep an eye on her. The drafting of the Universal Declaration itself involved an arduous effort to harmonize different cultures of law and rhetoric. Discussions of the relative merits of the thought of Confucius and Aristotle went on into the night. Fascinating to students of the philosophical issues involved in defining a global set of rights, the spectacle was of limited interest to senior officials of the major powers. Having succeeded in seeing off all discussion of covenants, courts, and implementation procedures, it seems they were happy enough to accept the appearance of a lofty-sounding Universal Declaration which committed them, in truth, to very little.<sup>33</sup>

Some anxieties remained of course. Meeting in a Paris hotel room in September 1948, the US delegation mulled over the forthcoming Declaration, which Secretary of State Marshall had just publicly heralded as so necessary to 'free men in a free world'. Dulles – to become secretary of state himself not long afterwards – asked nervously whether the Declaration was legally binding. His colleague Benjamin Cohen reminded him that though it was not, it did impose upon its signatories an obligation 'to favour and work towards certain principles'. Dulles was not reassured by this. He noted the provision in the Declaration which stated that 'everyone has the right of access to public employment' and 'recalled that he had had to sign a declaration that he was not a Communist at the time of his appointment to the Delegation'. He was anxious lest members of the Republican party interpret such a provision as 'a commitment by the US delegation agreeing to the employment of Communists in agencies such as the Atomic Agency Commission'. And Dulles's forebodings were not entirely misplaced. While the Universal Declaration of Human Rights was lauded by its supporters as 'a beacon of hope for humanity', and written off by several eminent international lawyers as little more than hot air, it was described by the president of the American Bar Association, Frank Holman, as 'revolutionary in character', 'an attempt to promote state socialism if not communism throughout the world'.<sup>34</sup>

### III

So did the United Nations usher in 'the idea of our time' – 'the first international document of ethical value' as some of its supporters have claimed? Or are the cynics right? Did all the talk of human rights serve, rather effectively, to disguise the fact that the United Nations was not an advance on the League but in fact a step backwards, planting us firmly once again in that Victorian world of a concert of powers telling everyone else what to do in the name of humanity?

<sup>33</sup> PRO, FO 371/59739, 'Report of the Commission on Human Rights to the 2nd Session of the Economic and Social Council', 24 May 1946.

<sup>34</sup> *Foreign relations of the United States, 1948*, vol. I, part 1 (Washington, 1975), pp. 291–2; Holman in Glendon, *A world made new*, p. 193.

Our answer may depend on whether one believes we would have been better off without the United Nations all these years. If it is to be valued, minimally, as a genuinely global forum for international discussion, then it is important to recognize the compromises which were necessary to bring it into being. While the British needed their world organization – or felt they did – neither the Soviet Union nor the United States did to anything like the same degree. They would not have joined if that organization had possessed the authority to intervene in their internal affairs. In other words, the United Nations did not represent a political community whose leading members were likely to derogate real power to it. Here the contrast is striking with western Europe, which, both inspired and dismayed by the example the UN had set in tackling human rights, brought into being a much more realizable and effective mechanism through the European Convention for the Protection of Human Rights in the early 1950s. So far as the Superpowers were concerned, human rights were strictly for export.

On the other hand, sufficient ambiguity was built into the UN's approach to allow a new emphasis on human rights to emerge during the Cold War. The UN bureaucracy itself, smaller member-states – especially those who linked the human rights agenda to the struggle for decolonization – and an increasing number of non-governmental organizations, all found that the provisions contained in the Charter permitted them to highlight issues of human rights internationally in a way that had no precedent. Cold War rivalries even made this strategy attractive to the Superpowers as well. This state of affairs also offered an incentive to international lawyers to develop theories of law which rationalized activist interpretations of the Charter, the Declaration, and many of the UN's subsequent pronouncements. The severely formalist approach taken, in different ways, by both Kelsen and Lauterpacht – namely, that without the precise definition of rights and the establishment of enforcement mechanisms the UN's real usefulness in defending rights was minimal – was replaced by an approach closer to that intended by the drafters of the Declaration who had clearly hoped that essentially moral aspirations might come themselves to be regarded as a source of law. This, then, is perhaps why today many guides to international human rights law skate over the question of origins. Looking forward rather than back, these compendia of texts, with their scholarly apparatuses, commentaries, and bibliographies, are not neutral; they themselves form part of the ongoing effort to assert the power of the law over politics.

The historian, however, is in a different position. It does no service to the cause of human rights to disguise the political struggles and conflicts of interest that accompanied their emergence into the international arena. On the contrary, a better understanding of that story, their relationship to prior rights regimes, and their dependence on the international balance of power may help us recognize their true weight and worth. In the early years of the United Nations memories were fresher than they are today. 'He who dedicates his life to the study of

international law in these troubled times', wrote Joseph Kunz, an Austrian émigré in 1954,

is sometimes struck by the appearance as if there were fashions in international law just as in neckties. At the end of the First World War, 'international protection of minorities' was the great fashion: treaties in abundance, conferences, League of Nations activities, an enormous literature. Recently this fashion has become nearly obsolete. Today the well-dressed international lawyer wears 'human rights'.<sup>35</sup>

<sup>35</sup> J. Kunz, 'The present status of the international law for the protection of minorities', *American Journal of International Law*, 48 (1954), pp. 282–7.