

Exploring Fractures within Human Rights: An Empirical Study of Resistance

by

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For my parents who surrendered so much to make possible such hopes and dreams.  
Daddy, I miss you.

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### **List of Abbreviations**

AMA	The American Medical Association
ABA	The American Bar Association
IBHR	International Bill of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations

## Chapter 1

### **The History of Human Rights Formation (Or How to Study a Concept that Does Not Yet Exist)**

As long as there have been laws that purport to shield humans from violence, danger, and deprivation, there have been rights holders that lay exposed and bare. The chasm in which dispossessed populations falter—between the comforting assurances of universal human rights and the devastating particularity of their application—is a troubling reality. For those who in recent years have been subjected to the most disastrous situations—in Rwanda, Darfur, and New Orleans, for example—are apparently already protected by a robust system of human rights. But even more troubling is the realization that the governments presiding over such tragedies typically sign the treaties, attend the conferences, and otherwise present themselves as strong supporters of human rights. But for those who falter and lack a robust network of social attachments, the law becomes distant, politics ever-more exclusive, and human rights a mere idea. How has it come to be that the modern international system of human rights allows states to offer such inspiring rhetoric in support of human rights in the international sphere, while socially dislocated populations so often have their rights violated with impunity?

The social consequence of this tragic incongruity is one of the most well-known problems surrounding modern international human rights. Scholars of human rights have addressed this puzzle from a variety of perspectives—enforcement, treaty ratification,

geopolitics, and implementation, for example. In this project, however, I look at the historical formation of the modern international human rights concept to gain an understanding of how its own constitution affects its application. In this regard, I follow the lead of others who have studied important moments of rights formation—e.g. the French, English and American Revolutions, the Civil Rights Movement or *Roe v. Wade*—to uncover the buried struggles, hidden conflicts, and otherwise forgotten histories that make the law what it is today.<sup>1</sup>

The focus of this empirical study is the creation of what is now considered to be the foundation of the modern human rights regime—the International Bill of Human Rights. The International Bill of Human Rights consists of the 1948 *Universal Declaration of Human Rights* (UDHR), the 1966 *International Covenant on Civil and Political Rights* (ICCPR), and the 1966 *International Covenant on Economic, Social and Cultural Rights* (ICESCR). This analysis focuses on the period from 1947-1954 when virtually all of the drafting of all three texts took place.<sup>2</sup> Though human rights today might seem like the only appropriate response to the Holocaust and World War II, during this time period, the concept was anything but self-evident. This empirical analysis reveals a multitude of serious reservations that are often overlooked by human rights scholars. The apparent unity and support for the non-binding UDHR (passed in 1948 by a vote of 48-0-8), for instance, quickly gave way when attention turned towards drafting a binding Covenant. Deadlocks split the text into two documents, and stalled its entry into

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<sup>1</sup> Depending on the particular question, locating the pertinent “moment” of rights formation may take a researcher back to the latest court case or through the past several centuries. After locating the institutional origins of rights formation in medieval England, Somers (1994:112) is correctly unapologetic: “If [the] search for causal contingencies takes me to the 12th through 14th centuries—so be it.”

<sup>2</sup> The phrase, “the drafting of the International Bill of Human Rights” is used throughout to refer collectively to all three texts during this important eight year period. See Appendix for an overview of the entire drafting process.



force for more than a generation.<sup>3</sup> Because the human rights concept promised (or *threatened*) to create new categories of right holders, imperial powers such as Great Britain and influential political groups in the United States resisted this universal and inclusive discourse. Interestingly, during the same period, prominent professional organizations such as the American Bar Association and the American Medical Association, as well as progressive thinkers like Hannah Arendt and Gandhi—each for their own reasons—also rejected key aspects of the new human rights concept.

In this project, I show that these strands of resistance had a significant impact on the creation of the International Bill of Human Rights. I argue that the modern human rights concept has been shaped by both positive support *and* (paradoxically) its opposition. Following World War II, the human rights concept fostered a vital consensus-building process by absorbing oppositional elements into its unitary frame. Thus from its inception, the concept has been encumbered by a series of “internal contradictions” that have created enduring structures that today enable rhetorical praise for human rights, while constraining their enforcement.

Many others have studied this history of human rights formation through approaches that tend to highlight human rights as a subject of politics, law, or philosophy (either alone or in conjunction with one another). Doing so has provided a wealth of indispensable knowledge about particular aspects of this history. However, for reasons outlined below, it has also shielded from view many other important facets of the human rights formation process in what has become the “standard account” of the development of the modern system of international human rights. Most importantly for the present

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<sup>3</sup> The Covenant was split into the ICCPR and the ICESCR in 1952. They were completed in 1966 and entered into force in 1976.

research question, the standard accounts often conceive of human rights in a way that dislocates them from their social moorings.<sup>4</sup>

Ironically, it is precisely the *social* aspect of modern international human rights that makes it so innovative and such a clear departure from previous eras of international law. In the modern era, non-state actors regularly take part in human rights creation, individuals have gained recognition within international law, and one concept apparently links all. It is therefore important to take a closer look at the social foundations upon which human rights rest—not just because human rights are created by social actors, but because human rights create social actors. By partitioning the social terrain into fields of recognition where actions matter and opinions count, where the plight of one represents the destiny of all, human rights define the social connections that allow people to live out the concept's lofty ideals. To do so entails moving the analytic field of view from its conventional sites, to focus in on the social elements that are commonly relegated to the penumbra of the other more common approaches to human rights. And once this social reality is met with an analytic counterpart—one that views human rights as basic statements of social relations—a different side of the history suddenly emerges.

This history has less to do with stories of moral progress, the realization of freedoms, or the triumph of human rights than do the standard narratives that have emerged over the past decade. This, however, is not a revisionist's excursion; this approach addresses a side of the history that is typically overlooked. It points towards contention and debate, it uncovers bitter social eruptions over how to organize the post-World War II world, and gives name to the silent, subterranean struggles for ownership

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<sup>4</sup> In this regard, Anthony Woodiwiss underscores the importance of an approach that “refuses to separate rights from social life.” See Woodiwiss, Anthony. 2003. *Making Human Rights Work Globally*, at 7.

of the human rights concept, itself. In doing so, it exposes the social conflicts at the root of mid-twentieth century battles over human rights: Whether African Americans should exist side by side with whites; whether colonial inhabitants were equal or subservient to citizens of the metropole; whether the market or the government should mediate relations between individuals; and whether those individuals should be citizens of the state, or citizens of the world.

The answers to these questions were recorded in the International Bill of Human Rights for all to see, but only to view through lenses that highlight the grandeur of the law, the infallibility of what is natural and fundamental, and the prerogatives of state power. They have yet to be decoded by an approach that translates its *dicta* into the basic language of the social and the words of the dispossessed. Perhaps this was never meant to be. But once a glimpse is caught of the hue and cry that was raised over human rights during their most formative moments of development, it becomes difficult to retreat.

Examining the creation of the International Bill of Human Rights might seem like a relatively straightforward proposition. But when a researcher endeavors to uncover a “buried” history, an account of *why* the story has been forgotten in the first place is a helpful, if not crucial, justification for the research. After all, there may be very good reasons for why it was put to rest. So why has the influence of such opposition *not* been studied and accounted for by human rights scholars? Why has it been overlooked? For now, *en route* to examination of the actual resistance and by way of literature review, I suggest that the answer is related to the various difficulties associated with studying rights, as well as the various blind spots associated with the most common approaches for doing so.

*What is a Human Right? ...and Where do They Come From?*

The multitude of distinct forms that rights manifest makes them an extremely complicated topic of inquiry—particularly in the context of a social scientific analysis where specificity and precision is essential. The great difficulty is that the same term invokes a multiplicity of guises—an incredible array of disparate definitions and an intractable range of conflicting foundational sources. For instance, a right can be a concept that has no legal bearing—a moral or normative statement about something that ought to be. Conversely, it can refer to positive law as it is written in constitutions and treaties. Codified rights can be unenforceable (as in the Universal Declaration of Human Rights), or they can be deemed enforceable (as in the International Covenant on Civil and Political Rights). Categorically, a right can be civil, political, cultural, socioeconomic, or human. Rights can be conceived as belonging to an individual, a group, a ruler, a corporate entity, or an animal. They can be associated with tangible private and public property or intangible intellectual property. As conceived, rights also have numerous sources. They can be considered God-given, or arise in the state of nature. Rights can accrue by virtue of one’s humanity, through one’s citizenship, via common law, statutory law, custom, treaty, birth, race, gender, religion, sovereign edict, an act of parliament, a UN General Assembly resolution, or a social revolution...the list goes on and on.<sup>5</sup>

The term “rights” can be thought of as a “free-floating” or “empty” signifier—a concept that is constantly deployed, yet vague, highly variable, and stripped of context and specified meaning (Derrida 1978). But even when flanked by additional signifiers it

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<sup>5</sup> For similar discussions see Goodale, M. 2007. "Locating Rights, Envisioning Law Between the Global and the Local (Introduction) " In *The Practice of Human Rights: Tracking Law Between the Global and the Local*, ed. M. Goodale and S. E. Merry. Cambridge: Cambridge University Press; Somers, Margaret R., and Christopher N.J. Roberts. 2008. "Toward a New Sociology of Rights: A Genealogy of ‘Buried Bodies’ of Citizenship and Human Rights." *Annu. Rev. Law Soc. Sci.* 4:385–425.

can remain just as nebulous. For example, when the phrase “*human rights*” is invoked, it is entirely unclear whether it refers to the natural rights associated with medieval ecclesiasticism, the eighteenth century French “rights of man and citizen,” the fundamental right of citizenship Hannah Arendt discusses in the context of European statelessness, or the rights that exist within the modern post-war international human rights regime. Indeed, the “multiplicity” problem is not necessarily solved by adding descriptors to the base term. Since rights can stand for so many things, as Bobbio warns, great care should be taken to demarcate the parameters of their usage.<sup>6</sup>

At this point then—as brief placeholder until more concrete definitions can be offered—it is necessary to present a few preliminary definitions. In this project, the term “human rights” is used to refer to modern international, post World War II, human rights. In this sense it is not limited to positive or enforceable human rights laws, but is used to reference a broad historical phenomenon that includes ideas, concepts, institutions, laws and treaties, for instance. Unless otherwise indicated, the word “right” is used in its broad, most abstract (and admittedly, potentially confusing) sense. In the present study, rights are taken to be at their most basic level statements about relations. Rights place individuals in particular social positions vis-à-vis the rest of society. These relations as translated into legal structures take the form of juridical categories of correlative rights and duties. Naming an entity as duty-holder is necessary to guarantee the social relationship implied by the former. This *relational* nature of rights is spelled out in much greater detail below.

In addition to the vagueness, multiplicity, uncertainty, tensions and contradictions, there is a final obstacle confronting the rights researcher: rights are not

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<sup>6</sup> Bobbio, Norberto. 1996. *The Age of Rights*.

real. That is, rights are non-empirical, conceptual entities. No one has ever seen a right, heard a right, or smelled a right. This does not in any way reduce their causal strength, downgrade their normative standing, or limit their reach, for they are very real at the conceptual level. Their existence, however, can be inferred at the empirical level through various indicators. So from a research perspective, it is extremely important at the outset to define not only the particular form of rights under investigation, but to identify where to look for the visible indicators of their existence. For example, does one find evidence of rights formation in the text of judicial opinions, the backrooms of the UN drafting conferences, or dissidents in Eastern European cafes?

In this regard, much of the heavy-lifting associated with defining such terms is accomplished through the use of an analytic frame—a shortcut for defining the operative concepts and relevant empirics. In doing so, it provides structure and establishes the parameters of a particular research endeavor. Importantly, in studies of rights, it is a way of specifying the particular conceptual guise of rights that is under investigation and the relevant empirical phenomena to be investigated. All analytic frames must at some level identify at least two things: The definition and source of the right(s) under investigation. In most basic terms, it answers the questions: *What is a right?* and *Where do rights come from?* In this way the rights universe can be partitioned and narrowed into various spheres of relevance so that specific (and therefore comparable) guises of rights can be isolated and studied from particular angles. In short, it provides a basic orientation for studying rights that instills a degree of analytic clarity to an inherently nebulous subject.

### *The Literature/Three Approaches*

The most commonly used orientations or analytic frameworks for approaching human rights are the disciplinary approaches of political science and international relations, philosophy, and law.<sup>7</sup> It is along the parameters of one (or more) of these three distinct “paths” that most researchers examine the post-War development of modern international human rights.<sup>8</sup> Importantly, the manner in which the human rights concept is typically defined in each orientation leads to a distinct type of engagement with the historical record, which in turn, highlights certain elements while downplaying (or entirely shielding from view) others.

In addition to outlining the human rights scholarship relevant to the present study, the following literature review is also meant to illustrate the consequences of relying upon different analytic lenses as a starting point for the study of rights in general and the present study of human rights formation in particular. In this latter capacity, it is important to note that the disciplinary categorizations below are ideal types, and not meant to operate as a rigid classification scheme. Invariably, work in the field of human rights, to a certain degree, cross-cuts each of these three broad categories.<sup>9</sup>

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<sup>7</sup> Evans, Tony. 1996. *US Hegemony and the Project of Universal Human Rights*; Waltz, S. 2002. "Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights." *Third World Quarterly* 23 (3):437-48.

<sup>8</sup> Waltz (2002:438).

<sup>9</sup> Evans (1996). In offering his own categorization of two distinct intellectual approaches, Isaiah Berlin (2000:437) offers a similar caveat: "...like all over-simple classifications of this type, the dichotomy becomes, if pressed, artificial, scholastic and ultimately absurd. But... like all distinctions which embody any degree of truth, it offers a point of view from which to look and compare, a starting-point for genuine investigation."

*Political Science/International Relations Approaches*

One of the most common ways to approach the history of human rights formation is to focus on the international political process leading to (and including) the drafting of the International Bill of Human Rights. Because the development of the international system of human rights is inseparable from the broader political backdrop of world war, decolonization and the beginning of the Cold War, the way states acted and reacted to the complex geopolitical reality during and immediately after the War tends to be a major part of any such historical analysis (the present analysis included). While there are no concrete definitions of human rights that are commonly shared amongst political scientists and scholars of international relations, human rights tend to be viewed as a function of state action in the international arena, and take form in international treaties, declarations, charters and so forth. In this regard, the political deliberations in which leaders and representatives act in their official capacities to create and define human rights instruments is often the focus. There are many detailed accounts, for instance, of the 1941 signing of the Atlantic Charter, the Dumbarton Oaks Conference, the 1945 Great Powers meetings at Yalta and Potsdam, the 1945 founding of the United Nations in San Francisco, as well as the actual drafting of the UDHR. In these meetings—which were instrumental in the structuring of post-war international institutions and inter-state relationships—the accrual and preservation of state power tends to be highlighted.<sup>10</sup>

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<sup>10</sup> Glendon, Mary Ann. 2001. *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*; Borgwardt, Elizabeth. 2005. *A New Deal for the World: America's Vision for Human Rights*; Morsink, Johannes. 1999. *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*; Waltz, S. 2001. "Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights." *Human Rights Quarterly* 23 (1):44-72; Forsythe, David P. 1985. "The United Nations and Human Rights, 1945-1985." *Political Science Quarterly* 100 (2):249-69.



Political science and international relations approaches to human rights typically seek to better understand *state* behavior.<sup>11</sup> Within the parameters of this orientation, a good amount of the relevant human rights history can be explored. But there are limits. The human rights formation process was not confined to FDR and Churchill’s Atlantic rendezvous off the coast of Newfoundland or the meetings held at the palatial Dumbarton Oaks mansion in Washington DC. As extremely important and consequential as these meetings were, these are the *political waypoints* along a complex historical path that is not limited to the analysis of states and the stories of their leaders. So if the focus or intent of the research question is not simply the narrow topic of state action and decision making (and here it is not), to subsume the analysis within the prerogatives of state power, interests, or ideas, limits engagement with the broader range of relevant empirics that relate to the rights formation process as a whole.

### *Philosophical Approach*

The philosophical “path” into the study of rights often highlights non-empirical matters relating to the moral justification for human rights or their fundamental source(s). Human rights, for example, are typically understood to be natural or positive. A natural understanding is one in which human rights emerge from an apolitical source such as nature, God, or humanity itself, and exist as moral entities regardless of whether they are codified in actual law or not. A strong natural rights perspective might assert that even if codified, an unjust law does not constitute actual law. On the other hand, a positive

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<sup>11</sup> This is true across the various theoretical perspectives within the international relations field—e.g. *realism* (see Morgenthau, Hans J. 1970. *Truth and Power: Essays of a Decade, 1960-1970.*), *neorealism* (see Waltz, Kenneth. 1979. *Theory of International Politics*), *neoliberalism* (see e.g. Robert O. Keohane. 1984. *After Hegemony: Cooperation and Discord in the World Political Economy*).

understanding focuses on rights as they are outlined in law—by a sovereign power, for example. Under this approach, there is no necessary connection between morality or ethics and the validity of the law.<sup>12</sup>

If any one of the above philosophical orientations for understanding rights is employed in an historical analysis, important (and perhaps essential) parts of the history will either enter or recede from view. For example, if a natural rights perspective is taken—i.e. an understanding that human rights are natural and fundamental to the human—human rights becomes not so much a social or historical phenomenon, but something that at certain key moments when good prevails over bad, is realized and enshrined into law. The focus then turns to those individuals, such as Eleanor Roosevelt and John Humphrey who helped make it so, or towards further identifying the foundations of the human rights under consideration.<sup>13</sup> On the other hand, when a positive approach is taken, the focus tends to reside with the actual codification of the law and the nature of the written law. Hart, for instance, identifies two distinct categories of rules: primary rules and secondary rules. He defines them respectively as rules of “obligation,” and “rules about rules.” In the present context, primary rules refer to the actual human rights (freedom of speech, religion, etc), and the secondary rules refer to the manner in which the primary rules are applied and enforced.<sup>14</sup> When the empirical object of inquiry is the individual, on the one hand, or the law, on the other, crucial aspects of the history are neglected. Of particular relevance to this study is the fact that both perspectives, while certainly valuable to the study of human rights, shift focus away

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<sup>12</sup> E.g. Hart, H. L. A. 1961. *The Concept of Law*; Raz, Joseph. 1994. *Ethics in the Public Domain: Essays in the Morality of Law and Politics*.

<sup>13</sup> E.g. see Morsink, Johannes. 2009. *Inherent Human Rights: Philosophical Roots of the Universal Declaration*.

<sup>14</sup> Hart, H. L. A. 1961. *The Concept of Law*.

from interactions across social actors – interactions that are critical to understanding the emergence and shape of the contemporary human rights regime.

### *Legal/Doctrinal Approach*

The traditional mode of legal analysis is the doctrinal approach which views law as an autonomous subject, separate and removed from other social phenomena. Within this perspective, rights are creatures of positive or “black-letter” law. Rights, then, emerge from formal legal institutions and can be studied through the analysis of judicial opinions, case law, treaties, codes, statutes and other forms of positive law. This approach is useful for approaching a narrow set of legal questions: e.g. determining the status of prevailing law at a given time, locating inconsistencies, tensions, areas of legal uncertainty, and identifying important changes in law over time. However, as in the aforementioned example, this perspective focuses attention away from relationships across individuals and social groups.

The legal approach is also circumscribed by a legal orthodoxy that divides law into domestic and international spheres.<sup>15</sup> The sourcing of the human rights under examination (i.e. whether they originate in domestic constitutions or international treaties, for example), is an important consideration; as the jurisdiction, relevant institutions, and possible remedies for their violation all turn on their sourcing. If the human rights, for instance, are understood to flow from the provisions of a state’s constitution, they are entirely distinct from the human rights outlined in an international treaty such as the International Covenant on Civil and Political Rights.

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<sup>15</sup> While this is changing rapidly—particularly in places like the EU where international law has been incorporated extensively into the domestic regimes of its members—in the US this bifurcation is as strong as ever.

Furthermore, a history of human rights formation from an international perspective looks quite different than it does from a domestic perspective. For example, while the 1945 United Nations Charter makes clear that one of the purposes of the organization is to promote human rights, significant state-level questions remain. Does this establish a legally enforceable duty for its member states, or can states only be bound by enforceable human rights treaties such as the Covenants?<sup>16</sup> How do the escape clauses within the UN Charter (e.g. Article 2[7]) or the reservations, understandings and declarations (RUDs) in the Covenants affect the force of these treaties?<sup>17</sup> On the other hand, a domestic analysis of human rights law might be concerned with locating the domestic laws that permit or deny the implementation of international human rights treaties.

As the province of the research exceeds these bounds of the prevailing state of law, difficulties quickly emerge. For example, what actually counts as “law” is much narrower in a doctrinal perspective than what is required for the type of historical narrative sought in the present study. The UDHR, because it was not drafted as binding law, largely escapes view.<sup>18</sup> The Covenants, on the other hand, were created as enforceable law, but they were not actually completed until 1966 and entered force in 1976. Under a strict legal approach, they only come into view as legal entities as of 1976 (and this only includes those states that have signed and ratified). Historically, though, virtually all of the formative work on the Covenants occurred between 1947 and 1954. However, what happened before the Covenants became binding law is not of as much

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<sup>16</sup> See Article 55 of the Charter.

<sup>17</sup> Upon signing and ratifying treaties, states often include legal footnotes called reservations, understandings, and declarations (RUDs). These are statements that range from merely voicing opinion to completely negating entire portions of the treaty.

<sup>18</sup> The UDHR’s status as customary international law, however, is a topic of inquiry.

concern in a legal analysis. Consequently, much of the essential social and political history that led up to their formation would escape the gaze of this doctrinal approach.

### *A Complimentary System?*

Each analytic framework incorporates a particular definition and sourcing of human rights that in turn dictates the nature of the empirical engagement, and therefore produces a distinct history of human rights formation. When the resulting narratives are taken together these approaches do not necessarily operate in competition with one another as much as they represent a complimentary framework that hones in on disparate, yet core representations of rights, thereby together covering an expansive swath of the historical human rights terrain. When the study of rights moves beyond the narrow parameters and logics of one approach, there is another analytic frame waiting to pick it up.<sup>19</sup>

So for example, within a philosophical or jurisprudential approach, human rights might be considered to be natural, fundamental, and inherent within the person. But on the other hand, when rights are conceived not in any moral or ethical capacity, but solely as a form of positive law, questions surrounding what the law actually *is* become more important. These questions then move from the philosophical terrain to the legal field of analysis which focuses directly on understanding the prevailing state of the law. This approach is strongest when the source of rights is narrowly defined in terms of domestic constitutions or judicial decisions, for example. But when the law is deemed to emerge from external sources—such as international politics, for instance—strict legal analyses only hold up so well. Here theories of international relations, the analysis of political

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<sup>19</sup> This is not at all to say that bitter debates over rights do not occur at the margins of these approaches.

institutions, and state decision making begin to hold more explanatory weight. The study of human rights is then passed on to political scientists and international relations specialists who tend to debate whether human rights are simply features of state power or exert their own influential ideational and normative forces. At the latter end of this continuum the analytic torch can return to the philosophical terrain to examine the normative and moral features inherent within the concept.<sup>20</sup> In this way, each approach can rely upon its core competencies, maintain the power of a narrow field of view, and pass what exceeds their own mandate and competencies on to others. As a result of the singular vantage point(s) associated with each approach, there emerge several distinct—yet equally indispensable—histories of human rights formation.

There are, however, problems with relying on such “complimentarity.” For example, this division of labor operates most fluidly at the disciplinary level. A lone researcher who wishes to gain a comprehensive understanding of human rights formation by employing multiple analytic lenses in a single study is right back at the initial “multiplicity of rights” problem, and is forced to grapple with disparate and incommensurable notions of rights—a complicating factor that Tony Evans suggests is actually quite common amongst researchers studying human rights; “It is rare, to find any distinction between these three [approaches] such that authors often move unselfconsciously from one to the other.”<sup>21</sup>

There also exists a common “blind spot” each approach shares. While these various approaches to human rights have provided incredible insight and knowledge about the creation of the International Bill of Human Rights, the “social” components that

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<sup>20</sup> These are “ideal types.” Actual research often bridges categories to some extent.

<sup>21</sup> Evans, Tony. 1996. *US Hegemony and the Project of Universal Human Rights*, at 4.

are so fundamental to the history of human rights under consideration are typically black-boxed (or if they are considered, are relegated to the margins of the analysis).<sup>22</sup>

One way that scholars are now attempting to revise the standard narrative of human rights formation (discussed below) that often neglects the social aspects of rights formation is through historical work in which the aforementioned analytic frameworks are less important to the overall structuring of the research program. This type of “follow the action” approach allows the relaxation of strict frames for studying human rights and therefore permits the relevant histories to appear without prior constraints. If, for example, international politics appears to be the most important element of a certain history, then the researcher has free license to trace those currents. If, on the other hand, non-governmental organizations and other social actors appear to be most influential, then the historical narrative can flow in that direction, thereby cross-cutting legal, philosophical and political approaches to recount the salient histories through the history itself, rather than focusing on any one manifestation of human rights through an explicit analytic frame.

For example, historians have shown that the rights formation process was certainly not limited to the legal system and international geopolitics—social actors and civic groups had a major role.<sup>23</sup> During the 1940s and 1950s individuals, grass roots movements, professional organizations, the media, and intellectuals for example, in various capacities all took part in the process. Importantly, they often worked to

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<sup>22</sup> The “missing social” has also been noted in studies of citizenship. See generally, Somers, Margaret R. 2004. "Citizenship Troubles: Genealogies of Struggle for the Soul of the Social." In *The Making and Unmaking of Modernity*.

<sup>23</sup> See generally, Anderson, Carol. 2003. *Eyes off the Prize*; Dudziak, Mary L. 2000. *Cold War Civil Rights: Race and the Image of American Democracy*; Korey, William. 1998. *NGOs and the Universal Declaration of Human Rights*.

influence human rights creation through protests, circulation of petitions, domestic lobbying efforts and so forth—all very salient to the overall history (but very easy to overlook, if only focusing on international geopolitics, for example). Looking towards the influence of non-state actors and civil society groups is an important aspect of this buried history.

But even if not explicitly acknowledged, an analytic framework is always doing its work in the background. As argued throughout this chapter, the “price of admission” for accessing a concept such as human rights is to define what it is and where it comes from. Particularly with respect to social scientific work where a systematic analysis of commensurate categories is imperative, an explicitly stated framework is essential. While such precision is not as essential for all tasks, the confusion caused by slipping between conflicting or incommensurate manifestations of rights is not just a matter of language. So to fully engage with the social elements, the starting point must be a conception of rights that permits—or *demand*s—such engagement.

In addition to building upon such historical work, this project is also situated within a growing body of scholarship within the social sciences that is beginning to study human rights in a way that permits active engagement with their social elements. Though the work in the area is wide-ranging and not bound by a particular disciplinary orientation, a major part of this trend relates to the desire to better understand the social and cultural dynamics upon which the theory and practice of human rights rests. In this regard, sociologists and anthropologists have in recent years developed better understandings of how human rights operate at these levels.<sup>24</sup>

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<sup>24</sup> For sociological work in this area see, Woodiwiss, A. 2003. *Making Human Rights Work Globally*; Woodiwiss, A. 2005. *Human Rights*; Turner, Brian. 1993. "Outline of a Theory of Human Rights."



## *The Crux of the Problem*

Taking stock: The most commonly used analytic frames (whether explicit or unstated, and whether used in conjunction with others or in isolation) obscure important aspects of the history of human rights formation that is under consideration here (and what gets shielded is not just the aforementioned “social” element). Each analytic frame enables engagement with specific aspects of the historical record that conform to its own definition of human rights. But on the other hand, each shields from view competing conceptions and empirics that challenge or sit outside of the lens’ own *a priori* conceptualization of human rights. For a history of rights formation, it is precisely those ideas that *do not* conform to prevailing understandings, those conceptualizations of rights that were lost to dominant perspectives (but may have nevertheless been extremely influential) that is of interest.<sup>25</sup>

So for example, viewing human rights solely as a phenomenon of *international* law or *international* politics (rather than as a domestic matter) is a common starting point for studying human rights (particularly in the United States). The domestic absence of human rights, however, does not at all mean that the historical processes through which they emerged only occurred at the international level. In the US, for example, it takes great work, continuous domestic struggles, and an active judiciary to keep human rights

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Sociology 27:489-512; Turner, BS. 2006. Vulnerability and Human Rights; Blau, Judith R., and Alberto Moncada. 2005. *Human Rights*; Sjoberg, G, EA Gill, and N Williams. 2001. "A Sociology of Human Rights." *Soc Prob* 48:11-47; Morris, L. 2006. *Rights: Sociological Perspectives*; Somers, Margaret R., and Christopher N.J. Roberts. 2008. "Toward a New Sociology of Rights: A Genealogy of ‘Buried Bodies’ of Citizenship and Human Rights." *Annu. Rev. Law Soc. Sci.* 4:385-425; Emilie Hafner-Burton and Kiyoteru Tsutsui. 2005. "Human Rights in a Globalizing World: The Paradox of Empty Promises." *American Journal of Sociology*, 110:1373-1411. For anthropological work see, Merry, SE. 2006. *Human Rights and Gender Violence*; Goodale, Mark. 2009. *Surrendering to Utopia: An Anthropology of Human Rights*; Goodale, Mark and SE Merry (Eds.). 2007. *The Practice of Human Rights*; Wilson, R, and JP Mitchell. 2003. *Human Rights in Global Perspective*.

<sup>25</sup> For a similar argument, though in the context of the study of constitutions see, Scheppele, Kim Lane. 2003. "Aspirational and Aversive Constitutionalism: The Case for Studying Cross National Influence Through Negative Models." *International Journal of Constitutional Law* 1 (2):296-324.

out of domestic affairs. Over the past sixty years it has required all types of legal and political maneuvering, strategic treaty drafting, and institutional structuring to give human rights their present place (or lack of it) in the domestic realm.<sup>26</sup> US lawyers, judges, senators and citizens, for example, waged contentious battles over whether human rights should gain entry or not when they arrived upon the domestic frontier in the late 1940s and early 1950s. But if it is assumed at the outset that human rights are only a form of international law and politics, the very social struggles that gave rise to this understanding of human rights—particularly the bitter struggles which took place on American soil—remain out of view. This certainly is not in any way to say that it is *incorrect* to focus on the international aspects of human rights. It merely suggests the need for an approach that can account for the fact that even in their domestic absence, there is a complex (yet underappreciated) story to tell.<sup>27</sup>

The same is true for any of the aforementioned starting points. From a philosophical orientation, taking as *Truth* the natural foundations on which the human rights under examination purport to rest, effaces the historical and deeply political processes through which such understandings actually emerged. And this, in struggles over rights, is exactly the point of a natural understanding—it roots the rights in a universal, unassailable, natural, apolitical realm.<sup>28</sup> After World War II, anti-colonial activists, for instance, began to embrace a natural understanding of human rights. Its antithesis—legal positivism—does just the opposite. In denying the existence of natural

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<sup>26</sup> In the field of economics Polanyi (1949) similarly shows that it requires an active and involved government to create a “free-market” environment.

<sup>27</sup> The historical work associated with Dudziak (2000) and Anderson (2003), deserves mention here. Their path-breaking work challenges the common assumption of a sharp demarcation between the domestic and international spheres during moments of rights formation in the twentieth century.

<sup>28</sup> Somers, Margaret R. 2004. "Citizenship Troubles: Genealogies of Struggle For The Soul Of The Social." In *The Making and Unmaking of Modernity*.

rights, it gives priority and power to the maker of the law—be it sovereign ruler, state, or judge—at the expense of inherent moral concerns. It is not surprising then, that in the late 1940s and early 1950s Great Britain adopted such a perspective with respect to human rights when fighting against a universal conception that would extend to its colonies.

The international relations debates over the primacy of power versus norms and institutions also play this out. While neoliberal analyses typically accept the ability of normative entities such as human rights to influence state action, it is actually no surprise that the realist framework downgrades them. This was in fact the original intention of its early founders—realism after all was an historical response to the failures of global organizations (e.g. the League of Nations), international law and “utopian idealism” to prevent global war.<sup>29</sup> So for an empirical study of human rights, relying on either perspective ultimately shields from view that which does not conform to its *a priori* understanding of human rights—thereby limiting historical engagement with the various notions of human rights that were actually at stake.

### *The Theory is Actually Political/Part of Struggles*

By identifying such blind-spots and historicizing these frameworks—that is treating empirically what is typically used conceptually and/or theoretically—it becomes clear that they were important aspects of the struggles under examination.

Methodologically, one way to proceed is to use these analytic lenses, not for defining the *concept* of rights, but for accessing the empirical and historical terrain in which the

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<sup>29</sup> For the history of realism, see e.g. Burchill, Scott, and Andrew Linklater. 1996. *Theories of International Relations*.

struggles over human rights transpired. Without getting too deep into the history that will be uncovered in subsequent chapters, each of these three perspectives (and the sub-debates within) represented important strategies of action—and indeed, a certain form of *collective action*—in the struggle over human rights. Proponents and opponents alike latched onto one or more of these orientations to frame their positions.

### *A Socio-Historical Reality in Search of an Analytic Counterpart*

So what would an appropriate starting point be for such a study? It would be one in which *a priori* conceptions of human rights did not obscure or prevent empirical engagement with any of the conceptions of rights that were at stake. It would be able to focus on the nature of the competing conceptions of human rights, the associated struggles, and their influence on human rights creation. And finally it would be able to acknowledge—at both an empirical and theoretical level—the social aspects of human rights. As shown above, different perspectives lead to different historical narratives about the creation of the International Bill of Human Rights. But so too do they determine the nature of the research questions posed at the outset. So for example, international relations perspectives often question the relationship between state action and human rights.<sup>30</sup> A legal approach might focus on legal consistency and

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<sup>30</sup> E.g. see Koh, Harold Hongju. 1997. "Why Do Nations Obey International Law?" *The Yale Law Journal* 106 (8):2599-659; Hathaway, O. A. 2002. "Do human rights treaties make a difference?" *Yale Law Journal* 111 (8):1935-2041; Simmons, Beth A. 2000. "International Law and State Behavior: Commitment and Compliance in International Monetary Affairs." *The American Political Science Review* 94 (4):819-35; Cassel, Douglass. 2001. "Does International Human Rights Law Make a Difference?" *Chicago Journal of International Law* 2 (121); Goodman, Ryan. 2003. "Measuring The Effects Of Human Rights Treaties." *European Journal of International Law* 14 (1):171-83.

implementation mechanisms.<sup>31</sup> And a philosophical approach might begin with questions about the “organic unity” of the various categories of human rights.<sup>32</sup>

On the other hand, a social approach to human rights formation would pose the questions in terms that relate to the social predicates and consequences of human rights formation; that is, directing the focus of the research to (1) the social forces responsible for their creation, and (2) how human rights demarcate particular ways of organizing social relationships. Implicit within such an approach is the acknowledgement that human rights, if implemented, have the potential to reshape (or solidify) existing social configurations. As such, human rights treaties, like those that comprise the International Bill of Human Rights, can be agents of sweeping change by extending recognition to new categories of social actors. Conversely, they can also be the servants of the *status quo*, by transferring older social hierarchies into the language and structures of human rights.<sup>33</sup> So the resulting research questions for this social approach to the historical examination of the creation of the modern international human rights concept might take the following forms:

- At a moment in which a large percentage of the world was in a colonial relationship—either as colony or metropole—the prospect of human rights was not inconsequential. How did the hope (or fear) of severing the colonial relationship of dependence and replacing it with one of autonomy, international recognition, and equality affect the drafting of the International Bill of Human Rights?
- In a world in which racial difference was a permissible (yet certainly contested) parameter for arranging social hierarchies, how did the hope (or fear) of enshrining into law principles of racial equality and non-discrimination influence the creation of the International Bill of Human Rights?

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<sup>31</sup> E.g. see, Vázquez, Carlos M. 2008. "Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties." *Harv. L. Rev.* 122:599-695.

<sup>32</sup> E.g. see Morsink, Johannes. 2009. *Inherent Human Rights: Philosophical Roots of the Universal Declaration.*

<sup>33</sup> This is already a dramatic departure from a natural, universal, fundamental notion of human rights.

- How did those who prospered from a system in which social relations were mediated by market forces respond to the prospect of the state taking a more prominent role in the distribution of goods and resources (as would be required by socioeconomic rights)?
- Finally, how was the International Bill of Human Rights influenced by the struggles over whether the high walls of sovereign statehood were to be replaced with a model in which citizens of the state became citizens of the world?
- In short, how did the struggles over organizing social relations influence the human rights that appear in the International Bill of Human Rights?<sup>34</sup>

After the devastation of the depression and two global wars, there emerged in the mid 1940s a strong impetus for the type of systemic change that would lead to peace and prosperity. Reshaping political, legal, and economic systems was imperative. But when the question is posed from a social perspective, it highlights what was also at stake during the creation of the UDHR and its two Covenants: the potential reordering of social relationships of hundreds of millions of people around the world. Each of the aforementioned alternatives for organizing social relations enjoyed undying support from certain quarters and suffered eternal opposition from others. At the center of the social struggles that soon erupted was the fight for the heart of the human rights concept. Would it consist of only civil and political rights, or socioeconomic rights as well? Would lynching be considered a violation of the human rights of African Americans? Would they only apply automatically to those living in nation states (as opposed to colonial territories)? While human rights might seem obvious today, as something of an

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<sup>34</sup> The development of implementation mechanisms is an important aspect of the human rights formation process. During the drafting of the Covenants, for example, there were numerous debates surrounding the question of implementation. While it is not a focus in this project, the opposition against creating a robust set of laws and institutions to see to it that the principles within the Covenants were actually enforced represents a distinct strand of resistance.

empty vessel, it is a concept devoid of meaning until filled. All of these matters were very much open questions in the 1940s and 1950s.

*Human Rights, Social Relationships, and Social Struggles: Defining the Terms*

Before proceeding, a few clarifying definitions are necessary. First, a social orientation approaches issues surrounding human rights from a conceptual starting point that understands that rights are statements of social relationships. Numerous scholars have suggested that rights are most fundamentally about social relationships.<sup>35</sup>

Typically, however, this observation is not elevated to the level of an analytic framework for studying rights as it is here. A notable exception is Wesley Hohfeld, the legal scholar who almost a century ago devised a correlative framework for understanding and studying rights. His typology though, does not incorporate the *social* elements that are a centerpiece of the present study.<sup>36</sup>

Taking rights as social relationships is a top-level ontological statement about the nature of rights. It provides an understanding and a definition of rights that does not just *permit* engagement with their social foundations, it *demand*s it. Rights, for example, can reveal much about the nature of social relations within a given society. Property rights are often associated with capitalism; a strong system of socioeconomic rights with social

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<sup>35</sup> Lefort, Claude. 1986. "Politics and Human Rights." In *The Political Forms of Modern Society*; Ginsburg, Morris. 1942. "The Individualist Basis of International Law and Morals: The Presidential Address." *Proceedings of the Aristotelian Society* 43:i-xxvi; Young, Iris Marion. 1990. *Justice and the Politics of Difference*; Hohfeld, Wesley Newcomb. 1913. "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning." *Yale Law Journal* 23 (1):16-59; Carr, E.H. 1948. "The Rights of Man." In *Human Rights: Comments and Interpretations*; Lien, Arnold J. 1948. "A Fragment of Thoughts Concerning the Nature and the Fulfillment of Human Rights"; Wright, Quincy. 1948. "Relationship Between Different Categories of Human Right".

<sup>36</sup> Hohfeld, Wesley Newcomb. 1913. "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning." *Yale Law Journal* 23 (1):16-59. Though immensely insightful, the complexity of his typology as well as the abstract character of its legal formalism has prompted two admiring legal scholars to lament that his typology of rights, "like a sack of dried beans" survives, but is "unesteemed by those who have lost the recipe for its use." Kennedy, Duncan, and Frank Michelman. 1980. "Are Property and Contract Efficient?" *Hofstra Law Review*, 8:711-770, at 751.

democracy, socialism, or communism; the absolute right of a sovereign, with authoritarianism, fascism, and so forth.

What is essential in this approach is to connect the articulation of rights, not with a system that exists on its own (e.g. capitalism, socialism, or imperialism), but with the type of social relationships that define that particular system and exist within it. So rights of property, capital, and the recognition of corporate personhood, for instance, might be indicative of a set of social relationships in which the market is significantly responsible for mediating social interactions (e.g. through business transactions, production and distribution of goods, capital transfers, and so forth). So in this context, when the term “capitalism” is invoked, for example, it is not viewed on its own as a master-category that somehow has agency, a fundamental nature, or its own teleology. It is referring specifically to the set of social relationships that are emblematic of capitalist *society*.<sup>37</sup> These defining sets of relationships, in turn, can be read through the language of the law in general and rights in particular.

Viewing rights as statements of social relations is a top-level ontological orientation. To understand the history of human rights formation that is of interest in this project (or for that matter, any history of rights formation), it is necessary to bring the ontological framework down to an analytic level that can account for the social relationships of the individual units within the social whole (individual units in this sense can be states, groups, or individuals, for example). At this level, the notion of *positionality* comes to the fore. Rights can be seen as “subject positions”—a location in a

“...complex configuration of relationships and institutional arrangements. Rights—whether human or citizenship rights or other kinds—are the label

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<sup>37</sup> Somers, Margaret R. 1994. "Rights, Relationality, and Membership: Rethinking the Making and Meaning of Citizenship." *Law & Social Inquiry* 19 (1):63-112, at 70.



we use to characterize certain kinds of social arrangements. To move the focus of rights away from what the individual possesses to the individual's position in a fluid network of social relations is to begin to construct the social foundations of rights."<sup>38</sup>

So within this (re)orientation, a right is to be understood less in terms of being a “thing” an individual possesses (as implied by the commonly used phrase “an individual’s bundle of rights”), and more in terms of how it defines that individual’s *position* in a complex network of social relationships and institutional configurations.<sup>39</sup> Here, the most basic unit of analysis is an interaction (Somers 2009:224). It is at this level that the researcher is able to locate meaning, identify power differentials, and access social identities; all of which are a function of positionality.

So for example, when the UDHR was adopted on December 10, 1948, under its terms those who lived in colonial dependencies suddenly had a new subject position. Under Article 2, they were now members of the international community and recognized by the UN and its member states as occupying a social position independent from their status as colonial subjects. As discussed at length in Chapter 3, because this new subject position was a great threat to colonial society, the colonial powers fought bitterly to prevent the explicit mention of their dependencies within the UDHR. But they also fought to prevent the structuring of political intuitions that reflected this new subject position. Similarly, the colonial powers fought philosophical battles over the nature of rights, eschewing conceptions that permitted their acquisition by colonial inhabitants. In the field of law, they also fought against legal provisions that would reflect this new

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<sup>38</sup> Somers, Margaret R., and Christopher N.J. Roberts. 2008. "Toward a New Sociology of Rights: A Genealogy of ‘Buried Bodies’ of Citizenship and Human Rights." *Annu. Rev. Law Soc. Sci.* 4:385–425, at 413.

<sup>39</sup> Somers, Margaret R., and Christopher N.J. Roberts. 2008. "Toward a New Sociology of Rights: A Genealogy of ‘Buried Bodies’ of Citizenship and Human Rights." *Annu. Rev. Law Soc. Sci.* 4:385–425.

subject positioning. Because social structures are buttressed by political, legal, and ideational structures, the battles over such social positioning necessarily take place at all of these levels. In this project, these battles are referred to as “social struggles.”

What is under investigation in this study is the influence that social struggles have had on the formation of human rights. In this sense, the phrase “social struggles” has a very specific meaning. It is not a statement about *who* engages in the struggles; it is a statement about *what* is at stake in the struggles. A social struggle is a struggle over who to include (and who to exclude) within the invisible boundaries that human rights draw through the terrain of the social. They are struggles over social positioning—over charting the appropriate relationships between groups and individuals; between the social collectivity and the state; the individual and state, but most fundamentally, the individual and the rest of society.<sup>40</sup> Again, there are many who share a similar orientation, supporting the idea that rights emerge from struggle—though it is generally stated in passing discussions of rights or as an empirical observation.<sup>41</sup> In this project, however, the observation is elevated to a general orientation for approaching rights formation and a tentative methodological approach for accessing the relevant historical data.

### *Consequences of Social Orientation*

There are several consequences of adopting a social approach for the standard narrative. First, the role of opposition comes to the fore. Any struggle, debate, or controversy requires at least two sides. Indeed when the historical focus shifts towards

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<sup>40</sup> Within the methodological approach taken here, these relationships are approached as empirical rather than normative matters.

<sup>41</sup> Bobbio, Norberto. 1996. *The Age of Rights*; Tilly, Charles. 1998. "Where Do Rights Come From?" In *Democracy, Revolution and History*, ed. T. Skocpol; Moore, B. 1966. *Social Origins of Dictatorship and Democracy*.

the *struggles* over competing notions of human rights, there is no shortage of serious objections to the concept. As mentioned above, researchers have often documented the work of the supporters without fully identifying the impact of the substantial resistance and opposition *against* various aspects of the emerging human rights discourse. So in this project, the focus will lean more towards understanding the nature and impact of the often overlooked social resistance, opposition, and the serious reservations that states, leaders, groups, and organizations had against various aspects of the emerging human rights concept. This line of inquiry is ultimately concerned with what has propelled the human rights movement forward. It is because the literature on human rights typically views resistance as a destructive force (and therefore overlooks its productive role) that opposition is the focus here.

Second, in this social approach, the Covenants gain much greater recognition. The UDHR is undeniably the foundational text that opened the door for the hundreds of human rights treaties, charters, governmental bodies, public and private organizations, groups and individuals that now make up what is known as the modern international human rights regime. The other two-thirds of the foundation—the two Covenants—however receive much less attention in the historical literature. They are in no way less important, however, since as binding treaties they are meant to actualize what the UDHR only expresses. Because the UDHR was non-binding, achieving political consensus on many matters came more easily than during the drafting of the enforceable Covenants.<sup>42</sup> In many instances, states that accepted certain provisions in the UDHR, for example, quickly balked when similar content was proposed for the binding Covenants. Focusing on resistance then, highlights the important host of contentious issues that were absent

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<sup>42</sup> McGoldrick, Dominic. 1991. *The Human Rights Committee*, at 14.

during the creation of the UDHR and that emerged with great force during the drafting of the Covenants. The international unity, success, and support for human rights that emerges in the standard story of the adoption of the UDHR, is quickly overshadowed by the animosity, hostility, and fundamental disagreements that emerged during the major drafting period of the Covenants (from 1947-1954). As a result, they were not officially completed until 1966 and did not enter force until 1976.<sup>43</sup>

Third, whether human rights actually “triumphed” over inequality, war, economic crises, and oppressive forms of political rule becomes an open question. The answer to this question will turn upon the underexplored social axis that relates to how the struggles over human rights actually shifted the parameters of existing social relationships. Did they move towards greater recognition and inclusion for all? Or did older forms of inequality and social hierarchy appropriate the concept to do their own bidding?

### *Conclusion*

If it is true that the modern human rights concept has been shaped by both positive support *and* opposition—that is, if the history shows that the foundations of the modern human rights regime were in fact born from social struggles—the greatest threats may not arise from external sources. It is quite likely that they reside *within* the human rights concept itself. Looking within the concept of rights, the researcher can identify areas of weakness and decay that from the inception of the concept have encumbered it with a series of “internal contradictions” that have created an enduring system of structural ambivalence that today enables rhetorical praise for human rights while

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<sup>43</sup> Though this becomes a very different story than is commonly told, it takes nothing away from the standard account. It seeks to tell the story in a broader context. In this way it is less “revision” and more of an “addition.”

constraining their enforcement. This is accomplished by reorienting the focus of the analytic lens to zero-in on the social aspects of human rights formation, to reverse-engineer the composition of the concept by identifying the constituent social elements that through debate and struggle, have given it its shape. The outline for the rest of the study is as follows:

*Chapter 2: From War and Politics to Human Rights: The Cold War and Colonial  
Recession*

Though the Universal Declaration of Human Rights is ground zero of the modern human rights regime, it does not represent the appropriate beginning or end of the present narrative. Human rights did not simply appear *ex nihilo* in December of 1948. Towards the end of World War II, two separate global transformations were already in motion: first, there was the growing rivalry between the East and the West, and second, there was the ongoing struggle over decolonization. Even before the War was over, the United States, the Soviet Union, and the colonial powers (led by Great Britain), had begun to carve out political, legal, and ideological spheres in which their own social systems could flourish despite strong external challenges. Perhaps the most explicit and direct empirical expression of this process took place within the emergent field of human rights creation, when in 1947 a handful of nations sat down at the United Nations to figure out what international human rights would be.<sup>44</sup>

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<sup>44</sup> This chapter represents an historical overview, while the other substantive chapters are arranged as parallel narratives of resistance against various aspects of the human rights concept.

### *Chapter 3: Protecting State Sovereignty from the “Dangers” of Human Rights*

Despite the role that states played in the actual drafting of human rights treaties, much of the human rights formation process (perhaps the majority of it) took place far a field from the halls and backrooms of the United Nations where ink and parchment met. Fearful of “atomic war” and frustrated by the inability to end the US’s systemic racial injustice, there were many members of the US Congress, as well as various state assemblies, legal scholars, and advocacy groups that supported *greater* intervention by international institutions in domestic matters. Just as quickly as this movement surfaced though, it succeeded in inflaming the passions of those who feared that international human rights treaties would irrevocably alter domestic law and, in turn, destroy a unique set of American traditions. One California court’s historic (though ill-conceived) use of the United Nations Charter as a controlling source of human rights law provided opponents with more ammunition against international human rights treaties than they could have possibly conjured on their own.

### *Chapter 4: Saving Empire: The Attempt to Create (non)-Universal Human Rights*

After World War II, human rights offered much to be hopeful for—and much that threatened the status quo. While human rights held great promise for the hundreds of millions of people who then lived in colonial dependencies, the colonial powers were much less sanguine about the universal extension of this empowering concept. During the drafting of the International Bill of Human Rights, Great Britain launched a campaign to prevent its colonial territories and their inhabitants from automatically being covered by the International Bill of Human Rights. The centerpiece of this campaign (and this

chapter's focus) was Great Britain's attempt to incorporate within the International Bill of Human Rights a restrictive colonial-era legal mechanism called the *Colonial Clause*.

*Chapter 5: A Version of Human Rights that Permits Racial Discrimination?*

During the late 1940s and early 1950s human rights ideas such as non-discrimination and racial equality collided dramatically with longstanding and widely-accepted practices of racial exclusion. States such as South Africa and the United States became increasingly concerned about the impact that human rights would have on their respective systems of apartheid. To placate domestic human rights opponents, the US attempted to insert a *Federal State Clause* into the Covenant which would have relieved the US government of the responsibility to enforce its human rights provisions on matters that were then left to the states (e.g. Jim Crow laws).

*Chapter 6: Unequivocal Ambivalence: The US's Hostility towards Socioeconomic Rights*

The prospect of incorporating socioeconomic rights into the Covenant aroused strong opposition amongst interest groups, powerful legislative blocs, and professional organizations (most notably the American Medical Association). Because an enforceable human rights treaty that contained such rights was sure to be rejected by the Senate, during the drafting of the Covenant the US became a dedicated opponent of socioeconomic rights. On the international stage, however, the US's dismissal of socioeconomic rights put it at a significant geopolitical disadvantage—many of the smaller and non-western states that were potential Cold War allies for the US were amongst the strongest supporters of these rights. To manage these competing forces, the

US developed a strategy to appear accommodating of socioeconomic rights in the international setting while simultaneously excluding them from domestic soil.

*Chapter 7: From Social Struggles to Human Rights*

In the search for causal relationships, causal mechanisms, and crucial historical contingencies in the human rights formation process, the overall approach taken in this project is one that focuses on the process through which competing forces (e.g. supporters *and* opponents of human rights) engage in “social struggles” over human rights. This chapter sets forth a theory of human rights formation in which social struggles transcend their existence as social *action*, and become a structural entity known as “human rights.” The latter term refers to human rights not merely in the sense of written law, politics, or philosophical ideas (though these are all key), but as a lived reality in which a sphere of human inviolability can first emerge.



## Chapter 2

### **From War and Politics to Human Rights: The Cold War and Colonial Recession**

In 1945 when the war was in its final stages, the international community of states descended upon San Francisco to institutionalize the wartime alliance of the United Nations. The fifty or so states at the UN's founding conference represented a range of competing systems—capitalism, communism, socialism, and imperialism, to name a few. Although each of these systems incurred differing degrees of damage during the war, they all remained significant forces during the UN's most formative moments. As a result, there existed many competing visions about what kind of post-war world would best foster international peace and security. Would it be one in which capitalism triumphed over communism? Or perhaps peace would prevail in a world in which the colonial powers could reestablish the boundaries and dictates of their global dominions. Would racial difference continue to be a permissible parameter for arranging social hierarchy? Each of these alternatives for organizing social relations enjoyed great support from certain quarters while suffering opposition from others.

Despite their differences, in the mid 1940s one of the clearest imperatives for the members of the new United Nations was the need to achieve some degree of unity amongst a vastly diverse set of political actors and social systems. If the nations of the

world were to move forward from the tumult of total war, they would have to agree upon a set of basic principles to govern the scope of their responsibilities and the limits of their powers. While there was widespread agreement about the need for lasting international peace and security, what the necessary preconditions were (or in what social setting they could be attained) became a matter of intense debate. Though researchers typically view this history through the lenses of power and politics, this project seeks to focus explicitly on the underlying social struggles that transpired during this period.

The struggle over how to (re)order the social world appeared in countless arenas: It hung heavily over the fields of power and war as the allies fought to supplant the totalitarianism that had proven itself so destructive. It was also waged—only through other means—by some of the world’s most influential thinkers as they sparred over their own competing visions of how best to organize the post-war world.<sup>45</sup> It appeared in the realms of politics and diplomacy as post-war institutions and new policy regimes helped carve the world into its Cold War “spheres of influence.” But perhaps the most explicit and direct empirical expression of the struggle over this question took place within the emergent field of human rights.

Though the Universal Declaration of Human Rights (UDHR) is “ground zero” of the modern human rights regime, it does not represent the appropriate beginning or end

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<sup>45</sup> In just a decade, writers from virtually every genre sounded-off in turn (many of these intellectual debates will be discussed in subsequent chapters). See for example, H.G. Wells, *The New World Order: Whether it is Attainable, How it can be Attained, and what sort of World a World at Peace Will Have to Be* (1940); H.G. Wells, *The Rights of Man: Or What Are We Fighting For?* (1940); Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (1942); F.L. Neumann, *Behemoth: The Structure and Practice of National Socialism* (1942); F.A. Hayek, *The Road to Serfdom* (1944); H. Lauterpacht, *An International Bill of the Rights of Man* (1945); Emery Reves, *The Anatomy of Peace* (1945); Karl Polanyi, *The Great Transformation* (1944); George Orwell, *Animal Farm* (1946), George Orwell, *1984* (1949); American Anthropological Association, "Statement on Human Rights" (1947); NAACP (with W.E.B. DuBois), *An Appeal to the World* (1947); Hannah Arendt, *The Origins of Totalitarianism* (1949); H. Lauterpacht, *International Law and Human Rights* (1950); Kenneth Arrow, *Social Choice and Individual Values* (1951)].

of the present narrative. Human rights did not simply appear *ex nihilo* in December of 1948. Their social precursors took form within all of the diverse realms mentioned above. The nature and outcomes of each of these expressions of struggle set the terms, parameters, constraints, and opportunities for the subsequent battles over human rights. It is therefore necessary to provide in this chapter a very brief overview of the history preceding the creation of the International Bill of Human Rights, before focusing on the resistance and opposition in subsequent chapters.<sup>46</sup> By outlining the historical context, this chapter serves as the empirical departure point for the rest of this study.<sup>47</sup> The purpose of this chapter is not to provide new ideas or new historical information—tasks that have already been accomplished by many others.<sup>48</sup> Rather, the intention is to organize the historical data in a manner that will permit the full deployment of the sociological framework for studying rights as outlined in the preceding chapter. In doing so, I outline the key players, their unique backgrounds, and most importantly, two large-scale social transformations—decolonization and the beginning of the Cold War—that were already well underway when a handful of state representatives sat down in 1947 to figure out what international human rights would be.

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<sup>46</sup> The International Bill of Human Rights consists of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Note: The ICCPR and the ICESCR were originally intended to exist as a single covenant. In 1952 the UN General Assembly passed a resolution that divided the Covenant into two separate documents.

<sup>47</sup> The present chapter represents an historical overview, while the other substantive chapters are arranged as parallel narratives of resistance against various aspects of the human rights concept.

<sup>48</sup> E.g. Gaddis, John Lewis. 2000. *The United States and the Origins of the Cold War, 1941-1947*; Offner, Arnold A. 2002. *Another Such Victory*; Offner, Arnold A., and Theodore A. Wilson. 2000. *Victory in Europe, 1945*.

### *Institutionalizing Social Structures and Global Transformations*

Towards the end of World War II, two separate global transformations were in motion. The first was the growing rivalry between the East and the West, led by the Soviet Union and the United States. The second was a more gradual transformation (though accelerated by the war) that had been underway for decades between the colonial powers and those pressing for an end to the colonial era. Each pole of these struggles represented a competing framework for organizing social relations. Even before the war was over, the United States, the Soviet Union, and the colonial powers (led by Great Britain), had begun to carve out real-world spheres in which their own systems could flourish despite strong external challenges. These underlying political dynamics were central to the social struggles over human rights that would soon develop.

### *The Potsdam Decision – Divided Unity*

Just a few weeks after the signing of the United Nations Charter in San Francisco, and a few weeks before the surrender of Japan in the Second World War, the “Big Three” allied powers met in Potsdam, Germany to negotiate the terms of Germany’s unconditional surrender.<sup>49</sup> From July 17 to August 2, 1945 the leaders of Great Britain, the United States and the Soviet Union met to devise a plan for the future occupation of defeated Germany. One of the chief tasks was to establish a German state that would best foster future peace and a swift European recovery. Agreement between the three about economic and political structuring, however, was in short supply. The divided

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<sup>49</sup> The Teheran Conference (November 20 - December 2, 1943), the London Conference (September 1944) and the Yalta Conference in the Crimea (February 2 – 11, 1945) were a few of the major wartime meetings that preceded Potsdam.

outcome of this conference revealed the growing fractures in the emerging East-West rivalry.

At the time, one of the most critical issues for Joseph Stalin was Soviet security. Having just experienced two major wars at the hand of an invading German army, Stalin believed that the future of his nation depended on nullifying any future German threats by keeping the defeated nation weak and unarmed. This entailed closing off the direct land-routes into Russia the German army had taken in both wars, and creating a buffer zone of friendly (or subservient) nation states along Russia's western border. Though unsuccessful in his attempt to install governments in Bulgaria and Romania, Stalin successfully negotiated the annexation and transfer of German territory to neighboring Poland. To ensure Poland would not become a threat, under the terms of the agreement, he installed a Soviet-backed Polish government. While Truman and Churchill (and later Clement Atlee) were wary of Stalin's expansionist agenda, because the Red Army still occupied much of Eastern Europe, their bargaining power on many issues was somewhat limited.<sup>50</sup>

Contrary to Stalin's aims, the Western leaders believed that the revitalization of war-torn Europe required prosperous economies (including Germany's) and political unity. For Truman in particular, Stalin's proposal to saddle Germany with \$10 billion in war reparations as a way to keep the nation weak and economically deprived would hamper the recovery effort—not to mention economic opportunities for the United

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<sup>50</sup> The Potsdam meeting was also attended by Clement Atlee who replaced Churchill at the meeting who suffered defeat in the general elections of July 26. For overviews of this historical episode, see McMahon, Robert J. 2003. *The Cold War*; Gaddis, John Lewis. 2000. *The United States and the Origins of the Cold War, 1941-1947*; Offner, Arnold A. 2002. *Another Such Victory*; Offner, Arnold A., and Theodore A. Wilson. 2000. *Victory in Europe, 1945*.

States.<sup>51</sup> Importantly, establishing a democratic and capitalist foothold in Europe could curb Soviet expansion into Western Europe without the need to resort to military force.<sup>52</sup> These aims translated into a vision of Germany that was quite different from Stalin's.

In Potsdam, the key differences proved too great to bridge and the country was divided into four military zones controlled by the United States, the Soviet Union, Great Britain and France. At the time, the need for a unified solution was great—the war, after all, was not yet over. But surrounded by mutual suspicion of the others' post-war expansionist plans, the best solution for what Churchill referred to as the “big question” at Potsdam, was divided unity.<sup>53</sup> The division of Germany represented fundamental tensions between systems of governance, economics, ideology and social life. The new borders that parceled Germany into separate spheres institutionalized the growing fractures between the East and the West, thereby cementing them into the foundations of post-war relations. It also allowed the Big Three to pursue mutually exclusive solutions within their respective spheres. For example, Western interests would now promote free markets and democratic political institutions, while just a few miles away the groundwork for central planning and communist leadership was being established.

Many of the same issues, concerns, and constraints that influenced the solution for divided unity at Potsdam reappeared during the drafting of the International Bill of Human Rights. When such major difference was forced to coexist, the chosen solution for human rights was also quite similar: to build protective walls around conflicting

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<sup>51</sup> McMahan, Robert J. 2003. *The Cold War*, at 23; Schwartz, Richard. 1997. *The Cold War Reference Guide*, at 151.

<sup>52</sup> While at Potsdam, Truman was notified about the first successful atomic bomb test on July 15—a piece of news he chose to keep to himself rather than share with Stalin. It is not clear how (if at all) this crucial development played into the negotiations (see, Schwartz, Richard Alan. 1997. *The Cold War Reference Guide*, at 80).

<sup>53</sup> Offner, Arnold A. 2002. *Another Such Victory*, at 82.

systems so they could each flourish side by side within their own spheres—thereby amplifying the differences and solidifying the divergent paths that would be taken by the East and the West.

### *Great Britain's Path – Warding off Colonial Recession*

As a beleaguered Great Britain limped to Potsdam to engage in the East-West struggle that in a few years would blossom into the Cold War, it was already part of another large-scale historical transformation—colonial recession. Like Great Britain, the strength of other colonial powers such as France, Belgium, and the Netherlands had been greatly depleted during the war. For these nations, post-war uncertainty extended well beyond their own European borders. Riots in dependencies such as Algeria, Madagascar, India, Vietnam and Indonesia, made the future of their respective empires all the more uncertain.<sup>54</sup> But as the largest imperial power, it was Great Britain that had the most at stake in absolute terms. Great Britain's power (and therefore its post-war political interests) continued to be a function of its imperial assets, which in 1945 remained vast. As a way of potentially heading-off the developing trend towards decolonization, it was therefore in Great Britain's interest to shape the still-malleable framework of the United Nations to be most accommodating of its existing imperial institutions, ideologies, and social relationships.

Great Britain's empire had been attained over the past several centuries through its naval superiority and military strength, at the insistence of its rapacious appetite for land, labor and resources. Equally important as its ability to protect its overseas interests

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<sup>54</sup> The decline of the European powers European NAvigator. Etienne Deschamps. Translated by the CVCE. [http://www.ena.lu/decline\\_european\\_powers-2-247](http://www.ena.lu/decline_european_powers-2-247). Last Accessed 05.2010.

through power and force was the need to manage its empire. Organizationally, it was comprised of an immense network of legal, political, and commercial institutions, at the center of which presided the British Colonial Office. Accompanying its well-developed administrative capacity was a set of ideas that provided the moral and practical justification for its existence (as well as its maintenance). These ideas were framed in a variety of self-legitimizing guises such as the *civilizing mission*, the *white man's burden*, the *sacred trust*, and Lugard's influential *dual mandate*.<sup>55</sup> These imperial motifs amounted to something of a moral imprimatur; the metropole's ownership of colonial land and labor was sanctioned by the recognized (though never enforced) duty to promote the welfare and development of the colonial inhabitants.<sup>56</sup> As these imperial narratives went, this duty was to be administered until the colonies could be brought along an upward path of development. At a certain point they would be sufficiently developed to "be able to stand by themselves under the strenuous conditions of the modern world," and independence finally would be granted.<sup>57</sup> The time horizon on this built-in goal of independence, however, was extended indefinitely by essentialist narratives of fundamental cultural and racial inferiority.<sup>58</sup>

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<sup>55</sup> Lugard, F. J. D. (1926). *The Dual Mandate in British Tropical Africa*. Edinburgh, London, W. Blackwood and sons. Lugard's *Dual Mandate* is considered a seminal text on the practices and ideological justifications underlying British colonialism (Rist 2002:62). As Callahan (2004:21) writes, "By the 1920s, Lugard's name had become synonymous with the political doctrine of colonial administration called 'indirect rule,' the idea of preserving African culture and protecting Africans from exploitation by governing through 'traditional' African leaders and institutions." In addition to his most influential writings, he cultivated a strong following amongst a large network of supporters throughout the British Government and its dependencies, academia, international and domestic civil society organizations, foreign governments, and businesses. Callahan, Michael D. 2004. *A Sacred Trust*, at 21.

<sup>56</sup> Rist, Gilbert. 1997. *The History of Development*, at 62; Cooper, Frederick, and Ann Laura Stoler. 1997. *Tensions of Empire*.

<sup>57</sup> Quote from Article 22 of the Covenant of the League of Nations (1919). Presently, I will discuss how colonial ideas were similarly imported into the UN's framework.

<sup>58</sup> Simpson, Brain A.W. 2001. *Human Rights and the End of Empire*.



The nature of this relationship was one in which colonial inhabitants were subject to the rules and laws imposed by the colonial power. It was predicated on the internal inequality between colonial power and colonial inhabitant. As property, colonial territories and their inhabitants were separated from the rights and freedoms enjoyed by people in other countries and in the metropole, itself. If there were any rights to be claimed by the colonial inhabitants, they were to be claimed and granted within the closed legal and political framework of the colonial relationship.<sup>59</sup> Great Britain's continued preeminence as a colonial power was in many ways dependent upon this relationship. For the moment colonial inhabitants gained political recognition in the international sphere—by acquiring human rights or territorial independence, for instance—the relationship of inequality and dependency that sustained the imperial venture was in serious jeopardy. It was well-known that in due-course the social, political, and ideational structures that separated metropole from colony and citizen from subject would begin to crumble, eventually surrendering to a new social paradigm. How soon though, was anyone's guess.<sup>60</sup>

It was thus in the colonial powers' interests to create durable institutional structures that mirrored existing colonial practices, institutions, and ideologies during these early years at the UN when the opportunity to influence its structure and design still existed. Reestablishing its imperial structures within the framework of the United Nations was a stated goal for Great Britain at the UN's founding conference in San

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<sup>59</sup> This analysis is based on British colonial law which had its own unique system of colonial law. Nevertheless the practices and ideologies of French colonialism, for example are incredibly similar (for such histories see Conklin 1998; Rist 1997); see Simpson (2003) for detailed discussions of the British colonial system.

<sup>60</sup> This use of the word "paradigm" roughly corresponds to the Kuhnian notion (only here it is deployed in the field of social organization, transformation, and change, rather than in the realm of scientific revolution).

Francisco. Lord Cranborne of the United Kingdom, for instance, argued that empire was not a choice, but a necessity for the world. Were it not for empire, he argued, liberty would not have prevailed.<sup>61</sup> Indeed, by 1946 large portions of the imperial framework had *already* been integrated into the organizational structure. For example, the colonial trusteeship system that appears in Chapters XI, XII and XIII of the UN Charter was derived from the language of the Covenant of the League of Nations, which in turn was largely based on existing British colonial policy.<sup>62</sup> Article 73 of the UN Charter gives explicit mention of the colonial idea of the “sacred trust” (discussed above). The Fourth Committee of the General Assembly—the organizational body responsible for colonial matters—also recognized the relationship as a legitimate one. As described below, Great Britain would soon be poised to mold the human rights concept in its own imperial image as well. Interestingly, the drive to solidify the colonial relationship within the new UN framework, gave the UN and its member states the authority discuss colonial matters. This amounted to an early form of political recognition for the trust and non-self governing territories that would soon have far-reaching consequences.<sup>63</sup>

What Great Britain could not have completely foreseen at the time, was that the ideological justifications which had been an asset in the previous era of colonial management, now had the potential to become one of its greatest liabilities. The burgeoning discourse of freedoms and rights that had emerged during the Great

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<sup>61</sup> Cited by Jacobson, Harold K. 1962. "The United Nations and Colonialism: A Tentative Appraisal." *International Organization* 16 (1):37-56, at 56; See *UNCIO Documents*, Vol. 8:143-146.

<sup>62</sup> See generally, El-Ayouty, Yassin. 1971. *The United Nations and Decolonization*, at 17; Rist, Gilbert. 1997. *The History of Development*, at 58-62. The League outlined a formal system for overseeing dependencies, thereby granting the colonial relationship institutional legitimacy. The moral justification for the relationship (as seen by colonial powers) was written into Article 22 of the Covenant of the League of Nations: "...[those territories] which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a *sacred trust* of civilization" (Italics mine).

<sup>63</sup> This also occurred under the Mandate System of the League of Nations.

Depression and gathered strength during the war, were potentially at odds with colonial society. Moreover, the notion that a nation could wield absolute and unmediated authority over a people was all the more suspect now that the horrific carnage of Hitler's totalitarianism had been exposed. It would be some time, however, before it became entirely clear that its ideological assets—those imperial creeds and social tropes that had in the past been leveraged for economic and political gain—were best suited for a world that had already shone its brightest. For while in 1946, anti-colonial dissent had not yet established a firm root within the United Nations, member states such as India, Panama, and the Philippines were becoming increasingly vocal in their opposition against colonial practices.<sup>64</sup>

### *The Soviet Union's Path*

The Soviet Union, along with much of Europe, incurred devastating losses during the war, with the Soviet Army losing millions of soldiers. The civilian population was not spared either. Adding to these problems in 1946 was the start of a two year famine resulting from Stalin's centralized agricultural policies. In the attempt to recover from these losses (as well as mitigate future loss), Stalin was fixed upon elevating domestic morale, productivity, and creating the neighboring network of subservient Eastern European communist states that would insulate Moscow from future incursions.<sup>65</sup>

If Great Britain's future rested with its colonial relationship, the Soviet Union's domestic and international future was wedded with the social and political ordering defined by communism. For Stalin, communism provided much potential for a robust,

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<sup>64</sup> A major UN debate emerged in 1946, for example, that revolved around colonial issues and the treatment of Indian workers in South Africa (see chapter on race).

<sup>65</sup> McMahan, Robert J. 2003. *The Cold War*, at 23.

productive domestic social order once the system recovered from the war and gained its own momentum. Domestic productivity and internal stability would be a natural outcome of the centralized planning process *if* external stability were established as well. And to this end, communism—as a political philosophy and an organizing frame for social and political relations—was central to his aims.<sup>66</sup>

For many in 1946, communism provided a hopeful alternative to the three biggest threats in recent memory: economic depression, fascism, and war. In this respect, communism allowed Stalin to leverage an important asset that possessed strength, resonance, and widespread appeal both at home and throughout Europe. The appeal of communism was not just an Eastern European phenomenon at the time, however. In Western Europe, though not uncontested, the communist parties were significant forces in national politics. The communist parties held large constituencies in Italy and France and in 1946 took 18% and 28% of the votes in their respective parliamentary elections.<sup>67</sup> Socialism also drew support from smaller nations around the world—particularly in Latin America where many states already had socialist principles written into their constitutions.<sup>68</sup> Even in the United States, the Communist and Socialist parties—though never serious forces in electoral politics—had their members and supporters. This was a reality that in the US produced strong anti-communist backlashes. McCarthyism

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<sup>66</sup> At various moments during the drafting of the UDHR explicit discussion of the parameters of Soviet communism emerged in debate. As Professor Koeetset, representing the Soviet delegation, warned at the very start of the drafting process, “the members of the Committee must not forget that one cannot oppose the individual to society and to government.” (UN Doc E/CN.4/AC.1/SR.2, P.6). This outlook would put the Soviet Union at odds with the Western capitalist nations, and underlie the six communist nations’ abstentions in the final vote on the UDHR in December of 1948. Providing an *ex post* justification for these abstentions, Andrei Vyshinsky argued that under communism there ultimately would be no classes, and none of the contradictions between the individual and the state that rights implied. It would be a place where the “state and the individual were in harmony with each other, [and] their interests coincided” (cited in Morsink, Johannes. 1999. *The Universal Declaration of Human Rights*, at 22).

<sup>67</sup> See [http://www.ena.lu/importance\\_communist\\_parties-2-248](http://www.ena.lu/importance_communist_parties-2-248). Last accessed 04.2010.

<sup>68</sup> Humphrey, John P. 1983. "The Memoirs of John P. Humphrey, the First Director of the United Nations Division of Human Rights " *Human Rights Quarterly* 5 (4):387-439.

developed alongside popular movements against the US's involvement in the United Nations as well as its role in creating international human rights treaties—both of which were seen by some as bastions of socialism.<sup>69</sup>

The need to strengthen the Communist Party's domestic footing, as well as project it beyond Russia's borders, translated into a new post-war policy approach that Stalin revealed to voters in Moscow on February 9, 1946—the eve of Soviet elections. This speech, which provided the West with the most direct exhibition of Stalin's post-war agenda to date, became an extremely important event in the developing Cold War.<sup>70</sup> In addition to defending communism as a viable system and providing his own interpretation of the cause of the war, he sought to gather domestic support for the communist party's political agenda.<sup>71</sup> He was also speaking to the war-ravaged Eastern European states that stood to benefit greatly from the US's desire to provide economic support (and access to foreign markets), and in the process subvert Soviet influence.<sup>72</sup> Guarding against US influence in Europe, Stalin explained that the US was not the answer for their economic problems—it was in fact, their *cause*. World War II, he argued, was a result of the inequities and imbalances that were a fundamental aspect of the system of capitalism. In their relentless pursuit of capturing new markets and acquiring raw materials by force, capitalist nations were directly to blame. In his speech, Stalin noted that a world dominated by the intrinsically destructive capitalist system

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<sup>69</sup> See Chapter 3 (Sovereignty) and see Chapter 6 (Socioeconomic Rights).

<sup>70</sup> Lee, Stephen J. 2008. *European Dictatorships, 1918-1945*, 3<sup>rd</sup> Ed., at 91.

<sup>71</sup> Having consolidated political power though, Stalin was not in any danger of being voted out of power. State Department records closely track these election events, concluding the election was a sham in which the communist party “cannot lose.” *Foreign Relations of the United States, 1946, Vol. VI*, pg. 646-709.

<sup>72</sup> Wettig, Gerhard. 2008. *Stalin and the Cold War in Europe*; Gaddis, John Lewis. 2000. *The United States and the Origins of the Cold War, 1941-1947*.

precluded the redistribution of wealth and resources—a central aspect of communism—and ultimately guaranteed war.

“...the war broke out as the inevitable result of the development of world economic and political forces on the basis of present-day monopolistic capitalism. ...the development of world capitalism in our times does not proceed smoothly and evenly, but through crises and catastrophic wars.”<sup>73</sup>

The Soviet election was an opportunity for the Communist Party in Russia to outline its agenda and post-war policies. It also permitted the US Department of State the opportunity to better understand its motivations and aims. Stalin’s speech, the most pointed (and potentially worrying) official statement of the Soviet Union’s foreign outlook aroused much concern and interest within the State Department. Soon after Stalin’s speech, the State Department requested George Kennan, the Moscow-based *chargé d’affaires* to the Secretary of State, to provide an interpretive analysis of the speech.<sup>74</sup> Kennan responded with one of the most significant communiqués of the early Cold War years.

### *The US’s Path*

The ideological tenor of the emerging conflict was not entirely appreciated at this early stage. The US was certainly wary of the Soviet Union’s advancements, but tended to view them in diplomatic, military and political terms. Outlining the importance of Soviet ideology in his “long telegram,” George Kennan provided a new perspective for those in Washington. In this February 22, 1946 missive, which was later reprinted in *Foreign Affairs* under the enigmatic pseudonym “X,” Kennan outlined an intellectual position that ultimately would be translated into a policy approach for managing US-

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<sup>73</sup> Stalin, Joseph. “Election Speech to Voters,” Moscow, February 9, 1946.

<sup>74</sup> Foreign Relations of the United States, 1946, Vol. VI, pg. 696.

Soviet relations.<sup>75</sup> Kennan argued that the Soviet Union was not a state like other states that could be dealt with diplomatically. Soviet actions were based on a theory in which they believed that communism and capitalism were inevitably bound to clash. The Soviets were too weak to attack the US directly, he reasoned, so they would surround themselves with client states and fight an ideological battle with the US by trying to subvert these smaller states. Importantly, he urged the US not to capitulate to the increasingly menacing Soviet force that was bent on expansion and spreading its anti-capitalism ideology. Kennan argued against Truman's previous assumptions that the Soviets could be bargained with diplomatically and suggested the need to fight ideologically as well and retain an "American way" of doing things. Kennan's argument became the intellectual basis of the US's foreign policy approach to human rights.

Less than two weeks after Kennan's telegram was placed on Secretary of State James Byrnes' desk, Winston Churchill—with Truman at his side—spoke at Westminster College in Fulton, Missouri. In this March 5, 1946 speech, Churchill, sounded his famously ominous warning that an "iron curtain" had descended across Europe.<sup>76</sup> By February of 1947, the "iron curtain" threatened to draw-in additional nations after the British government informed the US that it was no longer able to offer military and economic assistance to Greece and Turkey. This news was of particular concern to the United States. Given the nations' proximity to communist states of Eastern Europe, as well as the ongoing communist insurrection in Greece, absent a strong countervailing

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<sup>75</sup> X. "The Sources of Soviet Conduct." *Foreign Affairs* 25:566-82.

<sup>76</sup> Id. at 261, 291. In a subsequent press conference, Truman distanced himself from Churchill's rhetoric, saying that he had no prior knowledge of the contents of the speech. In a not so thinly veiled swipe at the Soviets, Truman smugly closed by telling a reporter that in *America*, Churchill (who was then Opposition leader) enjoyed the freedom to speak his mind. See *Foreign Relations of the United States, 1946, Vol. VI*, pg. 696-709.

force, the Soviets were sure to fill this emerging power vacuum. The United States was now forced to take decisive action; this entailed the stern articulation of a new foreign policy agenda. With the goals of helping allies recover from the war, expanding US political and economic influence abroad, creating new capital markets, and finally, keeping the Soviet threat at bay, the US agreed to take over Great Britain's former role.<sup>77</sup>

Shortly thereafter, on March 12, 1947, Truman addressed a joint session of congress to ask for \$400 million to support Greece and Turkey. Echoing Stalin's Manichean imagery and invoking Kennan as his Muse, Truman outlined a massive foreign policy initiative that deepened the growing fractures between the East and the West.

“One way of life is based upon the will of the majority, and is distinguished by free institutions, representative government, free elections, guarantees of individual liberty, freedom of speech and religion, and freedom from political oppression. The second way of life is based upon the will of a minority forcibly imposed upon the majority. It relies upon terror and oppression, a controlled press and radio, fixed elections, and the suppression of personal freedoms.”<sup>78</sup>

He drew out the humanitarian responsibilities of the United States in the international sphere, with a return on this investment that came in the form of economic stability, political freedom, and global security.

“I believe that our help should be primarily through economic and financial aid which is essential to economic stability and orderly political processes... The seeds of totalitarian regimes are nurtured by misery and want. They spread and grow in the evil soil of poverty and strife. They reach their full growth when the hope of a people for a better life has died. We must keep that hope alive. The free peoples of the world look to us for support in maintaining their freedoms. If we falter in our leadership, we may endanger the peace of the world—and we shall surely endanger the welfare of this Nation.”<sup>79</sup>

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<sup>77</sup> Schwartz, Richard Alan. 1997. *The Cold War Reference Guide*, at 18; McMahon, Robert J. 2003. *The Cold War*, at 28.

<sup>78</sup> Truman Address to Joint Session of Congress, March 12, 1947.

<sup>79</sup> *Id.*



The centerpiece of this initiative was the reconstruction of Europe through the Marshall Plan.<sup>80</sup> In a speech at Harvard on June 5, 1947, Secretary of State, George Marshall, echoed Truman's exhortations but broadened the argument for the allocation of aid to the countries of Europe that had been devastated by the war. He also emphasized certain elements of the humanist tone that were undercurrents in Truman's address, while focusing on the ability of US economic contributions as the answer.

“Our policy is directed not against any country or doctrine but against hunger, poverty, desperation, and chaos. Its purpose should be the revival of a working economy in the world so as to permit the emergence of political and social conditions in which free institutions can exist.”

Importantly, the US's aims in Europe—in particular, Soviet containment and economic recovery—were most likely to be achieved within the narrow parameters of a specific economic, political, and social environment. Capital for the redevelopment of European industry, for example, could flow copiously from the United States to target-areas in Western and Eastern Europe. But future returns on such outlays would be much greater for the United States if they were directed towards relatively free-market environments. Similarly, the desire to mitigate the growing influence of the Soviet Union was best supported by establishing strong democratic political regimes in Europe. In this sense, the projection of its own economic liberalism and representative government into the European sphere became key objectives in the emerging US foreign policy.

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<sup>80</sup> The Marshall Plan would later be followed by the Four Points Program to bring technical aid to countries in Africa, Latin America and Asia and the creation of the North Atlantic Treaty Organization (NATO) in 1949 to shore up the Western alliance militarily (see Schwartz 1997:18).

### *Section Summary*

Thus in the years immediately preceding and following the end of the Second World War, two historical transformations were being merged in the political arena. First, the colonial powers' grip on their empires was slipping because of the war and the new power of the smaller and non-western states—especially in the context of the United Nations. The second transformation was related to the rise in power of the US and the Soviet Union. Each of the Big Three's prospects in their respective struggles depended upon the extension of their own system abroad as well as its institutionalization. Since Great Britain's imperial system (and the social relationships upon which it was based), was already mature (if not suffering from age by the 1940s), amongst the Big Three, it was quite ready to mold UN institutions accordingly.<sup>81</sup> The Soviet Union and the United States were very much in the process of sorting out their post-war aims, but as of 1947 were reaching out beyond their own domestic borders to achieve them. Finally, there was the emerging anti-colonial bloc of smaller and non-Western states that had not yet become a significant force in the debate, but was at this point certainly a presence.

These divisions placed each of the Big Three (as well as the emerging bloc of anti-colonial states) on very different trajectories. As the task turned towards drafting a declaration on human rights in 1947, the threat was that each would hurtle away from one another towards their own visions of human rights, stability and appropriate social relations, before any substantive and lasting decisions could be made.<sup>82</sup> But for the

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<sup>81</sup> The colonial powers also had learned through experience, doing the same with respect to the League of Nations (see footnote 32 for example).

<sup>82</sup> Whether this happened or not is still very much an open question sixty years later. This question is addressed in the conclusion.

moment their unity hung tenuously on the hope of solving a single dilemma: creating the social and political preconditions for international peace and security.

*Taking Stock: Analytic Lens and Empirics*

From the analytic perspective taken in this project, these events are not as George Kennan suggested, fundamentally about ideology. Nor are they fundamentally about war, politics, diplomacy, or even human rights. These diverse phenomena are the empirical *indicators* of social struggle over the appropriate way to organize society. Again, it is the impact of such social struggle in the particularized field of human rights that is of interest in this project. Before the “human rights field of struggle” can be entered, however, it is essential, to gain at least a cursory understanding of how the struggle played out immediately before in other fields. The notion of path dependence is useful here since the nature and outcomes of each of these expressions of struggle set the terms, parameters, constraints and opportunities of subsequent struggles.<sup>83</sup>

Historically, these precursor battles over the appropriate way to organize society manifested themselves at the precipice of war and peace. In war, the lines that carved up the map at Potsdam, for instance, institutionalized the outcome by drawing the geographic boundaries in which certain opposing modes of organizing social relations could exist unimpeded by its competitors. In politics and diplomacy, the same was accomplished by creating institutions and foreign policies that supported the social arrangements unique to colonialism, capitalism, political liberalism, and/or communism. Ideologically, these battles drew normative boundaries of good and evil around

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<sup>83</sup> See, Somers, Margaret R. 1998. "'We're No Angels': Realism, Rational Choice, and Relationality in Social Science." *American Journal of Sociology* 104:722-84.

competing social frameworks. In peace—if the early Cold War years count as such—the same basic struggle also emerged in the field of human rights. The analysis of the human rights struggle is of the greatest importance in this research project, for nothing stated the differing (and fundamentally contested) relationships between individuals, governments, and the society at large more explicitly and with greater clarity than did the contentious debates that emerged over human rights.

### *An Inauspicious Moment for Human Rights?*

From the moment the Charter was signed in 1945, UN member states had agreed to create commissions “for the promotion of human rights.”<sup>84</sup> But two years later, given the tensions and the mutual exclusivity of the parties’ interests (as well as the fundamentally different social logics their future successes were based upon), it would seem to be a very inauspicious moment to begin such a collaborative endeavor. Not blind to these differences, the Human Rights Commission decided that drafting a declaration from scratch in the full eighteen-member Commission (or even within a smaller drafting body) would be virtually impossible—particularly when each delegation would inevitably bring along its own set of political aims, constraints, personalities (and outsized egos). As Hodgson, the Australian representative put it, “No concrete results could be achieved by a drafting committee composed of government representatives expressing different points of view.”<sup>85</sup>

An early meeting in February 1947 at Eleanor Roosevelt’s Washington Square flat, quickly revealed the vast philosophical divides between Charles Malik of Lebanon,

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<sup>84</sup> Article 68. The Commission on Human Rights was dissolved in 2006 and was replaced by the United Nations Human Rights Council—a subsidiary body of the General Assembly.

<sup>85</sup> UN Doc E/CN.4/SR.10.

Peng-Chun Chang of China, and John Humphrey of Canada.<sup>86</sup> John Humphrey, a professor of law at McGill University, was chosen to create the initial draft based on his knowledge of international law, as well as his official role as a representative of the Secretariat. Not bound by domestic politics or the exigencies of state office, Humphrey was free to incorporate a broad range of human rights that represented the interests of the members of the United Nations at large, rather than any particular government. His draft, which included civil, political, socioeconomic, and cultural rights, became the foundation of the Human Rights Commission's drafting work. It is quite unlikely that an initial draft could have been produced quickly (if at all), if the process were started as a more collaborative endeavor. Interestingly, as soon the Commission made this decision, its own members (e.g. Australia, Chile, China, France, Lebanon, the Soviet Union, the United Kingdom, and the United States), raised a host of objections and sought to gain a greater role in the initial process.<sup>87</sup>

While the decision to initially rely upon a lone draftsman solved the “taking off” problem, a much deeper challenge overshadowed the entire process. The rights that Humphrey had included in the initial draft were in large part, drawn from the constitutions of nations from around the world, and therefore derived from a variety of unique (if not competing) political, economic, and social systems. Property rights didn't rest with a communist system just as socioeconomic rights were in many ways incompatible with a free-market society. In this sense, certain conceptions of human rights seemed to inevitably clash with others. This represented more than just a simple

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<sup>86</sup> This gathering was held pursuant to the earlier decision of the Human Rights Commission to allow a small, four-person executive group to commence the official drafting process. The Chair (Roosevelt), Vice-Chair (Chang), Rapporteur (Malik), and the UN Secretariat (represented by John Humphrey who was the Director of the Secretariat's Division on Human Rights). (UN Doc E/259; also E/CN.4/AC 1/2).

<sup>87</sup> UN Doc E/CN.4/AC.1/2.

difference in law. As articulations of social relationships, they represented the basic pattering of social life.<sup>88</sup> How would a state that restricted rights to a certain segment of society deal with a mandate to extend them? How would colonialism fair amidst a push for universal political rights? Free market capitalism amidst socioeconomic rights? Communism amidst property rights? The Committee members reasoned that if a declaration of human rights were to come to fruition (and in 1947 it seemed extremely likely), they would each have to take leadership lest an unfavorable outcome be reached. For the US and the Soviet Union, this form of leadership came at the outset in their push to create the UDHR as non-binding document, rather than an enforceable treaty—one of the few issues for which there was unanimity between the two nations.

Great Britain also immediately realized that such a broad set of rights would raise issues with respect to its colonies. In May of 1947, the British Colonial Office informed its colonial governments of the ongoing process, warning them of the dangers associated with the “certain specific and sophisticated” rights—e.g. political rights—that were by then a part of Humphrey’s draft.<sup>89</sup> The British delegation decided it was better to denude the initial draft declaration of its broad array of human rights at the outset, rather than confront them once they became law. So British officials hastily assembled their own version to be considered as an alternative to Humphrey’s draft. The British version articulated a narrow set of human rights that corresponded to its existing domestic and colonial practices.<sup>90</sup> It did not include political, social, cultural, or economic rights.<sup>91</sup>

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<sup>88</sup> See Chapter 1 for definitions and related discussion.

<sup>89</sup> CO936/5/6, cited by Simpson (2003:386).

<sup>90</sup> Though it is beyond the scope of this analysis, the British government successfully pursued a very similar strategy with respect to the 1950 European Convention on Human Rights. For a detailed version of these events see Simpson 2003, Chapters 6 and 7).

<sup>91</sup> See the UK Draft International Bill of Human Rights, in the *Yearbook of Human Rights* 1947, 487-92.

Members of the Commission on Human Rights' Drafting Committee, however, ultimately decided to use Humphrey's more expansive version as the basis of the declaration.<sup>92</sup>

Though it was not successful with its own draft, Great Britain still maintained significant amounts of power at the UN, and enjoyed the support of strong allies such as the United States, France and Belgium. On the colonial question (as it came to be known), these states tended to vote as a bloc, for they were all aware that the power and rights gained by their dependencies inevitably decreased their own. In subsequent meetings, the British delegation was careful to not even bring up the issue of its colonial territories, let alone grant specific rights to them.<sup>93</sup> This type of strategy, however, would only work as long as the other delegations were willing to remain silent about the colonial question.

What complicated matters for Great Britain were the states such as India and Pakistan that now took seats at the UN next to their former overlord as equal and sovereign members of the organization. As these states, along with other smaller and non-western nations, grew increasingly vocal about ending colonial rule, the political dynamic at the UN changed significantly. Thus while the UN deliberations were certainly not free from friction, considering the increasingly suspicion-spiked extramural relations of many parties involved in the drafting, the overall process actually moved along extremely well. Working on the drafters' behalves were several important factors. First, the Commission was entirely clear on its mandate: the schedule of human rights was to contain both basic categories of rights—civil and political on the one hand, and

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<sup>92</sup> UN Docs E/CN.4/AC.1/SR.2-SR.3

<sup>93</sup> Morsink, Johannes. 1999. *The Universal Declaration of Human Rights*.

socioeconomic on the other. As Eleanor Roosevelt in her official capacity as Chair, made clear, to omit either category was not an option.<sup>94</sup> Second, in these early days of the UN, there still remained a need for unity; no state wished to be responsible for repeating the mistakes of the ill-fated League of Nations, or descend back into war.

Finally, and perhaps most importantly, was the decision to create the UDHR as a non-binding statement of principles. One way to maintain the support for the human rights project was to create it as a non-binding General Assembly resolution, rather than an enforceable treaty. In this regard, because the rights that occupied space within the UDHR would have no legal power whatsoever, UN member states would in no way be obligated to alter their domestic behavior. As a result, states were much more willing to support the UDHR *in toto* than the enforceable human rights treaties that were to follow the UDHR. Nevertheless, given its potential normative power, (as well as the fact that future enforceable human rights treaties would be based on it) the stakes remained high even if drafted as an unenforceable declaration.

### *The Cold War and Decolonization Contests Merge*

Whether by design or historical accident, Great Britain now had a prominent role in these two historical transformations. As a close ally of the US, it stood opposite the Soviet Union in the Cold War, and as the largest colonial power it was the main target of the anti-colonial forces, which now included the Soviet Union. During the drafting of the UDHR, the Soviet Union sought to draw the colonial powers (but Great Britain, in particular) into terrain that would weaken their positions and relative standing within the

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<sup>94</sup> UN Doc E/CN.4/AC.1/SR.9, p. 11. First Session of the Commission on Human Rights Drafting Committee, Ninth Meeting, Held at Lake Success, New York, on Wednesday, 18 June 1947, at 10:30 a.m.



UN while winning the favor of other smaller nations. Towards the end of 1947, as the draft UDHR was making its way through committee and commission, the Soviet Union continued its increasingly anti-Western foreign policy strategy. In September, Andrei Zhdanov, a key Soviet official, showcased this approach in his, *Report on the International Situation to the Cominform*.<sup>95</sup> In this report, he divided the world into two camps: “the non-democratic, imperialists which were led by the US, and the democratic, anti-imperialists, led by the Soviet Union.”<sup>96</sup> Here Zhdanov outlined one the strongest articulations of Soviet foreign policy to date.

Fractures now became rifts. As the Soviet Union sought to consolidate an international communist alliance, Zhadonov’s report positioned the Eastern nation against the “imperialist camp.” According to the report, the goals of this camp (which included, most notably, the US and Great Britain) were to “strengthen imperialism, to hatch a new imperialist war, to combat socialism and democracy, and to support reactionary and anti-democratic pro-fascist regimes and movements everywhere.” The Soviet Union, “a staunch champion of liberty and independence of all nations, and a foe of national and racial oppression and colonial exploitation in any shape or form,” he declared, was dedicated to “securing a lasting democratic peace.”<sup>97</sup> Never mind that in practice the Soviet version of democracy did not include free elections and its relationship with the other members of the communist bloc could be considered imperialist in its own right; as it is so often in politics, facts are not as important as their consequences. The

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<sup>95</sup> In September of 1947 Stalin established the Communist Information Bureau (Cominform). The stated goal of this alliance of communist parties in Eastern Europe was to direct the activities of the communist parties throughout the world (see Schwartz, Richard Alan. 1997. *The Cold War Reference Guide*, at 292).

<sup>96</sup> Morsink, Johannes. 1999. *The Universal Declaration of Human Rights*, at 97; McMahon, Robert J. 2003. *The Cold War*, at 31.

<sup>97</sup> Schwartz, Richard Alan. 1997. *The Cold War Reference Guide*, at 292.

consequences here were not insignificant: the two global transformations (decolonization and the East-West rivalry) were now merging with one another, *and* an already weak Great Britain was being forced to fight simultaneously on two fronts.

As the UDHR was nearing completion in 1948, what began as two distinct, large-scale transformations—the trend towards decolonization and the rise of the superpowers—were now becoming increasingly intertwined. Success for any of the parties involved in these respective struggles increasingly began to impact the chances of the others. This new dynamic complicated politics at the United Nations immensely and encumbered the effort to create a single schedule of international human rights that would enjoy widespread normative legitimacy *and* possess actual force.

#### *The UDHR is a Success but Difficulties Lie Ahead*

Passed in December of 1948 with a vote of 48 in favor, no states opposing, and eight abstaining, the UN representative from Paraguay called it “the most harmonious and comprehensive structure yet erected in this field...a flaming force which will lead all mankind towards felicity.” Eleanor Roosevelt even suggested that the UDHR could one day be akin to the Magna Carta or the French Declaration of the Rights of Man. Under the terms of the UDHR African Americans possessed the same political rights as colonial inhabitants and the “voters” in Moscow. Domestic practices were now bound by a higher, moral law, and all humans regardless of whether they were in the shanties of Johannesburg or the backwoods of Georgia had the right to adequate medical care, necessary social services, and to be free from discrimination...

Apart from overcoming such wild inversions of the *status quo*, another extraordinary challenged lingered. While the range of social ideals had successfully been reined-in and incorporated into the UDHR, the human rights that represented these competing systems were now just corralled together within the unitary framework of the emergent human rights concept. The UDHR may have been a “flaming force,” but it was also replete with internal contradictions. Like the earlier Potsdam solution for “divided unity,” the human rights terrain was divided and parceled out to the victors of the war. So for instance, socioeconomic rights which were associated with socialism and communism, sat alongside civil and political rights which were associated with liberalism and capitalism; universal political rights which were championed by proponents of decolonization now lay together with statements about the existence of colonial dependencies.<sup>98</sup> These contradictions, however, were not necessarily a bad thing. Paradoxically, the lasting strength of the UDHR perhaps lies most with its legal *weakness* (as opposed to it embodying any notion of enforceability). It was its normative strength that made its external contradictions—that is, the disconnect between its text and the social realities of the day—a collective call to action, rather than a scathing indictment. Moreover, placing opposing rights together with one another was viewed as less of an “internal contradiction,” than a statement about the “organic unity” and indivisibility of all of these rights.

Regardless of whether these issues were viewed as *contradiction* or *opportunity*, they were not too much of an issue—as long as the instrument in which they resided remained non-binding. The Human Rights Commission, however, had already decided

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<sup>98</sup> The smaller and non-Western states that now had a political voice in the UN, were not included in the Potsdam decision.

that the UDHR would be followed by a binding human rights covenant. This changed everything. For when the prospect of enforceability entered the equation, like a high-voltage circuit breaker, it activated the functional exclusivity of the internal contradictions while enlivening all of the external contradictions.

For those who had been excluded from areas of social and political life, or otherwise had been denied the basic resources necessary to enjoy such existence, contradictions or not, an enforceable human rights covenant held great promise. If enforced, human rights had the power to redraw the lines on the social map to incorporate the socially dispossessed into the realms from which they were excluded. This proposed remapping of the social terrain, however, set ablaze the social fears and anxieties of many others who believed that the *status quo* would irrevocably be lost. As of December 1948 the Covenant, which was already partially complete, could perhaps be finished in just a year or two. With the enforcement switch flipped to the “on” position, for supporters and detractors alike, there was much to gain and little time to lose.

### **Chapter 3** **Protecting State Sovereignty from the “Dangers” of Human Rights**

In 1945 as World War II was in its final stages and the United Nations was about to become a reality, the US Senate was a divided body. There remained a sizeable conservative, isolationist bloc. There was also a significant faction—informed by recent world events—that believed that lasting peace and security required international engagement with other nations. As plans for the United Nations unfurled, members of Congress were apprehensive about the US’s ability to participate freely in future international institutions due to the relatively high Senate hurdle required to ratify international treaties. Article II, Section 2 of the Constitution, which requires two-thirds of the Senate’s approval on international treaties before they are ratified, was designed both to foster bipartisan support and to provide the individual states an equal voice in such matters through their elected representatives. It also takes into account the great weight given to binding international agreements (or treaties) which under the Constitution become the “supreme law of the land.”<sup>99</sup>

Under these procedural safeguards, the obstructionist potential of the minority became a major concern for those who supported greater involvement for the US in international affairs, and were mindful of President Woodrow Wilson’s failure to garner the necessary two-thirds majority support of the Senate to ratify the Treaty of

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<sup>99</sup> US Constitution, Article VI (2). This is qualified by the different types of treaties—self-executing and non-self executing. This was a major issue that was not entirely settled.

Versailles—and thereby join the League of Nations. To repeat the same mistake after the Second World War could be catastrophic. As a work-around to this problem—as well as a means of ensuring the President’s continued ability to enjoin the nation in the many treaties that would inevitably follow—many US lawmakers supported amending the US Constitution to lower the hurdle to presidential treaty making.

Whether this plan to amend the Constitution was just a warning shot, meant to send a message to the Senate’s isolationist faction—a mix of Southern Democrats and conservative Republicans—to cooperate with the UN or endure substantive limitations on their legislative power, it enjoyed significant support. In 1944 and 1945 there were at least eight resolutions created to in various ways lower the two-thirds hurdle to international treaty making.<sup>100</sup> In 1945, for instance, House Joint Resolution 60 (which proposed to amend the Constitution to require only the *advice* of both Houses of Congress—rather than the advice *and* consent of the Senate—actually garnered the necessary support to pass in the House.<sup>101</sup>

There is great significance in these pre-United Nations efforts to amend the US Constitution. Amending the Constitution is neither an easy process nor one to be taken lightly—in 1945, this feat had only been accomplished eleven times. The stakes in this

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<sup>100</sup> For detailed discussions of these resolutions see Dean, Arthur H. 1953. "Amending the Treaty Power." *Stan. L. Rev.* 6:589-612; Sutherland, Arthur E., Jr. 1951. "Restricting the Treaty Power." *Harvard Law Review* 65 (8):1305-38. A partial list of such resolutions includes: 78th Congress, 1st Session, 1944, House Joint Resolutions Nos. 6 and 31—attempts to lower the consent-bar to a simple majority within each house; House Joint Resolution 64 proposed to require only the "advice and consent" of the Senate; 78th Congress, 2nd Session, 1944- House Joint Resolutions Nos. 238, 246, 264 and 320 proposed requiring only a simple majority of both houses (this would have required the majority of a quorum, and not a majority of the total membership); 79th Congress, 1st Session, 1945-- House Joint Resolution 60- requiring only the "advice of both Houses of Congress" (passed by the House, [see 91 *Cong. Rec.* 4368 (1945)]. Sutherland, Arthur E., Jr. 1954. "Flag, the Constitution, and International Agreements, The Comment." *Harv. L. Rev.* 68:1374. Also see "Judiciary Committee Report on House Res. 60," *H.R. Rep.* No. 139, 79th Cong., 1st Sess. (1945); and see Congressional Record for discussions about public support, citing Gallup Poll results [91 *Cong. Rec.* 4364 (1945)]; and Proposed Amendments to the Constitution of the U.S. Dec. 6, 1926-Jan. 3, 1947, (U.S. Gov't Printing Office 1947).

<sup>101</sup> It did not, however, pass in the Senate.

case, however, were extremely high. The need to reach out to allies and create a lasting institution with the power and authority to direct the actions of member states by force of law was of great importance at the time. But it also illustrated the presence of a sharp division about whether the United States should become more (or less) involved in international affairs.<sup>102</sup> Both sides realized quite correctly that joining an international organization that would have any effect at all would require the cession of a certain amount of sovereignty.<sup>103</sup>

In the end, however, a Constitutional Amendment proved unnecessary. Franklin Roosevelt and Harry Truman, having learned from Wilson's political error in not including the Senate (or at least Senate representatives) in the actual negotiations of the Treaty of Versailles, invited Senators to take part in the negotiations surrounding the Charter—most notably the Democratic Chair and the ranking Republican of the Senate Foreign Relations Committee, Tom Connally (D-TX) and Arthur Vandenberg (R-MI). The latter Senator—a long-time isolationist—after the war experienced something of a conversion, embracing internationalism and urging his Republican colleagues to do

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<sup>102</sup> Amending the Constitution as described above would also represent a sweeping shift in the balance of governmental powers—decreasing the power of minority blocs in the Senate and dramatically increasing the power of the Executive. The House too, no doubt saw an opportunity to increase its relative power as most of the resolutions originated in the House and a good number called for the House to take part in the process as well. As always in debates of this magnitude, there were many undercurrents at play that related to matters of power and policy far removed. See Moore, John Robert. 1967. "The Conservative Coalition in the United States Senate, 1942-1945," *The Journal of Southern History*, Vol. 33, No. 3, pp. 368-376.

<sup>103</sup> In this chapter, the term "sovereignty" refers to a state's ability to exercise unlimited authority within its territorial boundaries (see generally, Hinsley, Francis Harry. 1986. *Sovereignty*). The term "sovereignty" has multiple meanings and a multitude of different usages. For various explications of this concept, also see Donnelly, Jack. 2005. "State Sovereignty and Human Rights," Paper read at Paper presented at the *Annual Meeting of the International Studies Association*, at Honolulu, Hawaii; Henkin, L. 1999. "That 'S' Word: Sovereignty, and Globalization, and Human rights, et cetera." *Fordham Law Review* 68 (1):1-14; Reisman, Michael. 1990. "Sovereignty and Human Rights in Contemporary International Law." *The American Journal of International Law* 84 (4):866-76; Held, David. 1995. *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*. Held, David. 2002. "Law of States, Law of Peoples: Three Models of Sovereignty." *Legal Theory* 8:1-44.

similarly.<sup>104</sup> Interestingly, these tensions between internationalism and sovereignty were not settled by a showdown over amending the Constitution. As the next section will show, this ambivalence was institutionalized and integrated into the text of the UN Charter—the very foundations of the United Nations.

#### *1945: The United Nations Charter*

As the founding document, the United Nations Charter outlined the UN's organizational structure and legal framework, the duties and responsibilities of its member states, as well as the purposes of the organization.<sup>105</sup> But even a cursory reading of the Charter reveals important tensions between human rights and sovereignty. While the Charter explicitly respects the sovereign right of states to autonomy within their own domestic jurisdictions, it also limits “absolute sovereignty” in significant ways. On the one hand, the manner in which a state treats its inhabitants is articulated as a matter of international concern. Article 55, for instance, outlines a broad spectrum of basic human rights principles. In particular, UN member states “shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational co- operation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Under its companion article (Article 56), member states “pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.” Together, these articles—which would become

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<sup>104</sup> He voiced his transformation in a rousing Senate speech on January 10, 1945.

<sup>105</sup> The Charter was signed on June 26, 1945, and entered into force on October 24, 1945, after the five permanent members (China, France, the Soviet Union, the United Kingdom, and the United States), and a majority of the other signatory states, had ratified it.



focal points in the subsequent struggles over US sovereignty—illustrate the idea that the treatment of populations existing within a state’s boundaries was not entirely a private matter. In addition to such limitations of sovereignty based on human rights principles, Chapter 7 of the Charter permits the Security Council to use force against threats to international peace and security—even if those threats emerge from within the territorial boundaries of a particular state. Though left vague and nameless—and perhaps legally powerless—human rights stood for a crucially important idea that sovereign states could not do whatever they pleased.

The perceived importance of human rights at the time to the Great Powers, however, should not be overestimated. Various advocacy groups as well as many smaller UN member states were the most dedicated supporters of incorporating the idea of human rights into the Charter. As support for the inclusion of references to human rights grew, however, so too did the desire for a sharply worded escape clause.<sup>106</sup> So while Article 55, 56, and Chapter 7 all provide clear evidence that after 1945 state sovereignty could no longer be considered “absolute,” a seemingly contradictory provision guaranteeing state sovereignty was also incorporated into the Charter. Article 2(7) was drafted to highlight the primacy of state sovereignty and the untrammled power of a state to conduct affairs without interference within its domestic jurisdiction. In unequivocal terms it reads:

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<sup>106</sup> See Samnøy, Åshild. 1993. "Human Rights as International Consensus: The Making of the Universal Declaration of Human Rights 1945-1948." Bergen Norway: Report: Chr. Michelsen Institute. Also see, "Statement by Henri Laugier, Assistant Secretary-General for the United Nations Department of Social Affairs on the Covenant of Human Rights," April 13, 1950, *International Organization*, Vol. 4, No. 3 (Aug., 1950), pp. 553-559, at 554)-- Laugier shows that while human rights is mentioned in the Charter, the Great Powers initially overlooked it.

“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”<sup>107</sup>

Perhaps it was this escape clause, or perhaps the US Senate had learned from its earlier refusal to join the League. Either way, the US Senate was not, as some had feared, held prisoner to the whims of the isolationist minority, and approved the Charter overwhelmingly by a vote of 89 to 2.<sup>108</sup> Ambivalence regarding the limits of sovereignty thus became institutionalized in the UN Charter, providing ammunition for both future supporters *and* opponents of US sovereignty.

While the Charter is not a part of the International Bill of Human Rights, it is the foundational text from which the UDHR and the Covenants derive their authority. Importantly, the UN’s first public articulation of broad human rights principles emerges within the Charter. At the time, though, the precise nature of human rights—i.e. what they were, how they would be enforced, and who would be the beneficiaries and duty-holders—was unknown.

The fact that “human rights” is mentioned seven times in the Charter is often used by human rights scholars to illustrate the newfound legitimacy and importance of the human rights concept.<sup>109</sup> While this is quite true, the *relative* importance of human rights in context is perhaps more salient—the phrase “international peace and security” appears in the Charter no less than thirty times. The unbearably agonizing “proof” that ending

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<sup>107</sup> For analyses on domestic jurisdiction, see generally, Kelsen, Hans. 1946. "Limitations on the Functions of the United Nations Symposium on World Organization." *Yale Law Journal* 55 (5):997-1015; Goodrich, Leland M. 1949. "The United Nations and Domestic Jurisdiction." *International Organization* 3 (1):14-28; Davies, D. J. Llewelyn 1946. Domestic Jurisdiction: A Limitation on International Law. Paper read at Transactions of the Grotius Society.

<sup>108</sup> Opposing the Charter in the vote on July 28, 1945, were William Langer (R-ND) and Henrik Shipstead (R-MN). Jim Crow is just one example of many US laws that contradicted the Charter’s call for equality; [http://www.state.gov/www/background\\_notes/united\\_nations\\_0997\\_bgn.html](http://www.state.gov/www/background_notes/united_nations_0997_bgn.html); last accessed July 13, 2010.

<sup>109</sup> E.g. Henkin, Louis, ed. 1981. *The International Bill of Rights*, at 4-5; Morsink, Johannes. 1999. *The Universal Declaration of Human Rights*, at 3.

World War II and achieving the latter was a more pressing concern came two days before President Harry Truman signed the UN Charter, and then again one day after, when in two brilliant flashes tens of thousands of citizen-enemies evaporated and scores more were left to slowly fester away.

At 7:03pm on August 14, 1945 hundreds of thousands of Americans roared with joy as the “magic words” lit up the electric sign high atop the Times Tower in New York City: “Official—Truman announces Japanese surrender.”<sup>110</sup> The president called a two-day national holiday, crowds filled the streets, and four million US troops were promised home within a year.<sup>111</sup> International peace and security was at hand.

#### *World Federalism Movement: A Higher Authority?*

In October of 1945, a group of fifty or so influential writers, lawyers, professors, and politicians withdrew to the small town of Dublin, New Hampshire to take the initial steps to rectify what they perceived as the most disturbing weakness of the United Nations—its inability to curb state power. The conference was convened by several members of the legal and political elite, such as former Justice of the United States Supreme Court, Owen J. Roberts, and Robert. P. Bass, former Governor of New Hampshire.<sup>112</sup> Though the United Nations was already more representative and powerful than the ill-fated League of Nations, they believed that it was not a strong enough counterbalance for controlling state power (nor, as far as they were concerned, were the

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<sup>110</sup> “All City Let’s Go.” *New York Times*. August 15, 1945, pg. 1.

<sup>111</sup> “4,000,000 Troops Home By June 30.” *New York Times*, August 17, 1945, pg. 1.

<sup>112</sup> Some of the notable figures included Senator Styles Bridges of New Hampshire, member of the Foreign Relations Committee; Beardsley Ruml, Chairman of the Federal Reserve Bank of New York; Louis B. Sohn, Professor of Law at Harvard, and Sgt. Alan Cranston, who would later become a California Senator and run for president of the United States; Charles W. Ferguson, the editor of Readers Digest; John K. Jessup, editor of Life and Fortune; Donovan Richardson, managing editor of the Christian Science Monitor. See, “Declaration of the Dublin, N.H. Conference,” *The New York Times*, Oct. 17, 1945, pg. 4.

handful of references to human rights that were included in the Charter). In this sense, human rights were extremely important *goals*, but they were not the appropriate *means* for controlling (and successfully mitigating) the unbridled power of the state—which from Nagasaki and Hiroshima, seemed to still enjoy free reign. This goal, they believed, could only be attained through a much stronger international organization than the one just created—which was designed by and for state interests. The term they used for such a supranational entity with power over the state was “world federal government.”<sup>113</sup>

The attendees produced a statement that argued the United Nations was a weak institution that was “wholly inadequate to prevent war.”<sup>114</sup> The only way to prevent another war was through the creation of a stronger system of “world government” in which nations would vest a much greater portion of their sovereignty. This world federal government would come about by amending the Charter of the United Nations (or perhaps through the creation of an entirely new entity altogether). Either way it would be granted “limited but definite and adequate powers to prevent war, including power to control the atomic bomb and other major weapons and to maintain world inspection and police forces.”<sup>115</sup> Because atomic weaponry was deployed *after* the Charter was drafted, one of their main concerns was that the United Nations had not been structured to contain this new threat. To effect these changes, they put out a call for the “prompt” amendment of the US constitution to make possible the formation of such a “world federal government.”<sup>116</sup>

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<sup>113</sup> Also referred to as “world government.”

<sup>114</sup> They later submitted this statement to the United Nations. “Declaration of the Dublin, N.H. Conference,” *The New York Times*, Oct. 17, 1945, pg. 4; Louis B. Sohn. Letters to The Times, New York Times, Oct 24, 1945, pg. 20.

<sup>115</sup> “Declaration of the Dublin, N.H. Conference,” *The New York Times*, Oct. 17, 1945, pg. 4.

<sup>116</sup> *Id.*

For today's sensibilities the hope for "world federalism" no doubt seems absurd—the quixotic work of hopeless utopians or the province of leftist fringe groups and conspiracy theorists. Amazingly, the call for world federalism, and the desire to amend the US Constitution actually began to gather significant interest and mainstream support. In late 1945, for instance, even the American Bar Association—an organization that would soon become one of the most strident opponents of internationalism—passed a resolution urging not only "United American support" for the United Nations, but called for the consideration of strengthening the Charter to put further curbs on state power "because of the many momentous events since the adjournment of the San Francisco Conference"—i.e. the use of the atomic bomb.<sup>117</sup> Interestingly, a significant minority of those voting opposed this ABA House of Delegates resolution because it was not worded *strongly enough* in favor of a "world federation." Accordingly, the House of Delegates formally decided to address whether the ABA should support a world federation proposal at subsequent meetings.<sup>118</sup>

As discussed below, the amount of support the idea of world federalism quickly gained is remarkable considering how entirely unacceptable it would be in contemporary policy circles. As a result this very brief excursion into internationalism is rarely studied seriously by human rights scholars. But when looked at as a force in a social struggle between internationalism and state sovereignty, this short-lived movement had great bearing on the emergence of the powerful strands of opposition that developed against various aspects of the human rights concept. A major part of the reason world federalism (at least from the US perspective) now might seem absurd, is a direct outcome of this

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<sup>117</sup> See 32 *A.B.A.J.* 203.

<sup>118</sup> Holman, Frank E. 1946. "'World Government' No Answer to America's Desire for Peace." 32 *ABAJ* 642-45; 718-21.

very social struggle. What was envisioned at Dublin was not entirely impractical. It was actually very similar to the legal, political, and social principles of today's European Union, and shared ideas in common with the intergovernmental *International Atomic Energy Agency*.<sup>119</sup> In this early incarnation, the movement was confined largely to international security matters and the threat of nuclear warfare, rather than being about human rights specifically.

The actual implementation of this idea was not something the state could achieve this on its own—it needed a counterweight. For when the state is threatened, if given the untrammelled right to preserve itself it often does so at great cost to anything in its way. Exactly one year prior to the commencement of the world federalism conference, Roberts, as a Justice of the US Supreme Court, had listened from the bench to opening arguments in the notorious *Korematsu v. United States* case, which upheld the constitutionality of Roosevelt's Executive Order 9066 relegating American citizens to internment camps.<sup>120</sup> Roberts was one of three dissenting justices who refused—albeit in vain—to honor the precedent of state power at the expense of human life. Because individual states had proven to be inadequate protectors of human life, a supranational government with the authority to protect the individual over the state, the Dublin Conference attendees argued, was needed.<sup>121</sup>

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<sup>119</sup> The latter institution—a consequence of Eisenhower's "Atom's for Peace" initiative—however, was not endowed with nearly the powers they were arguing for.

<sup>120</sup> 323 U.S. 214.

<sup>121</sup> See "Declaration of the Dublin, N.H. Conference," *The New York Times*, Oct. 17, 1945, pg. 4.

*1946-1949: The United Nations Charter as an Early Human Rights Document*

Because the internment of American citizens of Japanese ancestry was not the only injustice sanctioned by the force of law and perpetrated on American soil, another strand of the nascent support for supranational authority began to look at the possibility of using the Charter as an early human rights text of binding legal authority. Though the UN Charter is today not considered a proper “human rights treaty,” in the late 1940s it was the only binding international agreement that mentioned human rights that the US had ratified. Not content to wait for subsequent human rights treaties, progressives in the United States began to wonder whether the Charter could invalidate the countless racially discriminatory laws that were standard elements of American law.<sup>122</sup>

So when the Charter entered into force in October of 1945, the potential impact of its human rights provisions (which were rather vague and articulated at the level of basic principles) was not altogether clear. For some legal scholars, Article VI, Section 2 of the US Constitution, which apparently made the Charter the “supreme law of the land,” opened up the possibility of addressing social problems that the federal government had proven too weak or unwilling to tackle. For instance in 1946, a report prepared for a civil rights conference convened at the behest of the National Bar Association, the National Legal Committee, the NAACP and the National Lawyers Guild, suggested that Articles 55 and 56 of the UN Charter could be used to force the creation of an anti-lynching bill.<sup>123</sup>

Soon after, the NAACP produced “An Appeal to the World” (1947), a petition to the UN that drew a comparison between racism in America and the treatment of people

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<sup>122</sup> In addition to Jim Crow in the South, anti-miscegenation laws and racially restrictive covenants that prevented minorities from owning, renting, or otherwise occupying restricted property, were very common.

<sup>123</sup> “Constitutional Basis for federal Anti-Lynching Legislation,” *Lawyers Guild Review*, 6:643-47.

of color under colonialism. In this document, the NAACP attempted to leverage the United Nations Charter's support for human rights to draw attention to the racial injustices blacks were experiencing in the United States (see Race Chapter).<sup>124</sup> Supporting the use of the Charter to compel the US to transform its discriminatory laws, however, was not limited to such private organizations. Both the Truman Administration, federal, and state courts actively drew upon the Charter as a touchstone for domestic human rights matters in the years following its adoption.<sup>125</sup>

Given the deplorable racial treatment of blacks in the US, Truman asked his newly created *President's Committee on Civil Rights* to prepare a report outlining recommendations for the adoption of legislation or "more adequate and effective means and procedures" for ensuring the protection of civil rights in the US.<sup>126</sup> The resulting 178 page report, released at the end of 1947 raised the distinct possibility that the Charter could be used as a source of law for ameliorating the US's internal racial problems. Though the report acknowledged that such a path was not free from controversy, the Charter (Articles 55 and 56 in particular) was nevertheless viewed as a possible basis for a federal civil rights program. Additionally, the report cited the ongoing drafting of the UDHR as a document, that when completed would "give more specific meaning to the general principle announced in Article 55 of the Charter," and could provide "an even stronger basis for congressional action" with respect to the creation of civil rights

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<sup>124</sup> See e.g. Logan, Rayford W. "The Charter of the United Nations and its Provisions for Human Rights and the Rights of Minorities and Decisions Already Taken Under This Charter," in *Appeal to the World*, at 85.

<sup>125</sup> While this chapter focuses more on the legal elements of this strategy, the political elements of this project are discussed in detail in Chapter 5 (on Race).

<sup>126</sup> President's Committee on Civil Rights. 1947. *To Secure These Rights: The Report of the President's Committee on Civil Rights* Washington, D.C.: United States government Printing Office, at viii. The Committee was created pursuant to Executive Order 9808.



legislation.<sup>127</sup> The strength of the Committee’s report (and Truman’s will to implement its findings) should not be overstated. The point of this example is to illustrate the willingness to actually consider the possibility that international human rights laws might be used to invalidate controversial domestic laws. This was a very unique moment in US history. In contemporary politics, the mere mention that international human rights treaties might require every state in the US to honor gay marriage or permit all prisoners to vote (from the President, no less), for example, is almost unthinkable.

By 1948, as the UDHR was just about completed and the Commission on Human Rights was in the early stages of the drafting of the Covenant, two Supreme Court decisions on racial discrimination—one at the Federal level and the other at the state—invoked the Charter and its human rights provisions. The first was a 1948 US Supreme Court in which Justice Black (joined by Justice Douglas) invoked provisions of the UN Charter to denounce a racially restrictive policy. Though Justice Black did not cite the Charter as a controlling source of law, he used it for guidance as an important moral touchstone. He wrote:

“...we have recently pledged ourselves to cooperate with the United Nations to ‘promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.’ How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?”<sup>128</sup>

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<sup>127</sup> *Id.* at 112.

<sup>128</sup> *Oyama v. California* (1948), 332 U. S. 633, at 649-650.

Similarly, in the same year, a 1948 California Supreme Court case also invoked Article 55 of the UN Charter as an important, but non-controlling source of authority to invalidate California's law banning interracial marriage.<sup>129</sup>

During this time, academics began to focus on the specific legal mechanisms that would actually enable the UN Charter to be binding human rights law within the United States. Because judges often consult such academic expertise in crafting their decisions, the positions taken by law professors in their writing is not inconsequential. One *Yale Law Journal* article found a possible way for the United Nations Charter—through the US Constitution—to protect minorities in the US. The logic was this: the US had ratified the Charter, pledging to “promote respect for, and observance of, human rights and fundamental freedoms for all.”<sup>130</sup> Under Article VI of the US Constitution, treaties (such as the Charter) are the “supreme law of the land.” Because Congress has the power to define and punish “offenses against the law of nations,”<sup>131</sup> it “may” have the power to protect minorities that are “not vested in the US Constitution itself.”<sup>132</sup> This argument was in no way definitive and only went so far as to suggest that the Charter “may” be used to prosecute things such as lynching. The legal logic—when considering precedent—was actually relatively sound. Socially, it could be revolutionary.

Politically, it was a fool's errand. For if lynching fell under this hypothetical doctrine, so

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<sup>129</sup> *Perez v. Sharp*, 32 Cal. 2d 711, 198 P.2d 17. In at least two other 1948 US Supreme Court cases [*Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Hurd v. Hodge*, 334 U.S. 24 (1948)], petitioners bringing suit against racially restrictive covenants that prevented African Americans from owning land, argued that such laws were contrary to the treaty obligations assumed by the United States under the United Nations Charter. In these cases, the Supreme Court did not consider the authority of the Charter and decided the case purely on Constitutional grounds. In yet another instance, the authority of UN Charter was unsuccessfully invoked by plaintiff in a 1947 New York Supreme Court case, *Kemp v. Rubin* (69 NYS 2d. 680).

<sup>130</sup> UN Charter, Art. 55(c).

<sup>131</sup> US Constitution, Article I §8.

<sup>132</sup> *The Yale Law Journal*, Vol. 57, No. 5 (Mar. 1948), pp. 855-873, at 868; also citing *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

too did anti-miscegenation laws, Jim Crow, school segregation, land ownership laws, the universal right to healthcare, social welfare, and so forth—all of which were hot-button social struggles that had the nation divided.

At the end of 1948 supporters of the UDHR and the United Nations were enlivened by its successful adoption. Several years since the Dublin Conference, some of the strongest support for the UN, the UDHR and the future Covenant came from the growing number of “world government” supporters.<sup>133</sup> At this point, the precise meaning of “world government” varied considerably. In all cases, however, the term was intended to increase the power of an international body (United Nations or other) while individual nation states would relinquish a certain amount of sovereignty for the greater good of peace and human rights.<sup>134</sup>

By the end of 1948, the largest world federalist group, the United World Federalists, had established over 650 local chapters, and claimed around 40,000 members, and had successfully introduced a world government resolution (HCR 64) to Congress that enjoyed the support of over 120 members of the House.<sup>135</sup> By October 12,

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<sup>133</sup> At the strong end of the spectrum were groups like the United World Federalists (NGO) and The Rollins College Conference on World Government. Davenport, John H. 1949. "Approach to World Government through the Technique of the World Constitutional Convention: American Experience." *Miami Law Quarterly* 3:500-63, at 508. Also see generally, Eagleton, Clyde. 1946. "The Individual and International Law." *Am. Soc'y Int'l L. Proc.* 40:22; Parker, John J. 1944. "World Organization." *American Society of International Law Proc.* 38:20.

<sup>134</sup> E.g. Davenport, John H. 1949. "Approach to World Government through the Technique of the World Constitutional Convention: American Experience." *Miami Law Quarterly* 3:500-63; Cohen, George H. 1950. "Human Rights and the Treaty Power." *Phylon* 11 (2):137-50; McDougal. 1949. "Rights of Man in the World Community: Constitutional Illusions Versus Rational Action." *Law and Contemporary Problems* 14:490-536; Williams, Wayne. 1949. "World Government." *Dicta* 26:79-86; Allen, Florence E. 1949. "Human Rights and the International Court: The Need for a Juridical World Order." *A.B.A. J.* 35:713-6; 88-89.

<sup>135</sup> Hennessy, Bernard. 1954. "A Case Study of Intra--Pressure Group Conflicts: The United World Federalists." *The Journal of Politics* 16 (1):76-95, at 88. At the time, this was the largest number to ever support a foreign policy resolution. To put this membership in perspective, the American Medical Association had approximately 140,000 members in 1950. See Fuchs, Lawrence H. 1957. "Federation Resolution: A Case Study in Congressional Decision Making." *Midwest Journal of Political Science* 1 (2):151-62.

1949 when the Congressional hearings on this resolution began, no fewer than twenty five US state legislatures had passed their own resolutions in favor of a world federation of governments. Though an important step in the legislative process, such resolutions are far from becoming actual federal law. More so, they are political statements showing unity of state support for federal legislative action. Any time a legislator offers support for a resolution, she opens herself up to potential challenges that could be politically damaging. Given the cost of creating a resolution and gathering the necessary votes to pass the representative chambers of state government, these state resolutions for world government signal the presence of broad encouragement—if not the presence of an actual movement.

For example, the California State Legislature passed “Assembly Joint Resolution 26” that was submitted to the US Congress in 1949 that offered what was a fairly standard text:

“Whereas the United Nations, as presently constituted, although accomplishing great good in many fields, lacks authority to enact, interpret, or enforce world law, and under its present charter is incapable of restraining any major nations which may foster or foment war.”

In addition to its stated goal of preventing war, Resolution 26—a bipartisan creation of California’s Assembly and Senate—implored Congress to amend the UN Charter as to bestow it with the necessary powers to guarantee “the inalienable rights of freedom for every human being on earth and the dignity of the individual as exemplified by the American Bill of Rights.”<sup>136</sup> Importantly, entry into a “world federal government” would require the cession of a portion of US sovereignty to the world government body. Finally, the Resolution called for a convention pursuant to Article V of the US

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<sup>136</sup> Most of these resolutions cited Articles 108 and 109 of the UN Charter, which provide procedures for reviewing and amending the Charter.

Constitution to be called “for the sole purpose of proposing amendment of the Constitution to expedite and insure the participation of the United States in a world federal government, open to all nations, with powers which, while defined and limited, shall be adequate to preserve peace.”<sup>137</sup> The latter call for Constitutional Amendment was a standard item in the many state resolutions produced during this period (see Appendix for an example of one such world federal government resolution).<sup>138</sup>

This was all part of an early acceptance of the importance of the United Nations and its nascent human rights project. Though such arguments and debates were largely confined to members of the intellectual and political elite, this type of support for the Charter illustrates an early optimism about international human rights law and its potential as a higher (and controlling) source of domestic law. It seemed that many in Congress, the executive, the judiciary, and the legal academy were taking small steps towards embracing international human rights law on domestic shore. In the years following though, a strong backlash against using external human rights laws to alter domestic US laws and policies emerged. This backlash in turn, spread hesitation and cast substantial doubt on the US’s participation in the post-war human rights project.

### *The Backlash*

At war’s end, international peace and security was a paramount concern. Even the cession of a degree of national sovereignty to achieve this end seemed like a small

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<sup>137</sup> 95 *Cong. Rec.* 4568-69. 1949.

<sup>138</sup> Hennessy, Bernard. 1954. "A Case Study of Intra-Pressure Group Conflicts: The United World Federalists." *The Journal of Politics* 16 (1):76-95, at 78, 91. The issues surrounding world federalism were covered in many academic and professional journals, see e.g., Farmer, Fyke. 1946. "Now: Is the Accepted Time." *American Bar Association Journal* 32:267; Andrews, Burton. 1950. "Amending the Constitution to Provide for Participating in a World Government." *Alb. L. Rev.* 14:125; Andrews, Burton. 1950. "Constitutional Amendment for Participation in World Government." *N.Y. St. B.A. Bull.* 22:391; "Survey of Statutory Changes in North Carolina." 1949. *North Carolina Law Review* 27:497.

price to pay for many—as evidenced by the bipartisan support for world government. Such support blossomed for an *idea* that was difficult to argue against—that there should be limits on state power, and humanity should be in certain key areas protected both *by* and *from* the state. But when this idea, through political support and legal formation, gained entry into the very social sphere it was designed to protect, the concrete implications were far too jarring for many to handle.

If this idea were to be actually carried out in the name of international peace and security, the plight of minorities was certainly to be defined as a matter of international concern (as evidenced by the tragic consequences of the stateless populations in interwar-Europe). So too was the health, welfare, and social inclusion of a nation's citizens a matter of concern. As supporters began to work out the necessary legal, political, and social details, and members of the US Congress began to submit social welfare legislation on behalf of the US's obligations under the Charter, the opposition began to mount.<sup>139</sup> For once the specific social implications of such an idea were articulated, the fear that the UN, human rights, or world government would fundamentally alter the domestic way of life, prompted detractors to mobilize with great urgency. In 1949 opposition welled, the US State Department demurred, national attention turned to the Korean War, and very quickly the opposition razed virtually every part of the short-lived world federalist movement.<sup>140</sup>

Newspapers from this time provide just one example of growing opposition to the actual implementation of a world government. One 1948 editorial in the *Chicago Daily*

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<sup>139</sup> Discussed in subsequent Chapters.

<sup>140</sup> Hennessy, Bernard. 1954. "A Case Study of Intra-Pressure Group Conflicts: The United World Federalists." *The Journal of Politics* 16 (1):76-95, at 92; Fuchs, Lawrence H. 1957. "Federation Resolution: A Case Study in Congressional Decision Making." *Midwest Journal of Political Science* 1 (2):151-62, at 155. Also see "Hearings before the House Foreign Affairs Committee," HCR 64, Oct. 12, 1949, at 262.

*Tribune*, for instance, entitled, “A Scheme to Loot America,” urged Americans to oppose the UN and international treaties. The author argued forcefully against world government which could “by taxation, appropriate [US wealth] for other world citizens. It could, by passage of world immigration laws, make us open our doors to tens of millions of immigrants from poorer nations and poorer souls. The proposed [world] government would have the world army to enforce its mandates.”<sup>141</sup> This *Chicago Daily Tribune* piece was just one of the numerous articles that reacted with great hostility to the world government idea.

#### *Resistance within the American Bar Association*

Some of the most heated resistance to the world government movement arose from the American Bar Association (ABA). In the early years of the UN, the American Bar Association was relatively quiet with respect to human rights treaties—and even quite supportive of the United Nations. There was, however an intense rivalry between the ABA *Section on International and Comparative Law* and its *Special Committee on Peace and Law through the UN*. The official purpose of the latter was to study all matters relating to “the United Nations, and to all international tribunals, resolutions, declarations, treaties, conventions, pacts and agreements which affect the rights and liberties of the American people.”<sup>142</sup> Though the *Special Committee’s* name seemed to imply it was part of a cooperative endeavor between the US and the UN, it was actually comprised of some of the ABA’s most isolationist and conservative figures who opposed the US’s involvement in international human rights treaties. Importantly, Frank Holman

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<sup>141</sup> *Chicago Daily Tribune*, Editorial Desk, “A Scheme to Loot America,” Nov. 4, 1948. p. 22.

<sup>142</sup> 75 *Annu. Rep. A.B.A.* 112 (1950), Proceedings of the House of Delegates

(who became president of the American Bar Association and a leading opponent of the UN and its human rights treaties) sat on this committee.<sup>143</sup> Given the overlapping areas of law that the two groups presided over, coupled with the ideological divergence in their support for human rights treaties, a power struggle between the groups soon developed.

In 1948, for instance, the Committee on Peace and Law drafted several resolutions opposing various aspects of the UDHR and its Covenant which were not in “form as to be suitable for approval and adoption by the General Assembly of the United Nations or for promulgation and acceptance by the United States and other Member Nations.”<sup>144</sup> Although the Section on International and Comparative Law categorically opposed the Committee’s resolutions, the ABA’s governing body—the House of Delegates—approved them. After a series of such defeats in which the Section on International and Comparative Law succumbed to the more conservative resolutions of the Committee, it was clear that the Committee was becoming the more powerful group within the Bar Association. With Frank Holman, one of the Committee’s most outspoken critics of applying human rights in the domestic realm, now president of the ABA, the locus of power soon came to rest with the Committee. So although the ABA was not undivided matters surrounding human rights treaties, the Committee on Peace and Law together with President Holman became the ABA’s public voice.<sup>145</sup>

After elected as president of the organization, Holman wasted little time in beginning his campaign against the United Nations and human rights treaties. Chief amongst his broad spectrum of concerns was the prospect that United States’ laws—and

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<sup>143</sup> See generally, Kaufman, Natalie. 1990. *Human Rights Treaties and the Senate*. Also see generally, 30 *ABAJ* 274, 1944.

<sup>144</sup> 73 *Report of the Special Committee on Peace and Law through United Nations*, 283-293 at 284 (1948).

<sup>145</sup> See Kaufman, Natalie. 1990. *Human Rights Treaties and the Senate*, at 22.



therefore its traditions and practices—would be infringed upon by binding international human rights treaties. In one of Holman’s first speeches on the subject as president, he addressed an audience of lawyers at a Bar meeting in Santa Barbara, California.<sup>146</sup> Here, he argued that the UDHR and its Covenant would breach the sovereignty of the US and the rights of its citizens, “and seriously affect [the] whole constitutional system.”<sup>147</sup> The arguments and themes touched upon here would be revisited by Holman throughout his crusade.

In this early speech Holman unloaded a barrage of arguments against the United Nations, the forthcoming UDHR, and the Covenant. While the UDHR was the most proximate concern, the main target of Holman’s attack was the binding Covenant. His baleful rhetoric spanned topics that included communist infiltration, abrogation of basic property rights, infringement of individual rights, and the prospect of forced racial equality.<sup>148</sup> All of these wide-ranging threats, however—while conjuring up a distinct set of political and social demons—were subsumed within the idea that the US should not cede a modicum of its sovereignty. As a binding document that was being created *outside* the parameters of domestic US law with the intention of having an impact on the *internal* activities of UN member states, the Covenant was unacceptable to Holman.

The sanctity of the US’s territorial boundaries was a major concern for Holman. An international bill of rights, he believed, would “emasculate” the United States’ own Bill of Rights. He argued,

“In order to enforce the provisions of a bill of rights, the United Nations will have to interfere continually and minutely in the internal affairs of member nations. It

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<sup>146</sup> Tananbaum, Duane. 1988. *The Bricker Amendment Controversy*, at 10.

<sup>147</sup> Holman, Frank. 1948. “President’s Page, 34 *A.B.A.J.* 1025.

<sup>148</sup> Holman, Frank. 1948. “An “International Bill of Rights”: Proposals Have Dangerous Implications for U.S.” *American Bar Association Journal*, 34 *A.B.A.J.* 984-86, 1078-81.

will have to establish standards, and determine when and where these standards have been violated, and to take steps to correct or punish such violations.”<sup>149</sup>

The other problem looming on the horizon, would be the implementation of the Covenant. Holman warned that an “international court on human relations” might be set up to implement the foreign laws that comprised the Covenant. If the Covenant were to have such binding force *and* a mechanism that ensured adoption of its laws, the US legal system could be bound by alien totalitarian concepts. While international courts were certainly a topic of discussion at the UN, Holman’s phraseology conjures an entity that represented his most profound concerns: the extra-national control of domestic legal and social life.

Holman regularly recited the refrain, that if the Covenant were not stopped immediately, it would eventually become “the supreme law of the land.”<sup>150</sup> Using the phrase, “supreme law of the land,” was no accident. It represented a carefully worded two-pronged critique of the relationship between the US legal system and the developing body of international human rights law. First, the critique was one in which international law was viewed as a separate system of law that had no place in the domestic sphere. As soon as it began to alter internal US law, it had already gone too far. Under this line of thought, the US Constitution was the utmost legal authority—there were no laws higher or superior to it. Second, while it held the Constitution above all other law, it was also a direct critique of it. Holman and others at the ABA believed that Article VI (2) of the US Constitution, which states that treaty law shall become the “supreme law of the land,” was far too accommodating of external laws. For these detractors at the ABA, the US

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<sup>149</sup> Holman, Frank. 1948. “An “International Bill of Rights”: Proposals Have Dangerous Implications for U.S.” *American Bar Association Journal*, 34 *A.B.A.J.* 984-86, 1078-81.

<sup>150</sup> Holman, Frank. 1948. “An “International Bill of Rights”: Proposals Have Dangerous Implications for U.S.,” 34 *A.B.A. J.* 984-86, 1078-81.

Constitution actually *permitted* its own destruction (and derivatively, the destruction of US law and the American way of life more generally).

This critique was both alarmist and prescient. The critique was alarmist because of its outlandish claims that were meant to arouse fear and mistrust of international human rights treaties. Taking the rhetoric at face value, one would be led to believe that communist infiltrators and totalitarian despots were pounding at the gates. It was prescient though, because if human rights were to mean anything, they would somehow have to be integrated into the domestic laws of UN member states. Incorporating an international human rights treaty, such as the Covenant, into the existing United States legal system would require relinquishing a degree of sovereignty. And in this sense, Holman was arguing the social meaning of sovereignty. Beyond its abstract legal or political guise, it meant imposing foreign values, customs, and laws on the American social system. His greatest fear was that if the US were serious about ratifying and adhering to international treaty law, the next logical step would be to transform domestic laws and institutions to conform to the treaty law. As discussed in the next section, in 1950 a California court attempted to do just that.

### *The Implications of Human Rights Treaties Become Concrete*

Opponents of the US's involvement with international human rights treaties issued warnings that were largely hypothetical. The central arguments used by Holman, for instance, generally turned on what *could* happen if the Covenant were allowed to become law—i.e. potential threats that had yet to be realized.<sup>151</sup> In the spring of 1950, however, a California court of Appeals decision catapulted such arguments from

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<sup>151</sup> E.g. 73 *Annu. Rep. A.B.A.* 404-448, 1948; 74 *Annual Report A.B.A.* 316-339, 1949.

conjecture to reality, thereby providing opponents of international human rights treaties with tangible evidence of how human rights treaties did in fact alter US law. In doing so it helped the opposition focus its message and mobilize support against the Covenant. This decision became a major turning point in the US's relationship with human rights.

The subject of *Fujii v. The State of California* was California's Alien Land Law of 1920.<sup>152</sup> Racial discrimination against Japanese residents had prompted the creation of this law which prohibited non-US citizens from owning land in the state of California.<sup>153</sup> But due to restrictive federal naturalization laws Japanese residents were not permitted to become US citizens, and therefore a Japanese person could *never* own land in California, because under the Alien Land Law, they were "not qualified or permitted to acquire, possess, enjoy, use, cultivate, occupy or transfer real property or any interest therein in the State of California, or to have in whole or in part the beneficial use thereof." Any land that a Japanese citizen acquired was automatically subject to forfeiture by the state.<sup>154</sup>

Born in 1882, Sei Fujii was a business owner who after graduating from USC law school, started and ran a bilingual Japanese newspaper called the California Daily News.<sup>155</sup> Although he had been a California resident for approximately forty years, under California's Alien Land Law he was unable to own land title in California. After the state of California seized his property, Fujii brought claim. When the lower court ruled in favor of the state, Fujii appealed, challenging the constitutionality of the Alien

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<sup>152</sup> *Sei Fujii v. State*, 217 P.2d 481 (Cal. App. 1950).

<sup>153</sup> Suzuki, Masao. 2004. "Important or Impotent? Taking Another Look at the 1920 California Alien Land Law." *The Journal of Economic History*, Vol. 64, No. 1. For a broader historical analysis of the to Japanese exclusion movement see Daniels, Roger. *The Politics of Prejudice*. 2nd ed. Berkeley and Los Angeles: University of California Press, 1977. See 1 *Deerings Gen. Laws*, 1944 ed., p. 129, Act 261.

<sup>154</sup> *Sei Fujii v. State*, 217 P.2d 481 at 482.

<sup>155</sup> John G. Tomlinson, "Four Lives," *USC Trojan Family Magazine*, Summer 1998.

Land Law, by arguing that it arbitrarily discriminated against him based solely on his race.

Upon review of the case, Justice Emmett Wilson of the California Court of Appeal, Second District, produced a decision on April 24, 1950, that was unlike any decision to have ever come out of a court in the United States.<sup>156</sup> As opposed to looking towards the dictates of domestic law, the US Constitution, or precedents in US case law, the Court held that the Alien Land Law was invalid because it ran afoul of the *United Nations Charter*. In what would quickly be heralded as unprecedented overreaching of an appellate court, Wilson wrote that “the Charter has become ‘the supreme Law of the Land.’” Thus, he continued, “The position of this country in the family of nations forbids trafficking in innocuous generalities but demands that every State in the Union accept and act upon the Charter according to its plain language and its unmistakable purpose and intent.”

The relevant portions of the UN Charter that apparently superseded both state law and the US Constitution were Articles 55 and 56 of the Charter, in which UN member states had pledged to respect “fundamental freedoms for all without distinction as to race.” The opinion also cited the nondiscrimination clause of Article 2 of the UDHR while arguing that the Alien Land Law was incompatible with Article 17 of the UDHR which states that “Everyone has the right to own property,” and that “no one shall be arbitrarily deprived of his property.”<sup>157</sup> Justice Wilson, argued that the discrimination Fujii had experienced due to his race was “contrary both to the letter and to the spirit of

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<sup>156</sup> Justice Minor Moore and Justice Marshall F. McComb concurring. *Sei Fujii v. State*, 217 P.2d 481 (Cal. App. 1950).

<sup>157</sup> *Sei Fujii v. State*, 217 P.2d 481 at 487, 488. Article 2 reads, “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

the Charter which, as a treaty, is paramount to every law of every state in conflict with it.” Based on this reasoning, he declared California’s Alien Land Law “untenable and unenforceable.”<sup>158</sup> Though human rights supporters longed for such strongly worded, unequivocal support for international human rights, in the long term this case inflicted immeasurable damage on their movement.

### *The Implications of the Fujii Case*

US law and politics and its relationship with international law were at a crossroads. Down one path lay support for international human rights treaties and the desire to integrate their provisions into the domestic laws and policies of the United States. The other path was marked by the belief that American citizens and the legal framework that governed their relations were not to be infringed upon by external laws or treaties. The *Fujii* decision embarked recklessly down the first.

Support for *Fujii* was muted. The decision was based on questionable legal interpretation, an overreaching appeals court, and a vaguely written opinion that could be interpreted as citing the non-binding UDHR as a controlling source of law for its decision. While other US cases had mentioned the Charter in the context of human rights (see above), this was the first (and quite likely, the *only* US case) to use the Charter to invalidate a domestic law on human rights grounds. Unfortunately for human rights supporters, the *Fujii* decision was by no means an exemplar of how a domestic court might approach international treaty law.

More than anything, *Fujii* energized the opponents of the UN and international human rights treaties. The ABA’s campaign against the UDHR and the Covenant, which

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<sup>158</sup> *Sei Fujii v. State*, 217 P.2d 481 at 488.

had begun almost two years before the *Fujii* decision, continued on, but now with renewed vigor. *Fujii* provided human rights opponents with a shining example of how international human rights would eviscerate domestic laws. Additionally, the media's harsh treatment of the case provided significant publicity that paralleled the ABA's overall aims. For instance, a Chicago Daily Tribune reporter quoted an unnamed "legal authority" as saying, "If the present interpretation is allowed to stand, the Russians could send in their people and buy up land in California."<sup>159</sup> Just a day after the *Fujii* opinion was written, California's Attorney General promised to appeal to the state's highest court.<sup>160</sup> Just days before the decision, the California State legislature withdrew its Assembly Joint Resolution 26 (supporting World Government) that it had submitted to the US Congress in the previous year. Four days after Judge Wilson's opinion was released, the US Senate held an afternoon discussion of this case that held the UN Charter as the supreme law in the United States. Those who discussed the case derided the court's decision and did not hide their anxieties about international treaties usurping state and federal laws. For these Senators *Fujii* opened up the possibility that many US laws could be nullified by US courts that cited the Charter. If upheld by the higher court, *Fujii* did actually cast doubt on the laws of six other states (Arizona, Arkansas, Idaho, Louisiana, Montana, and Wyoming) with similar laws barring non-citizens from owning property.<sup>161</sup>

Senator Homer Ferguson (R-MI) was vexed. Amongst his many concerns, Ferguson worried that the principles of equality that were outlined in Article 55 of the

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<sup>159</sup> Seymour Korman, 1950. "Way to Cast off UN Yoke Sought by California," *Chicago Daily Tribune*, Apr 26, 1950, pg. 20. "'Superior Authority'?" Anonymous, *Time Magazine*, May 8, 1950, p. 21, col. 2.

<sup>160</sup> *Id.*

<sup>161</sup> Walter Tohan, "Land Laws of Eight States Periled by Coast Ruling," *Chicago Daily Tribune*, Jun 5, 1950, pg. 3.

Charter could now be the “law of the land.” He warned his colleagues that Article 55 stood to “void all statutes in any State in relation to distinctions made between the sexes.” But the implications of *Fujii* went far beyond gender equality. After a heated discussion against accepting international treaties as a superior source of law, Ferguson saved his most damning arguments for his conclusion: if *Fujii* stands as law, “we may find that [via Article 55 of the Charter] equal rights have already been established in the United States.” Offering well-timed support, Forrest Donnell (R-MO) spoke up and solemnly agreed that it “is entirely possible that a court might so hold.”<sup>162</sup>

Though the discussion was focused on the Charter, the nature of the opposition posed a major problem for the Covenant that was then being drafted. For if the Senate was unwilling to allow any external treaties from impacting domestic laws in the United States and desired to hold on to laws that would stand in clear contradiction with the Covenant, the chances of ratifying such a human rights treaty was slim.

Additionally, immediately after the *Fujii* decision, Manley O. Hudson, a respected international lawyer at Harvard who chaired the UN’s International Law Commission, and who had been involved with the drafting of the UN Charter, believed that the case had been decided erroneously and was based on a “misconception of the human rights provisions of the Charter.”<sup>163</sup> Though Hudson was a supporter of human rights, he argued that Article 56 of the Charter listed a set of broad goals to be *promoted* by member states, but did not establish any formal obligations that automatically would be

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<sup>162</sup> 96 Cong. Rec. p. 5996, April 28, 1950

<sup>163</sup> Hudson, Manley. “Charter Provisions on Human Rights in American Law,” *The American Journal of International Law*, Vol. 44 (1950), p. 543-48, at 543.



part of domestic law.<sup>164</sup> He argued that it was not the intention of the drafters of the Charter at the 1945 UN Conference on International Organization, to create any specific obligations with respect to human rights, which themselves had not yet even been defined. The only obligation incurred by the US, he argued, is the obligation to cooperate with the international community with respect to the goals outlined in Article 55 of the Charter.<sup>165</sup> In this sense, Hudson and other jurists argued that the judiciary was not the right body to implement the Charter (if at all). Instead it was a political question that would require the executive or legislative branch to act.<sup>166</sup>

The legal community, the press, the general public and the federal government had all taken great interest in the *Fujii* decision (virtually all of which was critical). Given the questionable nature of the decision, even human rights supporters did not offer the case much support. Notwithstanding the questionable nature of the decision, the critical response illustrated that many in the US were not about to quietly accept the superiority of international human rights law. Here the Charter, which was not even a proper human rights treaty, was being used to nullify domestic laws. For the opposition, things could only get worse with the Covenant, since it was being created to do just that. Here was one of the most decisive steps a US court has *ever* taken to honor international human rights in the domestic realm. This venture into internationalism, however, garnered little

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<sup>164</sup> See Manley O. Hudson. 1948. "Integrity of International Instruments," *American Journal of International Law*, 42:108.

<sup>165</sup> Hudson, Manley. 1950. "Charter Provisions on Human Rights in American Law," *The American Journal of International Law*, 44:543-48. Also see Preuss, Lawrence. 1952. "Some Aspects of the Human Rights Provisions of the Charter and their Execution in the United States." *The American Journal of International Law* 46 (2):289-96, at 292.

<sup>166</sup> Also arguing against the soundness of the verdict were, L. C. Green. 1950. "Human Rights and Colour Discrimination," *The International Law Quarterly*, 3(3): 422-426; William Fleming. 1951. "Danger to America: The Draft Covenant on Human Rights," *American Bar Association Journal* 37:739-742. For an analysis of *Fujii*, see Lockwood, Bert Jr. 1984. "The United Nations Charter and United States Civil Rights Litigation, 1946-1955," 69 *Iowa Law Review*, 901-918.

support while providing opponents more ammunition against international human rights than they could have possibly conjured on their own.

*The ABA Continues its Push with Renewed Strength*

The “dangers” of the United Nations and the international human rights treaties that the US was engaged with were in many ways abstract quantities. Whether the US would actually be bound by the future Covenant to any major extent *in practice* was still unknown. The *Fujii* decision galvanized the ABA’s opposition, for suddenly after two years of trumpeting the hypothetical dangers of international treaty law, the ABA had a concrete example of what could happen if international law were allowed to trump domestic laws, practices and mores. At the annual meeting of the Washington State Bar Association in Spokane, Washington on August 12, 1950, Holman was invigorated. “In April of this year the District Court of Appeal of California ...unequivocally sustained what I predicted...”<sup>167</sup> Holman viewed *Fujii* as “incontrovertible” evidence that his previous concerns about international human rights treaties were justified and not at all “alarmist.” Holman pledged that the ABA would intensify its efforts to “save” the US from the host of evils it now confronted.

In September of 1950, the ABA House of Delegates issued a formal resolution opposing the Draft Covenant, while the accompanying report cited very similar concerns and consequences associated with ratifying the actual Covenant.<sup>168</sup> Such a resolution was by no means an idle threat to the Covenant as the ABA was well-connected with

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<sup>167</sup> Frank E. Holman . 1950. Treaty Law-Making: A Blank Check for Writing a New Constitution,” 36 *A.B.A. J.* 707-10, 787, at 787.

<sup>168</sup> Tananbaum, Duane. 1988. *The Bricker Amendment Controversy*, at 33. Also see, “Report of the Special Committee for Peace and Law Through the United Nations,” *Annu. Rep. A.B.A.* 75:286-329.

members of Congress, many of whom were members themselves.<sup>169</sup> The ABA's solution for shoring up the US's defenses against such external scourges was to alter the US Constitution *before* human rights treaties did so first. Though dramatic, this proposed solution was not novel. As discussed above, it had been attempted numerous times in the previous years by the internationalists who feared just the opposite—that the Constitution restricted access to treaty making.

During this period the ABA was responsible for initiating a movement to amend the Constitution—a movement that would later become one of the largest and influential coalitions against international human rights law. In 1950, the ABA House of Delegates also authorized an internal study of the feasibility of a constitutional amendment relating to treaty making.<sup>170</sup> Its goal was to limit the ability of international human rights treaties from becoming law in the US. It recommended that the US Constitution be amended in three ways: First, all international treaties would require congressional legislation before they applied domestically—that is, they could not automatically become law (as assumed in the *Fujii* case). Second, Congress would not be allowed to make laws that were not otherwise “authorized by the Constitution.” Third, no international law could alter the Constitution the individual rights and freedoms it grants to Congress, the states or the people. The House of Delegates additionally authorized copies of the resolution opposing the Covenant, resolutions relating to the proposed constitutional amendment and any suggestions by the committee and its members to be transmitted to Congress and the US Delegation to the United Nations.<sup>171</sup>

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<sup>169</sup> Kaufman, Natalie. 1990. *Human Rights Treaties and the Senate*.

<sup>170</sup> “Report of the Special Committee for Peace and Law Through the United Nations,” *Annu. Rep. A.B.A.* 75:286-329.

<sup>171</sup> *Id.* at 286-87.

Various scholars and human rights supporters pushed back against the ABA's attack. Quincy Wright, a preeminent US scholar of international law and international relations, and President of the American Political Science Association from 1948-1949, argued that in time a gradual use of the courts for implementing the UN Charter would provide international legal consistency and create an environment in which the observance of human rights would become a reality (though he realized there were major political hurdles that still needed to be overcome).<sup>172</sup> Oscar Schachter, Deputy Director, United Nations Legal Department, believed that the opponents were exaggerating their claims about the dangers of international human rights treaties.<sup>173</sup>

As shown in detail in subsequent chapters, the strength and momentum, however, seemed to lay with the opponents of international human rights treaties.<sup>174</sup> Former president Herbert Hoover seemed to agree as well. In a national radio address on January 27, 1952 he warned that the US's "relations to the United Nations Charter should be revised. It must not be allowed to dominate the internal sovereignty of our Government. Our courts have already made decisions that the Charter overrides our domestic laws."<sup>175</sup> For opponents of international human rights treaties *Fujii* was a godsend. In addition to directly addressing the ongoing controversies surrounding human rights laws, the central issues of the case mapped directly on to a set of gripping civic concerns. First, the

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<sup>172</sup> See, E.H.C. 1950. "The Declaration of Human Rights, the United Nations Charter and Their Effect on the Domestic Law of Human Rights." *Virginia Law Review* 36 (8):1059-84; Wright, Quincy. 1951. "National Courts and Human Rights-The Fujii Case." *The American Journal of International Law* 45 (1):62-82, at 70.

<sup>173</sup> Chafee, Zechariah, Jr. 1951. "Federal and State Powers under the UN Covenant on Human Rights." *Wis. L. Rev.* 1951:389; Chafee, Zechariah, Jr. 1951. "Problems of the Draft International Covenant on Human Rights." *Proceedings of the American Philosophical Society* 95 (5):471-89; Chafee, Zechariah, Jr. 1952. "Stop Being Terrified of Treaties: Stop Being Scared of the Constitution." *A.B.A. J.* 38:731.

<sup>174</sup> Sutherland, Arthur E., Jr. 1951. "Restricting the Treaty Power." *Harvard Law Review* 65 (8):1305-38.

<sup>175</sup> "Text of Hoover Address Reviving 'Great Debate' Over Arms Policy," *New York Times*, Jan 28, 1952, at 6.

question of whether and how international human rights would be applied in the domestic context was a controversial topic to begin with. Even steadfast human rights supporters understood it was a complex and charged matter that required incredible political dexterity and legal acumen to implement successfully. The *Fujii* court, however, used a hammer for a surgeon's job. As a result supporters could not rally behind the historic moment and opponents fed on the opinion like hungry sharks. Second, the Cold War fear of communist infiltration and McCarthyism was top of mind for many. Associating human rights with communism and enemies of the state was just one way that opponents gained traction. The fact that the plaintiff in the case was a Japanese citizen did not help matters so close to the end of a war in which the US fought against the Japanese. The particular confluence of facts in this case (i.e. an international treaty dictating the terms of domestic social relations between a racial outsider and war-time enemy and the American public) provided detractors a ready-made package of social demons to rally against. As a test-case for the promotion of increased internationalism, this was a complete failure.

In 1952, the California Supreme Court invalidated the Appeals Courts' ruling, holding that the lower court had erred in its decision—international treaty law was not an appropriate source of law on which to base its decision.<sup>176</sup> In addition to this ruling serving as vindication for the opponents of international human rights treaties, it all but closed the door on incorporating international human rights laws through judicial decision.

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<sup>176</sup> 38 *Cal.2d* 718, 242 *P.2d* 617 (1952).

## **Chapter 4**

### **Saving Empire: The Attempt to Create (non)-Universal Human Rights**

As a set of rules for delineating appropriate social, political, and economic relationships between states and their populations, after World War II, human rights offered much to be hopeful for—and much that threatened the status quo. While human rights held great promise for the hundreds of millions of people who then lived in colonial dependencies, the colonial powers were much less sanguine about the universal extension of this empowering concept. With concepts like equality and self-determination, the colonial powers were now faced with an emerging conception of law that undercut the foundations of the colonial relationship. So during the drafting of the International Bill of Human Rights, Great Britain endorsed a conception of human rights that would be as consistent as possible with the social relationships of its colonial empire.

Although today colonialism and human rights seem entirely antithetical to one another, it is important to note that during this time period “human rights” remained a partially-formed concept—its precise terms were still a matter of intense debate and had yet to be worked out. During the drafting of the UDHR and its Covenant(s), the scope of human rights—i.e. whether it was to become a universal or restricted concept, as well as its source—whether created by a sovereign authority or fundamental and natural—both became important sites of debate over colonialism.

*UNESCO, Human Rights, and Philosophy*

Before the UDHR was drafted, the United Nations hoped to attain some clarity (or perhaps even consensus) about what human rights actually were. A specialized agency of the United Nations solicited the aid of over thirty of the leading philosophical minds of the time to identify the nature, sources, and foundations of human rights. Among the many notable figures enlisted for this task were the French philosopher, Jacques Maritain, Quincy Wright, an American political scientist and international law scholar, Aldous Huxley, and Mahatma Gandhi. Designed to serve as a resource for the drafters (though never seriously used), the resulting, nearly 300-page document captured an extremely broad spectrum of theoretical perspectives and justifications for the human rights that were being considered at the UN.

Identifying the basic philosophical underpinnings of human rights was soon deemed a task wholly separate from the actual mechanics of the drafting process, and was therefore undertaken by the United Nations Educational, Scientific and Cultural Organization (UNESCO)—a specialized UN agency separate from the Human Rights Commission that was responsible for drafting the International Bill of Human Rights.<sup>177</sup> The compartmentalization of these duties was in part a function of pragmatic considerations. For one, the vast (yet predictable) breadth of the philosophical orientations that emerged, though excellent food for debate and discussion, was decidedly stifling in the context of drafting. For often, the intellectual starting points—be it Marxism, classical liberalism, Christianity, or Buddhism—represented starkly divergent intellectual schools of thought that were often mutually exclusive of one another.

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<sup>177</sup> Under its constitution, UNESCO was created in part to promote “collaboration among nations through education, science and culture” and to “bridge the cultural differences of the nations by fostering cooperation and intellectual activity.”

John Humphrey—the Canadian legal scholar responsible for creating the initial draft of the UDHR—realized just how heated and passionate some of these philosophical discussions could become while having breakfast with Charles Malik. In his memoirs, Humphrey recalls the Lebanese natural rights philosopher, diplomat, theologian, and member of the Commission on Human Rights (later President of the General Assembly), erupting in “a fit of temper” after Humphrey brought up Hans Kelsen’s influential theory of legal positivism.<sup>178</sup> For Malik, one of the most disturbing debates over human rights was the one between natural and positive law. As a philosopher and a man of religious faith, Malik believed that humans possessed inherent characteristics such as dignity, the capacity for reason, and conscience. Nature also endowed man with a set of natural rights,

“that he cannot be held in slavery or servitude, that he cannot be subjected to arbitrary arrest, that he is presumed innocent until proved guilty, that his person is inviolable, that he has the natural right to freedom of thought, conscience, religion and expression and so on down the list of proclaimed rights.”<sup>179</sup>

Suggesting that a state, a parliament, or even the United Nations could somehow create or grant such preexisting rights was utter blasphemy. The converse of this common (yet, for Malik, thoroughly mistaken) belief was even worse, for positive law could be used just as easily to revoke anything it extends. Malik firmly believed that human rights were “metaphysically prior to any positive law, and any such law must either conform to them or else be by nature null and void.”<sup>180</sup>

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<sup>178</sup> Humphrey, John P. 1983. “The Memoirs of John P. Humphrey, the First Director of the United Nations Division of Human Rights,” *Human Rights Quarterly*, Vol. 5, No. 4, pp. 387-439, at 397.

<sup>179</sup> <http://www.udhr.org/history/talkon.htm> (last accessed, 09.2010).

<sup>180</sup> *Id.*



Given such deep-rooted beliefs on all sides, it was decided that creating a human rights treaty would be virtually impossible if discussions of theory and metaphysics were permitted at the drafting table. Nevertheless, the UNESCO committee was actually quite optimistic about the ability for the Commission on Human Rights to reach consensus and agreement on the substance of the law—at least in the narrow confines of political diplomacy and legal draftsmanship. Opening up the drafting discussions to the all-important questions, *What is a right?* and *Where do rights come from?* was a recipe for endless debate, discord, and most likely failure. The oft-quoted quip from a UNESCO representative, “Yes, we agree about the rights but on condition that no one asks us why,” nicely sums up the dilemma as well as the chosen solution.<sup>181</sup>

For a task as novel and potentially monumental as drafting an international bill of human rights, pragmatic solutions are necessary. But for a comprehensive *analysis* such as the present one, these philosophical debates are virtually inseparable from the legal drafting debates; they are in fact part of the very same social struggle. For both the legal text of a human rights instrument, as well as its philosophical underpinnings serve to carve out an institutional sphere in which a particular class of social and political relationships can flourish (while its competitors falter).

If Humphrey integrated Kelsen’s theory of law into his draft of the UDHR, the consequences for colonial territories and their inhabitants could be devastating. For if the status of law only vests from pronouncements issued and executed by a sovereign

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<sup>181</sup> This was the reply offered by a UNESCO committee member when asked by an incredulous observer about whether proponents of such vastly different philosophical orientations had in fact led to a common list of rights (Maritain, Jacques, “Introduction,” in *UNESCO Symposium 1948: Report Comments and Interpretations*, Page 1). John Humphrey also noted the same thing during one of the very first meeting of the Commission on Human Rights (Humphrey, John P. 1983. “The Memoirs of John P. Humphrey, the First Director of the United Nations Division of Human Rights,” *Human Rights Quarterly*, Vol. 5, No. 4, pp. 387-439, at 403).

authority, those living in colonial dependencies would remain bound by the laws and dictates of the metropole. On the other hand, for those living in colonial dependencies, the idea of universal, natural rights was emancipatory and held great hope (just as it did for those on the winning sides of the French and American Revolutions). Recall Edmund Burke's and Jeremy Bentham's mutual disdain for natural rights (the latter calling natural rights "a bastard brood of monsters, 'gorgons and chimaeras dire'"). The ferociousness of the Bentham's anti-natural rights diatribe similarly shows that much more than philosophical ideas was at stake. Indeed, natural rights permitted the destruction of the social and political arrangements that were both created and protected by existing positive law. Thus, the natural rights that were embraced by revolutionaries, for Bentham were nothing more than the "mortal enemies of law, the subverters of government, and the assassins of security."<sup>182</sup> For regardless of what a sovereign power decrees through law, under a natural rights orientation, the final source and authority exists above and beyond the sovereign authority of state or empire. Unwittingly, through jurisprudential path, Humphrey had just tread into one of the most pressing and emotionally charged social issues of the day: did colonial inhabitants have human rights?

Even when the differences between natural and positivist theories of jurisprudence were jettisoned for law and politics in the Commission on Human Rights, this was precisely the ongoing battle fought during the drafting of the International Bill of Human Rights, between the colonial powers and their foes. Whether approached through philosophical debate, the language of law, or the conventions of diplomacy, the underlying social question was the same: could colonial inhabitants have international

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<sup>182</sup> Bentham, Jeremy. 1843. "Anarchical Fallacies: Being An Examination of the Declarations of Rights Issued During the French Revolution." In *The Works of Jeremy Bentham*, ed. J. Bowring, at lns. 731–36.

legal, political and social recognition absent the colonial authority. Though perhaps never even mentioned by name, colonial powers such as Belgium and France (but Great Britain in particular), were tireless executors of a positivist theory of law during the drafting of the International Bill of Human Rights. Whatever it was called—a philosophy, a drafting strategy, a political orientation, or simply a “world view”—it was a strong scaffold upon which to construct the human rights concept in the image of empire.

#### *1946-1948 – The Debates over the Universal Declaration of Human Rights*

World War II left behind a power vacuum and an uncertain future for Europe. In its immediate aftermath, wartime allies quickly became Cold War rivals. For the Soviet Union, if the colonial powers—particularly Great Britain—were permitted to regain their power and re-establish the rules and structures of their empire within the framework of the United Nations, the Soviet Union would suffer. Very early on, the Soviet Union began to target the Western colonial powers and advocate on behalf of those in dependencies for a swift end to colonialism. The International Bill of Human Rights became an important battleground in this struggle. The human rights documents that emerged from the drafting process would speak to whether or not the nations of the world believed the colonial relationship was a legitimate one. The Soviet Union therefore pushed for a concept of human rights that unequivocally *rejected* colonialism. Great Britain, on the other hand, searched for a way to emerge from the drafting process with a definition of human rights that was as least damaging as possible to its imperial system.

During the drafting of the UDHR, the colonial problem didn't develop into debate until the end of 1947, at which time the Soviet Union increasingly began to define itself in the Commission on Human Rights as a strong opponent of colonialism. Tension

between the British and Soviet delegations began to appear during the deliberations of the Second Session of the Commission on Human Rights in December of 1947 when the Soviet and Belarus representatives in the Commission on Human Rights voiced their concerns about issues surrounding elections and whether basic political rights would be extended to trust and non-self governing territories. It was their opinion that colonial dependencies should be explicitly included as beneficiaries of any human rights document.<sup>183</sup> This posed at least two problems for Great Britain. First, political questions—especially those relating to elections—were particularly worrying to a government that presided over a decidedly undemocratic empire. A second issue however was much more pressing: would colonial dependencies and their inhabitants be mentioned at *all* as rights holders? The British delegation strongly opposed any explicit mention of its dependencies.

By the late 1940s the colonial powers were fighting an uphill normative battle—the universal character of human rights was gaining considerable momentum. But UN rules, organizational structures, and simple power politics were leveraged with great skill by the colonial powers. These structural inequalities weighed heavily in favor of the colonial powers reinstalling their colonial structures within the emerging human rights concept itself (and in a perverted tautology was evidence of the correctness of their theory of legal positivism).<sup>184</sup>

### *The Covenant and the Colonial Clause*

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<sup>183</sup> UN Doc E/CN.4/AC.2/SR.7; E/CN.4/57.

<sup>184</sup> The colonial debates during the drafting of the UDHR are recounted in great detail in, Morsink, Johannes. 1999. *The Universal Declaration of Human Rights*.

While the mention of the colonies in the UDHR was a central issue for Great Britain, whatever the result, it did not create any binding legal obligations. The Covenant, however, was to be a legally binding international treaty. What was incorporated within it *would* have a legally enforceable character. Accordingly, Great Britain, in its attempt to maintain the legal conventions and political structures of its empire, introduced a proposal for a *colonial clause*.

### *The Colonial Clause as Law-- Overview*

There were several different versions of this legal device which by the late nineteenth and early twentieth centuries, had become a common convention in colonial governance.<sup>185</sup> Some colonial clauses, for example, contained provisions for the optional application of a particular treaty. That is, the colonial clause granted the colonial power the discretion to withhold the treaty from (or apply it to) any or all of its dependencies. E.g. a model colonial clause created in 1948 stipulates:

A state party to the present agreement may at the time of signature, ratification, accession or at any time thereafter by notification given declare that the present convention extend to any of the territories for the international relations of which it is responsible, and the agreement shall, from the date of the receipt of the notification, or from such other date as may be specified in the notification, extend to the territory named therein.<sup>186</sup>

In other cases a colonial clause could hold that a treaty automatically applied to a colonial power's dependencies, but included a stipulation allowing the power to exclude any (or all) of its dependencies if it so chose. For example:

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<sup>185</sup> See the *1904 International Agreement for the Suppression of the White Slave Traffic*. Fawcett (1949) traces this colonial tradition to the mid nineteenth century, though territorial exclusion clauses in treaties appear as early as 1528 (see Fawcett, J.E.S. 1949. "Treaty Relations of British Overseas Territories." *British Yearbook of International Law* 26:86-107).

<sup>186</sup> Draft Art. 25. *Yearbook on Human Rights*, 1947:549; also cited in Simpson 2001:289.

Any Member or State signing the present Convention may declare that the signature does not include any or all of its colonies, overseas possessions, protectorates or territories under its sovereignty or authority.<sup>187</sup>

Another version of the colonial clause granted the colonial signatory the right at any time to withdraw the treaty's application with respect to any of its dependencies. For example:

Any High Contracting Party may at any moment withdraw, in whole or in part, any declaration made under the second paragraph of this Article. Such withdrawal will take effect one year after its receipt by the Secretary-General of the League of Nations.<sup>188</sup>

Finally, a colonial clause might mandate the automatic application of a treaty to all dependencies.<sup>189</sup> Whichever form it took, the presence of a colonial clause advanced the proposition that colonial territories were not valid, independent actors, and that in international law their existence was solely a function of the colonial relationship.

Though the colonial clause had been used for decades in the colonial context, it was not clear what the implications were for including a colonial clause in United Nations treaties—particularly at a moment when the trend was towards decolonization. In 1947 though, the representatives in the General Assembly established a very important bright-line rule; they decided that the deletion of such provisions meant that the Conventions would automatically “apply to all territories for which the Contracting States had international responsibility.”<sup>190</sup> From this moment, the colonial powers were on notice, for this decision implied that if a colonial clause was absent from a treaty, a

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<sup>187</sup> Article 14 of the *1921 International Convention for the Suppression of the Traffic in Women and Children*.

<sup>188</sup> Article 10 of the *1933 International Convention for the Suppression of the Traffic in Women of Full Age*.

<sup>189</sup> In 1950 the Commission on Human Rights requested that the Secretary General draft a report on the history, uses and legal issues surrounding the colonial clause issue. This document (UN Doc E/1721) became an important resource in the debates over the colonial clause. For a discussion of the colonial clause, see Liang, Yuen-Li. 1951. "Colonial Clauses and Federal Clauses in United Nations Multilateral Instruments." *The American Journal of International Law* 45 (1):108-28.

<sup>190</sup> See E/1721, p.16, 36.

colonial power's dependencies would be recognized by international law. In the case of human rights treaties, they would be covered under the treaty and would therefore be entitled to all of its rights. While this alone did not necessarily bestow sovereign equality upon the trust and non-self governing territories, it was a step towards leveling a relationship that depended on sovereign *inequality*.<sup>191</sup> The treaties that had been in question with respect to the colonial clause however, had not been human rights treaties. During the drafting of the Covenant this battle would take new form, becoming increasingly bitter and hostile. The colonial powers attempted to retain the colonial clause and establish a restricted and limited conception of human rights law, despite the growing momentum towards a "universal" conception of human rights.

When inserted into an international treaty, this legal mechanism would give a colonial power complete control over whether it extended or blocked the application of that particular treaty with respect to its colonial territories. Though a colonial clause generally constituted no more than a paragraph or two text, it embodied a social ideology, a political system, and a legal framework that *was* colonialism. The black-letter law of a colonial clause stood for a particular social relationship between metropole and colony that was both private and unequal. It was a private relationship between metropole and colony because international law did not apply directly to colony and was required to be filtered through the legal framework of the metropole for it to even be considered. Second, it was a relationship of political inequality because the colonies were dependent upon the metropole for legal and political recognition and subject to its decisions and policies. Finally, it preserved Great Britain's colonial legal framework of "indirect rule,"

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<sup>191</sup> "Trust and non-self governing territories" is a term which was in common use at the time, and refers to colonies, dependencies, and territorial possessions.

in which the consent of local-level legislative bodies was required before an international treaty could take effect.<sup>192</sup> In this way the colonial clause and the practice of colonialism (even when integrated into the framework of human rights) were mutually reinforcing.<sup>193</sup>

Though not unknown, the battles over the colonial clause have not enjoyed much attention in the literature on colonialism and the development of modern international human rights law. Because researchers often begin with the texts of the UDHR and the Covenants, as they appear today, and work backwards to examine how various individual articles came to be, amongst the many International Bill of Human Rights drafting debates between colonial and anti-colonial factions, the battle over the right to self-determination (which appears prominently in Article 1 of both of the Covenants) tends to be highlighted in historical research.<sup>194</sup> In-depth analyses of the colonial clause (which unlike the right to self-determination, did not survive the drafting process and appears nowhere in the body of the International Bill of Human Rights), tend to take a back seat to the items that actually appear in the text. For instance, in the 800 pages that comprise what is probably some of the most thorough and exhaustive research of the drafting of the International Covenant on Civil and Political Rights, Bossuyt does not discuss the colonial clause.<sup>195</sup>

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<sup>192</sup> Although the system of “indirect rule” was unique to Great Britain, France, Belgium and the United States generally voted as a bloc in support of the colonial clause. See Simpson, Brian A.W. 2001. *Human Rights and the End of Empire*, at 290.

<sup>193</sup> Since the British colonial relationship was based on a legal system in which the consent of local-level legislative bodies was required before an international treaty could take effect, the inclusion of a colonial applications clause was most strongly fought for by Great Britain (see Simpson 2001:290). That said, France, Belgium and the United States were strong allies and generally voted as a bloc in support of the colonial clause.

<sup>194</sup> E.g. Cassese, Antonio. 1981. "The Self-determination of Peoples." In *The International Bill of Rights*, ed. L. Henkin. New York: Columbia University Press; El-Ayouty, Yassin. 1971. *The United Nations and Decolonization*;

<sup>195</sup> Bossuyt, Marc J. 1987. *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*. But see, Fawcett, J.E.S. 1949. "Treaty Relations of British Overseas Territories." *British Yearbook of International Law* 26:86-107; Liang, Yuen-Li. 1951. "Colonial Clauses and Federal



Methodologically, it is of great value for a researcher to take note of the *rejection* of certain ideas that do not enter legal texts.<sup>196</sup> What is perhaps even more important, however, are the “aversive alternatives”—i.e. those elements “that are so forcefully rejected that they cast their influence over the whole...effort.”<sup>197</sup> Indeed, when examining legal documents the negative elements (i.e. items that do not appear in the text because they were actively removed, prevented from being included, or were never even considered as valid in the first place) can be just as important as the items that actually show up in the text. These insights are particularly relevant in the present case; in addition to examining the actual contents of the International Bill of Human Rights, researchers must also focus on what did *not* become a part of it. In this regard, the “missing” colonial clause is no exception.<sup>198</sup>

This research approach demonstrates that the colonial clause debates were at least as important as those over self-determination. For while the battle over self-determination focused on the validity of a specific right, the battle over the colonial clause was essentially a debate over the entire meaning of *universal* human rights. If the colonial powers had succeeded in placing colonial clauses in the International Bill of Human Rights, human rights would not be “fundamental” to all humans. Instead, human rights (at least in theory) would have become subordinate to an individual’s political situation—an understanding of human rights that is completely antithetical to its contemporary meaning. At stake, then, was the question of whether colonial territories

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Clauses in United Nations Multilateral Instruments." *The American Journal of International Law* 45 (1):108-28.

<sup>196</sup> Scheppele, Kim Lane. 2003. "Aspirational and Aversive Constitutionalism: The Case for Studying Cross National Influence Through Negative Models." *International Journal of Constitutional Law* 1 (2):296-324.

<sup>197</sup> *Id.*, at 298.

<sup>198</sup> Though Scheppele’s discussion is oriented towards national constitutions rather than international human rights instruments, I will borrow the substance of her approach and apply it to the latter.

and their inhabitants had *any* fundamental human rights absent the administering colonial power. Were the inhabitants of the colonial territories to be recognized by the international community first as *humans* or as *imperial subjects*? As illustrated throughout this project, in addition to creating a lasting definition of human rights, how these questions were answered has also influenced over sixty years of US human rights policy.

### *Covenant Debates*

#### *The Fight over the Colonial Clause in the Draft Covenant-The Sides Form*

Most studies of the drafting process look at the drafting of the UDHR or of the Covenants in isolation from one another. It is important to recognize that between 1947 through the end of 1948, that the UDHR and its Covenant were being discussed concurrently by the Commission on Human Rights. Because the UDHR and its Covenant were typically discussed at the UN as separate agenda items, with very different time horizons for their completion, the official records typically compartmentalize these drafting processes. The delegations of course, were quite aware of the concurrent processes, and tailored their arguments and strategies accordingly. The battles won or lost with respect to the UDHR impacted the debates on the Covenant as well as the relative strength of the delegations' bargaining positions. This is very important in the present narrative, for even if the colonies were mentioned explicitly in the UDHR, the British delegation possessed a trump card within the colonial clause. At a legal level, anything given to the colonies in the UDHR, could technically be withheld indefinitely through a colonial clause.

Just one day after the Soviet Union raised the question about elections in the discussions over the UDHR, Great Britain fired right back with a proposal to include a version of the colonial clause with in the draft Covenant.<sup>199</sup> In addition to opposing such issues as they arose, Great Britain deployed this legal backstop to prevent the Covenant as a whole from automatically applying to its dependencies. The colonial clause was therefore something of an insurance policy for the British delegation. While it would certainly be opposed by many states at the United Nations, if included, the British government would have the final say on the actual application of the rights. When voted on, Great Britain’s colonial clause proposal passed and became Article 25 of the “Draft International Covenant on Human Rights.” The text of this colonial clause read:

1. This Covenant shall apply in respect of any Colony or overseas territory of a State party hereto, or to any territory subject to the suzerainty or protection of such State, or to any territory in respect of which such State exercises a mandate or trusteeship, when that State has acceded on behalf and in respect of such Colony or territory.
2. The State concerned shall, if necessary, seek the consent at the earliest possible moment of the governments of all such colonies and territories to this Bill and accede on behalf and in respect of each such colony and territory immediately its consent has been obtained.<sup>200</sup>

### *The Anti-Colonial Position*

The issue was tabled until the next meeting of the Human Rights Commission during the spring of 1948. During these meetings, the Soviet delegation believed that the question of how (if at all) the Covenant would be extended to the colonies was of major

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<sup>199</sup> At this early stage, the terms Declaration, Convention, Covenant, and International Bill of Human Rights were used with some confusion. In a meeting on December 16, 1947, the Commission on Human Rights decided “to apply the term ‘International Bill of Human Rights’, or for brevity, ‘Bill of Rights’, to the entirety of documents in preparation”—i.e. the UDHR and the Convention. The Convention, in turn, refers to what later became the two Covenants. UN Doc E/600, p.6; E/CN.4/AC.3/SR.8; E/CN.4/56.

<sup>200</sup> UN Doc E/600.

importance and should be discussed by the drafting sub-committee.<sup>201</sup> Pavlov, the Soviet representative, believed “it was clear that the authors of draft Article 25 [i.e. Great Britain] did not wish those rights and liberties to be extended to non-self-governing territories. The equivocal wording of the article left the final disposal of the non-self-governing territories to the arbitrary decision of the administering authority.”<sup>202</sup> In a bold move that initiated a major drafting battle over the Colonial Clause, Pavlov suggested replacing the British text with an article that that was “clear, concise and unequivocal”: an *anti-colonial clause*.

“The provisions of this Covenant shall apply to the territories of States parties to the Covenant, and to any territories for the international relations of which the said contracting Government is responsible (non-self-governing territories, trust territories and colonial territories).”<sup>203</sup>

#### *A Line is Drawn—Human Rights Stand for two Competing Social Orders*

The line had been drawn. The drafting committee now had before it two competing articles on the issue of the colonies. The British draft which would establish a limited conception of human rights that incorporated colonial legal, social and political conventions into the nascent framework of the human rights concept, and the Soviet draft that pushed for a universal human rights concept. This moment represented a potential turning point for colonial empires, their dependencies and the concept of human rights, itself. The Soviet’s strategy of drawing a bright line between those who supported the

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<sup>201</sup> UN Doc E/CN.4/AC.1/SR.43.

<sup>202</sup> UN Doc E/CN.4/AC.1/SR.43/p.7.

<sup>203</sup> UN Doc E/CN.4/AC.1/SR.43/p.7.

British proposal and those who supported their own was excellent politics. It was in fact the legal manifestation of the Soviet's stated foreign policy.<sup>204</sup>

The conventions and practices of colonialism were becoming less and less tenable in the post War world—a reality that Great Britain, not least of all, understood quite well when engaging in foreign affairs. During this period, Great Britain was not entirely unified in its support for the colonial clause. At times, the growing strength of the human rights discourse proved to be a conundrum for the diverging aims of Great Britain's Foreign Office on the one hand, and the Colonial Office on the other. The former being responsible for foreign relations and the latter was charged with maintaining the British colonial empire.<sup>205</sup> The Colonial Office tended to fall in line with traditional colonial ideology and resisted a universal conception of human rights more so than the Foreign Office. The Foreign Office understood that at times maintaining adequate relations with other states often depended on taking a more progressive approach to human rights than the Colonial Office might have been able to, lest it sabotage its own mandate.<sup>206</sup>

### *Soviets Try to put US in Colonial Camp*

In addition to the Soviet-led strategy of opposing colonialism at every turn, the Soviet Union also actively sought to define the US as a leader of the “imperialist camp.”<sup>207</sup> As an institution that was clearly in decline (though no one knew whether it would be years or decades), there were political gains to be had at the US's expense. In

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<sup>204</sup> Recall from Chapter 2, Andrei Zhdanov's *Report on the International Situation to the Cominform*, in which he divided the world into two camps: “the non-democratic, imperialists which were led by the US, and the democratic, anti-imperialists, led by the Soviet Union.

<sup>205</sup> Simpson (2001) recounts some of the heated internal debates between the two offices in 1948 when Great Britain was creating its own draft of the UDHR.

<sup>206</sup> Simpson, Brian A.W. 2001. *Human Rights and the End of Empire*.

<sup>207</sup> Jacobson, Harold K. 1962. "The United Nations and Colonialism: A Tentative Appraisal." *International Organization* 16 (1):37-56.

terms of political alliances, bloc politics, and the broader arc of the burgeoning Cold War, this was an image that was potentially very damaging for the US. In this regard, the US and the Soviet Union were fighting for the same limited resource: a position of moral leadership at the UN. This was a valuable asset that would pay dividends in cultivating relationships with not only the smaller and non-Western states that were in the UN at the time, but also all of the dependencies that eventually would become members.

The difficulty for the United States was that it in many respects it *was* a member of the older Western, colonial imperialists.<sup>208</sup> As their strongest ally, the US typically sided with colonial powers such as Great Britain, France and Belgium. Historically, the US originated from the same social, political and legal stock. But perhaps even more damaging, was the fact that the US seemed to adhere to the same exclusionary legal positions as the British, while subscribing at home to a racial ideology that they saw as inseparable from the one central to colonialism. As discussed in subsequent chapters, at the time the US was waging a concurrent and just as unpopular battle to get a “Federal State Clause” included in the text of the Covenant (this was essentially a colonial clause intended for federal states).<sup>209</sup> One of the major issues that was debated extensively was whether the colonial clause and the federal state clause issues should (1) be discussed together in debate, and (2) whether they should be merged together in the text of the Covenant as a single article. This of course was much more than simply a matter of legal drafting. It was a way to legally enshrine the US’s close relationship with the colonial tradition. While the US fought and won on both points, the hours of debates over how

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<sup>208</sup> *Id.* at 42.

<sup>209</sup> As discussed in the following Chapter, the effect of the Federal State Clause was that the Covenant would not automatically apply to the federal states of the United States with respect to matters that were not within the jurisdictional purview of the federal government—e.g. racial discrimination.

similar the colonial and federal state clauses were (on its own, regardless of outcome) put the US closer than it would have liked to the colonial powers.<sup>210</sup> Throughout these colonial and federal state clause debates the US and Great Britain—at a definite cost to their moral leadership at the UN—remained loyal in their support for the other’s clause.

### *Human Rights Without Political Recognition?*

History seemed to be repeating itself. The debates over what was right for the colonial dependencies were for the most part initiated and waged by the great powers, on behalf of what was right for the *great powers*. While the smaller states certainly joined in and took sides, the terms of the debates were typically set by the more powerful states. The nobility of rhetoric offered by all sides barely hid (if at all) the self-interest brimming within their positions. For the Soviets, for instance, striking the colonial clause from international agreements was argued as a necessary step towards the ending the evils of colonial rule—and as it so happened, a prerequisite for achieving its own geopolitical ambitions.

For smaller anti-colonial states (a political faction within the UN that was increasingly becoming more united and powerful), Great Britain’s attempt to restrict the automatic application of human rights from including trust and non-self governing territories was one of the most blatant and abhorrent attempts to write the idea of imperial superiority into law.<sup>211</sup> Given the fact that human rights (under a natural rights orientation) were supposedly granted by virtue of one’s humanity, these states saw

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<sup>210</sup> E/CN.4/AC.1/SR.34.

<sup>211</sup> Though there was not necessarily a cohesive voting bloc of smaller and non-Western states that consistently voted together on colonial issues at this point, each of the following—to varying degrees—adopted anti-colonial positions on certain matters: Israel, Lebanon, Pakistan, Philippines, Saudi Arabia, Syria, Yemen, Ethiopia, Egypt, Afghanistan, Iraq, India, and Iran. The communist bloc—consisting of Poland, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics, Yugoslavia, the Byelorussian Soviet Socialist Republic, and Czechoslovakia—always voted together on such matters.

Britain's conduct as unforgivable. While colonial officials argued that their policies fostered democracy, colonial autonomy, and were a necessary antecedent of self-determination, opponents saw the colonial clause as a mechanism to maintain the colonial relationship and its system of economic exploitation.<sup>212</sup> The anti-colonial states believed that the presence of a colonial clause would enshrine into international law the very relationship of legal and political dependency they were attempting to shed.<sup>213</sup> But as a political fact, even the smaller and non-Western, anti-colonial states that so often advocated on behalf of the dependencies had their own political interests in mind (though these interests were much closer to those of the colonies).

Self-interested politics is an integral part of human rights formation—it is not necessarily a bad thing.<sup>214</sup> But in this setting, those whose rights were being bargained over and whose territories fought for were not able to become member states and therefore had little opportunity or power to voice their own positions. The structures, power differentials, and overall organizational framework made it extremely difficult for smaller states (let alone dependencies) to actually make these human rights “their own.” Instead, the rights being discussed were in large part defined and given meaning by the more powerful states. The tricky thing about human rights is that at the legal, political, and philosophical levels, they typically appear universal, sound emancipatory, and are presented as altruistic. The colonial structures and systemic inequities underlying the

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<sup>212</sup> Evans, Tony. 1996. *US Hegemony and the Project of Universal Human Rights*, at 138-43.

<sup>213</sup> See for example, the debates of the General Assembly, 5th Sess, 3rd Committee, 292nd, 308th and 309th Meetings, 317th Plenary Meeting.

<sup>214</sup> Throughout this project, the case is developed that using human rights as a form of politics does not in itself subvert the underlying mission of human rights. Conversely, a devout respect for the principles and ideas of human rights does not necessarily lead to better results.



colonial clause's promises of increased autonomy, independence, and self-rule is just one forceful example.

As one of the several dozen thinkers asked to provide his thoughts on human rights for UNESCO, Gandhi's contribution was inseparable from his larger struggle against the institutions and practices of colonialism. Interestingly, of all the contributors, it was Gandhi—the tireless opponent of human suffering and imperial domination—who provided the most damning (yet infinitely edifying) social statement of human rights. While other contributors provided detailed and lengthy philosophical tomes, Gandhi's three paragraph contribution captured up in a few short sentences all of the social powers and illusions of human rights.<sup>215</sup>

“I learnt from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done. Thus the very right to live accrues to us only when we do the duty of citizenship of the world. From this one fundamental statement it is easy enough to define the duties of Man and Woman and correlate every right to some corresponding duty to be first performed. Every other right can be shown to be a usurpation hardly worth fighting for.”<sup>216</sup>

This theme of “duties before rights,” was one that he spoke of long before the UDHR was to be drafted (and even before World War I or II), as he fought to secure for colonial people, the recognition necessary to have any rights at all. For Gandhi, human rights granted or bestowed upon a population by its captors had little, if any, substantive meaning. It was only by acting out the “duties” of a global citizen—and in doing so effacing the sovereign boundaries of empire within which brown-skinned human life was nothing more than fuel—that a sphere of human inviolability could first emerge. Any other freedom or right—no matter how pious sounding—represented the freedoms and rights of others. For Gandhi, the “sacred trust,” the colonial right of “indirect rule,” and

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<sup>215</sup> See Parel, Anthony J., ed. 2000. *Gandhi, Freedom, and Self-Rule*, at 10.

<sup>216</sup> See Appendix for the entire text of Gandhi's UNESCO submission.

even the “universal” political freedoms outlined in the Atlantic Charter were the very “usurpations” that were hardly worth fighting for.<sup>217</sup> But was the UDHR or the Covenant any different? Could colonial inhabitants act out Gandhi’s call to become global citizens and cross the structural barriers that currently held them as non-entities in international law and politically, as silent wards of metropolitan exigencies? Gandhi was intensely ambivalent.

Indeed, the boundaries, ideologies, and dictates of empire (and now perhaps the UN) had all but prevented such duty formation, international recognition, or for that matter, a sphere in which a political voice of their own was possible. And this of course was the insidiousness of the imperial project—it prevented colonial subjects from acting out the very human rights they apparently possessed. For Gandhi, the debate between the legal positivists and the natural rights theorists was irrelevant. Within either frame—be it through sovereign edict or one’s own inherent dignity—legal bearers of human rights so often remained as a matter of social fact, completely rightless.

#### *Smaller and Non-Western States Gain Recognition in the General Assembly*

In many respects the smaller states that opposed colonialism were woefully out-muscled by Great Britain, the US, and the Soviet Union. These powerful states maintained a disciplined staff of experienced diplomats who were supported by legions of analysts, lawyers, and governmental officials at home. Virtually every major move that was made at the United Nations had been extensively researched and vetted before the final instructions were transmitted to the United Nations representatives for action. In

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<sup>217</sup> This was the same Atlantic Charter that after signing, Churchill assured members of Parliament did not as a matter of course apply to Great Britain’s colonies (see Borgwardt, Elizabeth. 2005. *A New Deal for the World*).

addition, a global network of diplomats and foreign officers was in constant contact with embassy counterparts, making deals and trading favors ahead of the major decisions at the United Nations. In terms of achieving their agendas, all of this provided the more powerful states a major advantage over the smaller states.<sup>218</sup> As a political bloc however, these smaller states were not powerless. There was one post-war political innovation that seemed to catch many of the larger powers off guard: the Third Committee of the General Assembly.

As a political forum, the General Assembly's Third Committee—the body responsible for debating, voting on and approving the provisions within the UDHR and its Covenant(s)—offered a new sense of political equality for the United Nations member states.<sup>219</sup> Each state had an equal vote and was granted equal opportunity to voice its opinions, complaints, and concerns on the official record. Because other United Nations bodies such as the Security Council and the Trusteeship Council were exclusive and non-representative of the UN's overall membership, the smaller states made extensive use of their positions in the General Assembly—more so than was originally envisioned.<sup>220</sup> Since the official proceedings were matters of public record, the Committee's debates were monitored and reported on by news agencies around the world, and could therefore be used to rally public opinion and sway political blocs. This influenced the political dynamic considerably on many issues, as it permitted the smaller, resource-strapped states to compete directly with the larger powers such as the United States and Great Britain by leveraging public opinion.

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<sup>218</sup> Jacobson, Harold K. 1962. "The United Nations and Colonialism: A Tentative Appraisal." *International Organization* 16 (1):37-56, at 39.

<sup>219</sup> The Third Committee is responsible for social, cultural, and humanitarian matters.

<sup>220</sup> *Id.*

The tenacity with which the colonial powers fought to hold on to various elements of their empires—and in doing so maintain the systemic inequities associated with imperialism—helped spur the development of a strong, and vocal anti-colonial bloc in the UN. On such colonial matters the smaller states recognized that their larger adversaries were in many ways out of step with an increasingly widespread, progressive public sentiment.<sup>221</sup> These states seized upon this perceived weakness and broadcast it to the world. In the Third Committee the colonial powers were all but powerless to stem the flow of this discomfiting anti-colonial discourse. So during the debates over the colonial clause, many of the smaller states—embittered by colonial behavior past and present—unleashed torrents of harsh rhetoric against Great Britain’s continued opposition to extending human rights to its colonies. As a State Department memo voiced the US’s frustrations in the General Assembly, the smaller states often exhibited little “diplomatic restraint” when confronting the larger, more powerful states.

The smaller state’s tactics in the General Assembly were derided by powers such as the US and Great Britain. For one, their *modus operandi* did not conform to the established political decorum and diplomatic conventions that put Great Britain and the US at such an advantage. So most importantly, it was an effective way to mitigate the great disparities in state power. The US State Department, for example, often expressed the difficulties it had in many of the General Assembly debates over human rights. When interacting with developing Arab, Asian, Africa, Latin states, a State Department report summarized the US delegation’s two major difficulties. Tinged with the undertones of an

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<sup>221</sup> This was also very true with respect to matters surrounding race and socioeconomic rights as well. (These dynamics are discussed in subsequent chapters).

assumed racial superiority, this report also unintentionally illustrates the wide social divide between the US and “the others.”:

- (1) They generally attend UN meetings without instructions and speak idealistically, holding up to Western states western ideals in abstract form, while ignoring the inadequacies of their own Governments and countries.
- (2) In matters concerning discrimination, their intensity and emotionalism make it next to impossible to reason with them. Many are colored, and those that are not feel a close bond to those that are.<sup>222</sup>

The State Department also objected that ideals such as equality, freedom from oppression, human rights and tolerance of racial and cultural difference were “employed by a majority of ex-colonial and economically backward peoples in an emotional and frequently reckless campaign in GA committees.”<sup>223</sup> The Third Committee could certainly be a difficult place to implement an agenda—particularly if that agenda was contrary to prevailing interests. It was a place that John Humphrey said lacked “inhibitions,” and was replete with “bad manners, bad temper, fake points of order, irrelevant speeches and ambitious men who wanted to play a role in the international arena.”<sup>224</sup> Accordingly, when dealing with drafting issues related to colonialism, it was generally in Great Britain’s and the US’s interests to make as much progress as possible in the smaller Commission on Human Rights (which included building a strong coalition of support and squashing unfavorable proposals), before taking the matter to the more representative General Assembly.<sup>225</sup>

This, however, is precisely what happened when the Commission on Human Rights reached a deadlock over whether to support the British proposal or the Soviet

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<sup>222</sup> *Foreign Relations of the United States*, Bureau of United Nations Affairs, 1952-1954 (1979), Vol. III, United Nations Affairs, at 132.

<sup>223</sup> *Id.* at 90.

<sup>224</sup> John P. Humphrey. 1983. “The Memoirs of John P. Humphrey, the First Director of the United Nations Division of Human Rights,” *Human Rights Quarterly*, 5(4), at 162-63.

<sup>225</sup> The Economic and Social Council was an intermediary political forum which had to approve the Human Rights Commission’s proposals before being addressed by the General Assembly.

proposal on the colonial clause. Given the mutually exclusivity of these proposals, a compromise solution was virtually impossible).<sup>226</sup> So the commission—urged by various unnamed members—decided to put the matter before a broader and more representative forum for discussion.<sup>227</sup>

*Social Meaning is Given to Colonial Clause and Human Rights By Smaller and Non-Western States*

It was now the fall of 1950. Since the founding of the United Nations, a handful of new members had been admitted (Afghanistan, Pakistan, Burma, Israel, Indonesia, Iceland, Yemen, Sweden, and Thailand), influencing the political dynamics of the General Assembly.<sup>228</sup> During this next round of debates the Third Committee of the General Assembly discussed the colonial clause at length.<sup>229</sup> Fueled by the unrelenting position taken by the colonial powers, the anti-colonial rhetoric reached a boiling point over several weeks of bitter deliberations.

This session was certainly full of bad manners, bad tempers, and ambitious men—all wonderful for capturing the attention of the media. Indeed, the colonial issue at this session of the General Assembly garnered much attention by major news outlets. And this was of course part of the strategy—one that Great Britain and the US had little ability to control. So when the Soviet representatives made inflammatory remarks about the US's colonial credentials or how Great Britain, France and Belgium were failing to live up to their responsibilities with respect to their dependencies, the papers were there to

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<sup>226</sup> See UN Doc E/CN.4/SR.129, p.24, and UN Doc E/1681. For a procedural history see UN Doc E/1721, at 46-47.

<sup>227</sup> UN Doc E/1681/Art.25/p.5.

<sup>228</sup> Between 1946 and 1960 over four dozen states gained new membership.

<sup>229</sup> UN Doc A/C.3/SR.287-303. Also see, General Assembly, 5th Sess, 3rd Committee, 292nd, 308th and 309th Meetings, 317th Plenary Meeting.

report on it.<sup>230</sup> While this of course has become standard practice in international politics, for the former colonial territories that just a few years before had virtually no international recognition, this was a major shift (and as State Department records indicate, a constant source of irritation for the US).<sup>231</sup>

The colonial powers outlined their reasons for supporting the colonial clause which tended to repeat the same arguments that had been used over the past several years. Both Great Britain and France for example, argued that to *not* have a colonial clause would be a great disadvantage to their dependencies since, as Lord MacDonald from the UK said, the colonies would “find themselves deprived of the right to decide” if they wanted to accept the Covenant or not. Attempting to turn the argument back on his opponents, he followed up by saying that the “opponents of the colonial clause would therefore seem to be illogical since they demanded autonomy for the peoples of the non-self governing territories while at the same time denying them the right to decide for themselves.”<sup>232</sup> When it was turn for the United States delegation to voice their reasons for supporting the colonial clause, Eleanor Roosevelt attempted to balance all of the competing interests while exposing the US as little as possible to the charge of being a “colonial power.” She told the General Assembly that unlike Great Britain, the United States was not obligated by its internal laws to have a colonial clause in the text of the Covenant. The US, delegation was, however, “aware of the constitutional difficulties that might be encountered by certain States in that connexion [*sic*], and would therefore support the inclusion of a colonial clause in the draft covenant.”<sup>233</sup> In this way, the US

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<sup>230</sup> E.g. “Russian Denounces U.N. Trustee Powers,” Special to the New York Times, Oct 12, 1950, pg. 17.

<sup>231</sup> E.g. see, *Foreign Relations of the United States, 1952-1954* (1979), Vol. III, United Nations Affairs.

<sup>232</sup> UN Doc A/C.3/SR.294/p.150.

<sup>233</sup> UN Doc A/C.3/SR.294/p.153.

boiled the issue down to a legal obligation unique to the colonial powers, distanced the US from its peculiarities (and colonialism altogether), while offering support for an ally that would do the same for the US while it argued for its federal state clause.

Each of these positions, was slammed by the members of smaller states. Menon from India, for instance, called upon the first hand experience of the former British colony. She correctly argued that the colonial clause would be a way for the colonial powers to maintain their ability (through force of human rights law) to “impose their will upon” their dependencies. It was specifically in the colonies-- where people subjected to generations of abuse—specifically *needed* human rights.<sup>234</sup> Kayali of Syria—another representative from a former colonial territory—warned the General Assembly to not be fooled by those colonial powers “posing as champions of non-self governing countries... Their only purpose, of course, was to prevent the application of the covenant on human rights to colonial territories.”<sup>235</sup> Pazhwak of Afghanistan said that his delegation regarded colonialism as a flagrant violation of the most sacred rights of the individual. In depriving peoples of their rights to govern themselves, colonial powers often violated the right to life and liberty and many other fundamental rights of the individual.”<sup>236</sup> The Cuban representative, used the very composition of the General Assembly to bolster what he saw as the “most eloquent argument in favor of rejecting the colonial clause”: the presence “at the committee table of the representatives of countries which had once been Non-Self-Governing Territories.”<sup>237</sup>

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<sup>234</sup> *Id.* at 151.

<sup>235</sup> *Id.* at 153.

<sup>236</sup> UN Doc A/C.3/SR.296/p.169.

<sup>237</sup> *Id.* at 167.



At the conclusion of the debates on the colonial clause on October 27, 1950, participating states were permitted to submit their own draft resolutions.<sup>238</sup> In light of the discussions, the Philippine and Syrian delegations submitted a jointly authored draft resolution that, similar to the Soviet proposal, stated in unequivocal terms that the Covenant would apply to all territories (non-self-governing, trust, or colonial) that were administered by a metropolitan signatory.<sup>239</sup> The Delegate of the Philippines did not mince his words when stating the purpose of the resolution: it was to “do away once and for all with the so-called colonial clause which constituted a constant source of irritation, as well as of embarrassment for the colonial powers.” The resolution not only advocated for an important shift in international law, if accepted, it would also be instrumental in bringing it about. Mendez of the Philippines continued, “...a new concept had arisen in public international law—that the individual could be the subject of international law. The benefits of the covenant should therefore be extended to human beings everywhere...From the moral viewpoint the inhabitants of the dependent territories were clearly as much entitled to the enjoyment of human rights as anyone else.”<sup>240</sup>

By 1950, the normative tide had turned. Not only was the decolonization process undeniably underway, the membership of the United Nations—as represented in the General Assembly—had ratcheted up the anti-colonial sentiment. To the extent that this mood had been reflected before in the Commission on Human Rights the limited composition of the body had enabled the colonial powers to keep the colonial clause alive. However, in the Third Committee of the General Assembly the colonial powers took a political beating and were now faced with an emerging conception of law that

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<sup>238</sup> *Id.* at 170.

<sup>239</sup> UN Doc A/C.3/L.71/Rev.1.

<sup>240</sup> UN Doc A/C.3/SR.302/p.203.

undercut the foundations of their colonial law and ideology. The anti-colonial states had used the forum to their advantage by focusing their efforts on waging a war of public opinion. For the major news outlets reporting on the United Nations, the inflammatory language and heated political conflict was excellent material. Indeed, during the General Assembly meetings of 1950, the major newspapers in the United States printed scores of articles covering United Nations events.<sup>241</sup> It appeared as if the smaller and non-Western states had begun to carve out a political sphere for themselves where they could challenge the more powerful states and define for themselves their own social meanings of the human rights they were fighting for.

Though unsuccessful, the attempt to incorporate the colonial clause into the main body of the Covenant colored much of the drafting process. In response to the persistent attempts to integrate the inequities of the colonial relationship into the framework of the nascent human rights concept, the anti-colonial states fought (successfully) for the explicit mention of the “Non-Self-Governing and Trust Territories” and the inclusion of the right to self-determination. Both now enjoy pride of place in the very first article of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. So even in its absence, the colonial clause (and the underlying social struggles), was an extremely formative element in the overall development of the Covenants.

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<sup>241</sup> See e.g., “U.N. Nears Period of Crucial Work,” *Los Angeles Times*, September 3, 1950, pg. 4; “Indian Minority Taken Up” *New York Times*, September 8, 1950, pg. 13; “US Stand Explained,” *New York Times*, October 27, 1950, pg. 9; *The Washington Post*, “Louder Voice For The U.N.” Malvina Lindsay, September 16, 1950, pg. 8; *The United Press*. (1950, September 12). Nehru Urges West to End Colonialism: Says Asia Will Stay In Red Camp Unless Self-Rule Is Aided. *The Washington Post* (1923-1954), pg. 1; “Colonial Powers Scored: Saudi Arabian Asks U.N. Clause of Self-Determination,” *New York Times*, November 10, 1950; “Rights Pact Widened: U.N. Social Committee Votes to Extend Its Provisions,” *New York Times*, November 3, 1950, pg.10; “Russian Denounces U.N. Trustee Powers” *The New York Times*, October 12, 1950, pg. 17; “Chile Scores Soviet on Colonial Policies; Aide at U.N. Hails Britain’s Africa Stand,” *The New York Times*, October 13, 1950, pg. 4.

## **Chapter 5**

### **A Version of Human Rights that Permits Racial Discrimination?**

The United Nations General Assembly—particularly its Third Committee—provided smaller states a place to raise issues and wage debates (often times against the wishes of the more powerful states) that would have been impossible just a few years before. Accordingly, representatives of the smaller states and non-Western states took every opportunity to use the forum extensively, often raising issues their colleagues from the more powerful states would have rather left alone. One such issue that merged the matters of race and colonialism became a matter of international concern in the summer of 1946 when India filed a complaint with the UN about the discriminatory treatment of Indian workers in South Africa.<sup>242</sup> As one of the first major international conflicts at the United Nations, India’s complaint effectively internationalized an issue that for hundreds of years had been considered a private colonial matter.

When the South Africa issue came to debate at the UN, the United Kingdom and the United States could only sit uncomfortably as Vijayalakshmi Pandit, the Indian representative, gave a passionate and stirring speech condemning South Africa’s racial policies. Though India could not match the power and influence of states such as the UK and the US, what Pandit could leverage was what she referred to as the “bar of world

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<sup>242</sup> Filed on June 22, 1946.

opinion.”<sup>243</sup> As opposed to offering the “legal and meticulous arguments” that were typically favored by more powerful states, India’s strategy was to leverage international public opinion and call upon the “nations of the world” in “defense of the law, ethics and morality.”<sup>244</sup>

As states such as the Philippines, Panama, and the USSR joined India’s side, Sir Hartley Shawcross of the UK, sought to squash the entire debate on the issue by arguing that Pandit’s concerns were out of place in the present forum of the General Assembly. Shawcross, who was then trying war criminals as the lead British prosecutor at the Nuremburg War Crimes Tribunal, attempted to remove the issue of race from the political forum of the General Assembly.<sup>245</sup> Joined by states such as the United States, Belgium, and Canada, and South Africa, who no doubt worried about establishing the precedent that such matters were fair game in the new General Assembly, Shawcross argued for the issue to be taken up behind the closed doors of the International Court of Justice, where the court would only focus on legal issues and be insulated from such appeals to public opinion.<sup>246</sup> In this way, many of the less powerful states at the UN used the General Assembly as an international political forum to voice their opinions and define issues of importance to them.

### *Racial Issues in the United States enter the International Arena*

Because the paths leading to racial justice and equality were all but blocked in the US, many black advocacy groups during this period, like Pandit, focused their efforts on

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<sup>243</sup> UNGA Official Records, Fiftieth Plenary Meeting, December 7, 1946, p.1016.

<sup>244</sup> For her efforts and leadership, Pandit would become President of the General Assembly in 1953. UNGA Official Records, Fiftieth Plenary Meeting, December 7, 1946, p.1017.

<sup>245</sup> UNGA Official Records, Fiftieth Plenary Meeting, December 7, 1946, p.1035.

<sup>246</sup> See Borstlemann, Thomas. 1993. *Apartheid’s Reluctant Uncle: The United States and Southern Africa in the Early Cold War*. New York: Oxford University Press; also see Anderson 2003:88 for cites to FRUS documents.

internationalizing their social struggle. By joining the global populations that faced similar discrimination, these groups also sought to use the United Nations as a political venue. Broadly defined as pan-Africanism, this involved reaching out to other oppressed populations of color around the world who were fighting concurrent battles against racial discrimination.<sup>247</sup>

One method undertaken by such groups was to submit petitions to the UN outlining the US's systemic practices of segregation, discrimination and racial violence. If enough pressure could be leveraged on the United States and the international human rights treaty making process it was engaged in, they reasoned, these international treaties could lead the way towards substantive racial equality at home. In the summer of 1946, for instance, the National Negro Congress unveiled a petition that was to be submitted to the UN entitled, *A Petition to the United Nations on Behalf of 13 Million Oppressed Negro Citizens of the United States of America*. This resource-strapped, advocacy group's effort to bring the petition before the world's eyes, however, was hampered by the UN's onerous policies that required petitioners to thoroughly document actual violations. Nevertheless, this strategy was part of a growing effort to effect local changes by appealing to international audiences. In their words, US discrimination was not only "domestic in character... and was far more than an internal problem."<sup>248</sup>

Understanding that race relations were an obvious sore-spot for the US in its foreign relations, W.E.B. Du Bois and the NAACP soon thereafter built upon the efforts of the National Negro Congress. In October of 1947 they submitted to the UN an aptly-worded petition entitled, *An Appeal to the World: A Statement on the Denial of Human*

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<sup>247</sup> Pan-Africanism was a movement that preceded the creation of the UN—though the UN provided new opportunities.

<sup>248</sup> Cited by Anderson, Carol. 2003. *Eyes off the Prize*, at 89.

*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.* Walter White of the NAACP said that the petition was capitalizing on the great opportunity by “lifting the struggle of the Negro” out of the “local and national setting and placing it in the realm of the international.”<sup>249</sup> In this way they hoped to use the negative publicity generated by such a report as a lever of domestic change from outside of the United States.

It was not just advocacy groups and former colonial states that were connecting local and global matters surrounding race. In the United States, legislators, foreign diplomats, the State Department, and Truman, himself all felt the international pressures that arose from the US’s own racial policies and practices. Though this phenomenon has only recently been studied in depth by historians, these linkages quickly became critical issues for the US on multiple fronts.<sup>250</sup>

In the years following the War, the domestic and foreign presses often reported on the staggering brutality of race relations in the world’s most powerful and prosperous nation. This, the Truman Administration began to realize, posed significant issues for its diplomats. A US diplomat in India, for example, relayed his concern to the US over the Indian press calling the treatment of African Americans “shameful” and a “blot” on the US.<sup>251</sup> From 1945 to 1947, the London Times carried many articles about lynchings and other race problems in the United States.<sup>252</sup> British diplomats worried to their US

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<sup>249</sup> Cited in, Anderson, Carol. 2003. *Eyes off the Prize*, at 93.

<sup>250</sup> E.g. see Dudziak, Mary L. 2000. *Cold War Civil Rights*; Anderson, Carol. 2003. *Eyes off the Prize*.

<sup>251</sup> “Treatment of Negroes a Blot on U.S.,” *Sunday Standard* (Bombay), July 8, 1945; “Shameful Act,” *Morning Standard* (Bombay), October 16, 1945. Cited in Lauren, Paul Gordon. 1988. *Power and Prejudice*, at 164.

<sup>252</sup> “Murder ‘To Prevent Lynching’ F.B.I. Officers Sentenced,” *The Times* Jan 13, 1945, pg. 3; “Lynching In Georgia: Negro Men And Women Shot,” *The Times* Jul 27, 1946, pg. 3; “31 White Men On Trial For Lynching: Murder In S. Carolina,” *The Times*, May 15, 1947, pg. 3; “South Carolina Lynching Trial; Three Men Acquitted,” *The Times*, May 21, 1947, pg. 3; “Lynching Of A Negro; Mass Prosecution Fails In

counterparts that such stories would be excellent propaganda items for the communist bloc states to use against the US (and by association its allies).<sup>253</sup> Acting Secretary of State, Dean Acheson wrote to the Fair Employment Practice Committee that it is “quite obvious...that the existence of discriminations against minority groups in the United States is a handicap in our relations with other countries. The Department of State, therefore, has good reason to hope for the continued and increased effectiveness of public and private efforts to do away with these discriminations.”<sup>254</sup>

Within the United States, some lawmakers also embraced the international dimensions of domestic racial issues—not just in their political rhetoric—but in their actual proposed legislation. For instance, on March 27, 1947 two bills were introduced to both chambers of Congress to prohibit discrimination in employment based on “race, religion, color, national origin, or ancestry.”<sup>255</sup> Importantly, they contained verbiage that used the various human rights obligations imposed by the UN Charter as a reason for the civil rights legislation. Subsection (c) of the House bill read:

“(c) This act has also been enacted as a step toward fulfillment of the international treaty obligations imposed by the Charter of the United Nations upon the United States as a signatory thereof to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. (d) It is hereby declared to be the policy of the United States to protect the right recognized and declared in subdivision (b) hereof and to eliminate all such discrimination to the fullest extent permitted by the Constitution. This act shall be construed to effectuate such policy.”<sup>256</sup>

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Carolina,” *The Times*, May 23, 1947, pg. 3; “Negro Taken From Gaol In North Carolina, Lynching Suspected,” *The Times*, May 24, 1947, pg. 3; “Negro In ‘Protective Custody’: Escape From Lynching Gang,” *The Times*, May 27, 1947, pg. 4.

<sup>253</sup> To Secure These Rights. at pp. 147-148.

<sup>254</sup> Dean Acheson, Letter to the Fair Employment Practice Committee, May 8, 1946. Cited in To Secure These Rights, at 146-147.

<sup>255</sup> Senate Bill 984 (introduced by Ives (NY)); and House Resolution 2824 (Ives-Fulton (PA)). See 93 Cong. Rec. 2688 1947. For a detailed discussion of civil rights legislation introduced by Ives see Chen, Anthony S. 2009. *The Fifth Freedom: Jobs, Politics, and Civil Rights in the United States, 1941-1972*. Princeton, NJ: Princeton University Press. (esp. Chapter 3).

<sup>256</sup> 93 Cong. Rec. A2554 1947.

The attrition rate for bills in Congress is quite high, with most dying silently in committee (as did these). So while too much should not be read into such legislative proposals in terms of their legal standing, such referencing of race and international law is highly significant since the language of such bills is not at all chosen by chance. These bills frame racial discrimination as both a domestic *and* an international matter. Within their texts, there is a claim that US citizens have a right to be free from racial discrimination. These bills also state that the US—as a member of the UN—has an affirmative duty to guarantee that its citizens in fact remain free from racial discrimination. As discussed in previous chapters, recognizing this rights-duties nexus is imperative for actualizing, implementing, and enforcing any such rights principles. Without named duty holders that are accountable by force of law, rights principles largely remain at the normative and discursive levels. In this sense, the type of language within such bills represented a possible legal sea change for the United States. While Truman, the State Department and its foreign diplomats recognized a need (but not a duty) to improve domestic race relations at the service of pragmatic political concerns, these bills leveraged the force of international and domestic law to establish an affirmative duty on the part of the US government.

Legislators often use the text of bills as signaling devices—ways to curry favor with various constituencies by showing that a representative supports a shared cause. This means that bills are often drafted with the knowledge that even in the event that it becomes law, there is a strong likelihood that relevant sections will be amended or struck from the bill entirely. This does not in any way, however, mean that such provisions are not important. A legislator exposes herself politically when supporting such an issue and



will resist incorporating inflammatory or unpopular provisions that can be used by opponents. Amazingly, at the time, referencing such international legal obligations to override entrenched domestic racial practices was perceived as being not nearly as politically perilous as it has now become in domestic politics 60 years later. This contemporary reality is in part an outcome of this very social struggle.<sup>257</sup>

Similar themes were present in *To Secure These Rights*—a 178 page report issued in October of 1947 by the President’s Committee on Civil Rights. A major aspect of this report linked the domestic issue of racism and discrimination with broader international issues such as the push for human rights at the United Nations. This report maintained that matters typically treated as “local issues”—such as discrimination, lynching, and voting problems were not local issues, or even national matters—have serious repercussions that “echo from one end of the globe to the other.”<sup>258</sup> It argued that the US’s international standing would deteriorate with domestic racial violations.<sup>259</sup> This also affected the US’s diplomacy efforts.

“Similarly, interference with the right of a qualified citizen to vote locally cannot today remain a local problem. An American diplomat cannot forcefully argue for free elections in foreign lands without meeting the challenge that in many sections of America qualified voters do not have free access to the polls.”<sup>260</sup>

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<sup>257</sup> In the coming years the mood shifted dramatically. For example, less than twenty years later, the landmark *Civil Rights Act of 1964* does not mention the words “treaty” “human rights,” or “United Nations,” or any sources of law beyond the US Constitution. The one place that international matters were referenced in *Civil Rights Act* was in *Title VII*. Here, its ban on unlawful discriminatory employment practices was deemed to *not apply* to employment actions taken against members and associates of communist organizations.

<sup>258</sup> “To Secure These Rights: The Report of the President’s Committee on Civil Rights,” 1947, at 100-101.

<sup>259</sup> *Id.* at 98-101, 146-148.

<sup>260</sup> *Id.* at 101. The Alabama voters’ ballot during this period included a drawing of the Democrat’s mascot—a rooster—and the motto: “White Supremacy.” See *Time Magazine*, “National Affairs: Tom in the Fight,” Monday, Oct. 20, 1952. Also see “Is This What They Mean by Civil Rights?” In Cornell Political Americana Collection, Political Cartoons, 1952.

Whether such rhetoric was earnest and substantive, merely window dressing, or political bargaining chips that were never really expected to succeed, is important, though only a minor part of the overall story. Either way, they existed within the parameters of acceptable public discourse (though only for the moment). The noble sounding rhetoric upon which the US often gave reason and justification for its international agenda were hollow as long as stories and images of lynchings continued to flow in the press. Towards the end of 1947, this was excellent fuel for the communist bloc's campaign to brand the US as a "colonial power." Because racial discrimination was fundamentally a *colonial* matter in the mind of colonial dependencies, smaller and non-Western states, the US needed to take proactive steps to dispute this label and make the US seem like a progressive supporter of liberty, rather than a regressive oppressor. So when Truman spoke to international radio audiences, for instance, saying that the United States' case for representative forms of government and freedom around the world rested on "practical evidence that we have been able to put our own house in order," this was the sort of thing he was speaking of.<sup>261</sup>

The moral aspects of racial discrimination were a major concern for the United States' foreign policy. But at the time, one would be hard pressed to find a nation that did not have its own problems of discrimination. New Zealand and Australia had their problems with their indigenous populations, the Soviet Union and Eastern European states had their gulags, pogroms, and entrenched anti-Semitism, India its caste system, and so forth.<sup>262</sup> So what had the US in a difficult spot was not merely the presence of

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<sup>261</sup> "Truman's Address" June 29, 1947 speech, *Crisis*, July 1947:200. Cited in Borstlemann, Thomas. 1993. *Apartheid's Reluctant Uncle*, at 558.

<sup>262</sup> Gross, Jan T. *Fear: Anti-semitism in Poland After Auschwitz: An Essay in Historical Interpretation*. New York: Random House, 2006.

discrimination within its own borders, it was the *social meaning* that the international community was attaching to it. This social meaning (a social reality, in fact), was one that had been lived for centuries by those in former and existing colonies. It was one that viewed racism and colonialism as inseparable. Colonialism was becoming a liability not just for Great Britain, but for the US as well. Ironically, back in the US, colonialism was the last thing on the minds of the Southern segregationists.

The one thing that the segregationists could reliably count on was their filibuster. The filibuster had been used to block all federal civil rights legislation since 1875.<sup>263</sup> In addition to lynching—which was the most horrific example of the broader white supremacist policies of the South—the southern senators also blocked anti-poll tax bills in 1942, 1944, 1946, and 1948, as well as fair employment bills in 1946 and 1950.<sup>264</sup> Any human rights treaty that attempted to alter US laws on race was all but certain to be rejected by the Senate.

#### *Deliberation at the United Nations: The US and the Federal State Clause*

The principle of non-discrimination was a foundational human right that was sure to be a part of any international human rights treaty. Even the UN Charter, which offered only the most basic and vague definition of human rights, incorporated the idea of non-discrimination, mentioning the need to respect and observe human rights and

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<sup>263</sup> Maslow, Will, and Joseph B. Robison. 1953. "Civil Rights Legislation and the Fight for Equality, 1862-1952." *The University of Chicago Law Review* 20 (3):363-413, at 382, 404. For example, between 1921 and 1948 the following anti-lynching bills, each varying in small details, were introduced but never passed: H.R. 13, 67th Cong., 1st sess. (1921); H.R. 1, 68th Cong., 1st sess. (1924); S. 121, 69th Cong., 1st sess. (1927); S. 1978, 73d Cong., 2d sess. (1934); S. 24, 74th Cong., 1st sess. (1935); H.R. 1507, 75th Cong., 1st sess. (1937); H.R. 2251, 75th Cong., 1st sess. (1937); H.R. 800, 76th Cong., 3d sess. (1940); H.R. 5673, 80th Cong., 2d sess. (1948); S. 2860, 80th Cong., 2d sess. (1948), (list of bills provided by Harvey, William B. 1949. "Anti-Lynching Legislation." *Michigan Law Review* 47 (3):369-77, at 370. For a discussion of many more legislative actions surrounding race that were blocked, see generally Ford, William D. 1948. "Constitutionality of Proposed Federal Anti-Lynching Legislation." *Virginia Law Review* 34 (8):944-53.

<sup>264</sup> Maslow and Robison (1953:400).

fundamental freedoms for all without “distinction as to race, sex, language, or religion” four times.<sup>265</sup> With over a third of the US Senate sure to reject a treaty containing an enforceable non-discrimination clause, early on in the drafting process the US devised a pre-emptive strategy that it hoped would preserve its international standing by allowing it to at least offer nominal support for human rights while allowing it to pass with the Senate’s approval at home. This strategy involved placing a *federal state clause*, in the Covenant. The US introduced the first version of this federal state clause on November 26, 1947. The proposed federal state clause read:

“In the case of a Federal State, the following provisions shall apply: (a) With respect to any article which the Federal Government regards as wholly or in part appropriate for Federal action, the obligations of the Federal Government shall, to this extent, be the same as those of parties which are not Federal States; (b) In respect of articles which the Federal Government regards as appropriate under its constitutional system, in whole or in part, for action by the constituent states, provinces or cantons, the Federal Government shall bring such provisions to the notice of the appropriate authorities of the states, provinces or cantons” (E/CN.4/37/p.6-7).<sup>266</sup>

The main argument put forth by the US delegation in support of the federal state clause was that the federal government could not take responsibility for all potential matters that were covered by the Convention— it “could not dictate to the Governments of the various federated States the course of action they should take” in all such matters.<sup>267</sup> The legal impact of the proposed federal state clause was that under

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<sup>265</sup> UN Charter, Articles 1, 13, 55, 76.

<sup>266</sup> This US proposal was introduced just two weeks prior to Great Britain’s introduction of its colonial clause.

<sup>267</sup> UN Doc A/C.6/SR.201. The use of the federal state clause was not entirely unprecedented. Previously, the United States had proposed (unsuccessfully) for its inclusion in the Convention on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (UN Doc A/C.3/L.13, p.3). The only other treaty under the UN framework that contained a federal state clause was the Constitution of the International Labor Organization of 1946. The federal state clause in the ILO Constitution however, contained five subparagraphs making the mechanism of application much more explicit. For discussions

paragraph A, *if* a particular article of the treaty was determined (by the state, itself) to lie within its federal jurisdiction, the obligations of the signatory federal state were no different than the obligations of non-federal states.

The federal state clause, however, “kicked in” when the signatory state determined a particular article of the treaty was a jurisdictional matter for its constituent states (such as racial segregation in the US). In this case, the federal government was not responsible for exercising authority over the states. Instead, it was only to inform the states about potentially relevant articles in the treaty. For practical purposes, the federal state clause would have done absolutely nothing to combat the discrimination, segregation, and lynchings in the United States since such issues were already determined to lie within the purview of states’ rights. The only thing the federal government could do was bring the Covenant(s) to the attention of the states. In other words, with a federal state clause in place, nothing would change.

When the matter was debated at the UN, for many of the delegations, the hypocrisy of creating a human rights treaty that permitted lynchings was a moral disgrace. It also put the US in the dubious company of the colonial powers that were similarly pushing for a very unpopular colonial clause.<sup>268</sup> But in the event that any party in the Commission on Human Rights failed to appreciate the practical consequences of the federal state clause, Borisov of the Soviet delegation was quick to spell it out with deliberate frankness: “The lynchings of Negroes in the United States is the most horrible crime of civilization,” he began. He continued by saying that Daniels, the US representative in the Sub-commission, only wanted to “protect his right to discriminate

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on the federal state clause, also see Looper, Robert B. 1955. “Federal State Clauses in Multi-Lateral Instruments.” *British Yearbook of International Law* 32:162-203.

<sup>268</sup> See previous chapter.

against Negroes.”<sup>269</sup> The Soviet delegation proposed its own article, which, as was the case during the “colonial clause” debates, represented the polar opposite of the US’s—intended not to supplement, but to negate. The article, which was introduced first in the Commission on Human Rights’ Sub-commission on the Prevention of Discrimination and Protection of Minorities on November 28th read:<sup>270</sup>

“All people are equal before the law and shall enjoy equal rights in the economic, cultural, social and political life, irrespective of their race, sex, language, religion, property status, national or social origin. Any advocacy of national racial and religious hostility or of national exclusiveness or hatred and contempt, as well as any action establishing a privilege or a discrimination based on distinctions of race, nationality, or religion, constitute a crime and shall be punishable under the law of the State.”<sup>271</sup>

The Soviet delegation came to these debates heavily armed with damning evidence of the US’s racial problems. At one point during these meetings, the US delegation was even forced to concede that it had been out-muscled by the extent of Borisov’s knowledge. After being pummeled with a barrage of unpleasant evidentiary support, Daniels, the US representative, could only reply that he was not an expert in the affairs of the Soviet Union and could not “review the situation as thoroughly as Mr. Borisov had done” with respect to the United States.”<sup>272</sup> As a result of these discussions, the members of the sub-commission voted to explore the Soviet proposal in-depth.<sup>273</sup> Rounding out his performance, Borisov argued strongly for the UN to include both the NAACP’s and the National Negro Congress’ petitions on its agenda to help continue the mounting Soviet propaganda attack against the US.

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<sup>269</sup> See Anderson 2003:109-12 for part of this story.

<sup>270</sup> “Soviets Blast US Lynchings,” *The Chicago Defender*, Dec 6, 1947, pg. 1.

<sup>271</sup> UN Doc E/CN.Sub.2/21. Also see CN.4/Sub.2/SR.15-18.

<sup>272</sup> Intolerance Crime Issue in U.N. Group. *Special to The New York Times*; Nov 29, 1947, pg. 2.

<sup>273</sup> “Intolerance Crime Issue in U.N. Group,” *Special to The New York Times*, Nov 29, 1947, pg. 2.

Just a few weeks later Bogomolov, the Soviet Ambassador in Paris suggested that the Soviet proposal be discussed in the full Commission on Human Rights (rather than its sub-commission).<sup>274</sup> Eleanor Roosevelt immediately objected to the proposal citing the difficulties a federal state like the US would have with the enforcement of such a law. As an example (and no doubt eager to move the conversation away from race), she argued that the failure of the prohibition law in the US was evidence of the difficulties a federal government encounters when attempting to control the behavior of its constituent states. A focused Bogomolov, brought the issue right back to race and replied that without such an article, the “lynching of negroes would continue”).<sup>275</sup> While the Soviet Union was stoking the fire, the US hoped to ease tensions by making the draft Federal State Clause as palatable-sounding as possible while retaining its overall impact. Thus minor changes were made to its text. The changes (in italics) read:

In respect of articles which the Federal Government regards as appropriate under its constitutional system, in whole or in part, for action by the constituent states, provinces or cantons, the Federal Government shall bring such provisions, *with favorable recommendations*, to the notice of the appropriate authorities of the states, provinces or cantons *at the earliest possible moment*.<sup>276</sup>

#### *The NAACP's International Strategy Dies*

If the purpose of the NAACP's petition, *An Appeal to the World*, was to bring the lynchings, institutionalized segregation and racial injustices to the attention of the UN, its petition was a success. But after the meetings at the UN, Daniels had no polite words for the NAACP's international petition strategy. To the consternation of the US delegation,

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<sup>274</sup> Anderson, Carol. 2003. *Eyes off the Prize*, at 131.

<sup>275</sup> UN Doc E/CN.4/SR.34, p.10-11, December 12, 1947.

<sup>276</sup> For the progression of these textual changes see UN Doc E/CN.4/AC.3/SR.8, p.15; UN Doc E/CN.4/56; UN Doc E/CN.4/AC.1/SR.42, p.41; and also see UN Doc E/800, Art. 24.

the communist bloc had used the NAACP's report for its own battle against the US. For the NAACP's petition strategy, things were becoming perilous. By the end of the year even Eleanor Roosevelt, an ally and board member of the NAACP, had decided that her support for the organization had limits. Going to the UN with its petition, she believed, had been a major mistake. In a clear signal that would effectively end the NAACP's human rights petition strategy, Roosevelt submitted a letter of resignation threatening to resign from its board. Though she later agreed not to quit the board, the repercussions of this episode were lasting. The NAACP was on notice—its important relationship with Roosevelt could not withstand another public relations debacle. At this most critical moment of human rights formation the UN was essentially off limits for the NAACP.<sup>277</sup>

The diverging aims of the black advocacy groups and the US State Department were quite apparent. The NAACP's strategy was to reveal the truth about domestic race relations, while the US strategy was to conceal it from its adversaries. The NAACP's goal was to gain substantive rights for black Americans, while the US strategy was to settle for nominal support of human rights. On this last point, in a 1947 memo to Walter White, Du Bois wrote that the problem with human rights was “not the lack of pious statements, but the question as to what application is made of them and what is to be done when human rights are denied in the face of law and declarations.”<sup>278</sup> But Du Bois underestimated the US's predicament, for soon, under the weight of Southern opposition, even the consolatory “pious statements” would be in jeopardy.

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<sup>277</sup> Anderson, Carol. 2003. *Eyes off the Prize*, at 112, also see generally, pp. 109-112.

<sup>278</sup> W.E.B. Du Bois to Walter White, memo, November 24, 1947, cited by Anderson (2003:105).



*Activities in the International Arena Challenge Domestic Practices in the US*

On December 10, 1948 the UN General Assembly adopted the Universal Declaration of Human Rights. The fact that the world community could come together and agree upon a statement of moral principles seemed to show that the UN—this “experiment in world cooperation—was surely working.”<sup>279</sup> Riding the celebratory wake of this international accomplishment, President Truman signed the Genocide Convention the very next day, signaling that the United States government was ready to ratify this treaty. Even more so than the *non-binding* UDHR, this enforceable treaty against genocide gave credence to the notion that the international community would actually *act* on its promises. For the moment, the prospect of an enforceable covenant to go along with the UDHR appeared to be close at hand. But tugging at the seams of the supposedly “united” nations was the matter of race. For as seemingly unassailable as the criminalization of genocide would seem, racial bigotry prevented ratification of the Genocide Convention in the Senate.<sup>280</sup>

The Genocide Convention was of immediate concern to certain powerful members of the legal and political establishment within the US for several reasons. For many members of the American Bar Association and the Senate—especially Southern Democrats—it was an unprecedented overreaching of international law that threatened not only US sovereignty, but state sovereignty vis-à-vis the US federal government (i.e. “states’ rights”). Moreover, for those with preexisting isolationist sentiments, with Cold War tensions rising, all things international came to be associated with communism and

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<sup>279</sup> Chamberlin, William Henry. A Look at the United Nations. *Wall Street Journal*; Dec 26, 1946; pg. 4.

<sup>280</sup> The US, however, was not alone: In 1947 Great Britain resolved to oppose the Convention on Genocide, and if unsuccessful in that venture, to use delay tactics to stall its creation indefinitely (Lauren 1988:196).

socialism (these issues are discussed in subsequent chapters). But it was the issue of race that was central.

Article 2 of the *Convention on the Prevention and Punishment of the Crime of Genocide* (the Genocide Convention) defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”<sup>281</sup> Given the systemic discrimination and violence against African Americans, many of these subparagraphs were worrying for some Southerners. While the Truman administration made it clear that no activities that were taking place in the US would or could be tried under the Convention, it did seem to many that there might be an argument for it.<sup>282</sup> The fact that the Convention actually had “teeth”—“persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals” (Art.4)—was of even greater concern.<sup>283</sup>

There were numerous instances of opposition to the Genocide Convention in the United States. For example, after the American Bar Association released its formal resolution stating that the US should not ratify the Genocide Convention until it could be further studied, its president, Frank Holman, followed up with his own campaign. As an outspoken opponent of international treaties and human rights laws, Holman played strongly upon prejudice, fear, and blatant racism to rally opponents. Holman for example, in 1949 wrote that the Genocide Convention opened a “Pandora’s Box” of

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<sup>281</sup> Under the terms of the Convention, this includes: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

<sup>282</sup> Tananbaum, Duane. 1988. *The Bricker Amendment Controversy*.

<sup>283</sup> *Id.*

individual crimes that US citizens could be charged with. Segregating troops in the National Guard (a practice he apparently had no qualms with) could be considered genocide; authorities who kill African Americans while “attempting honestly to suppress” a race riot could be charged with “complicity in genocide”; an organization that advocates birth control: genocide; a white motorist who accidentally kills an African American: genocide.<sup>284</sup>

*Domestic Resistance Highlights the Social Consequences of International Treaties*

In 1949, there was much that had been written by lawyers, political scientists and legal specialists about the implications of international treaty law. But it was the series of editorials in the *New Orleans States* newspaper, written by William Fitzpatrick that provided some of the most diligently researched and methodically argued statements outlining the *social* consequences of such treaties that was written for a broad audience. Fitzpatrick assumed the role of city editor of the paper when his predecessor, F. Edward Hebert vacated the position after being elected to the US House of Representatives. Were it not for Hebert, it is quite likely that Fitzpatrick’s ideas would have never had the chance to reach beyond the limited readership of his local paper.<sup>285</sup>

Representative Hebert was a Southern conservative who championed the causes of segregation and state’s rights. He referred to himself as one of the last “unreconstructed rebels.”<sup>286</sup> According to Carson, his “world view was framed by four

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<sup>284</sup> “International Human Rights: Part 1,” *Law and Contemporary Problems*, 14(3):479-489; Tananbaum, Duane. 1988. *The Bricker Amendment Controversy*.

<sup>285</sup> (F. Edward Hébert (LA). 1949. “Where do we Go?: extension of Remarks.” 95 *Cong. Rec.* A5082-84 at A5082.)

<sup>286</sup> Charles G. Rivet, “Southern-Style Americanism: Congressman F. Edward Hebert: ‘The Un-Reconstructed Rebel’” (typescript of paper delivered at the University of New Orleans, 1992), 4-5. Cited in Mark D. Carson. 1996. “F. Edward Hébert and the Congressional Investigation of the My Lai Massacre.”

basic tenets: defense of Southern racism and of states' rights, fierce anti-communism, super patriotism, and enthusiastic support of the American military.”<sup>287</sup> Importantly, Hebert also shared Fitzpatrick’s disdain for international treaty law. On a number of occasions, Hebert extolled the virtue and insight of Fitzpatrick’s editorials before his Congressional colleagues, urging them to read his articles and to take the necessary legislative actions to prevent racial integration through treaty. He also reprinted over a dozen of Fitzpatrick’s articles opposing international human rights treaties, as well as the text of several of his speeches in the Congressional Record.

But it was Fitzpatrick (who apparently shared Hebert’s predilections and prejudices) who deserves the credit for translating the technical legal provisions and the abstract principles of international law into the language and substance of American social relations. The difficulty with extracting evidence of racism from public materials is that the speakers so often employ coded prose that have double meanings or alternate (and acceptable, if not pious sounding) interpretations to fall back upon if pressed. Hebert, for instance, praised Fitzpatrick’s contribution, by saying that international human rights might appear noble and laudable, but are in reality “an insidious and destructive force, which, in the ultimate, will destroy the very thing we seek to preserve—our American way of life.” The latter phrase was purposefully ambiguous. It referenced a picket-fence, Norman Rockwell-style vision of Americana that also stood

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*Louisiana History: The Journal of the Louisiana Historical Association*, Vol. 37, No. 1 (Winter, 1996), pp. 61-79, at 62.

<sup>287</sup> *Id.* As a signer of the 1956 “Southern Manifesto” that condemned the *Brown v. Board* decision, Hebert’s segregationist credentials were in still in order years later. For evidence of Hebert’s strong racism, see Badger, Tony. 1999. “Southerners Who Refused to Sign the Southern Manifesto.” *The Historical Journal*, Vol. 42, No. 2 (Jun., 1999), pp. 517-534; “National Affairs: The Southern Manifesto,” *Time Magazine*. Monday, Mar. 26, 1956. For a copy of the text of the “Southern Manifesto,” and a list of its signers, see Aucoin, Brent J. 1996. “The Southern Manifesto and Southern Opposition to Desegregation.” *The Arkansas Historical Quarterly*, Vol. 55, No. 2 (Summer, 1996), pp. 173-193.

for state's rights, segregation, and Southern justice. "Disaster lurks near us," he grimly warned the members of Congress, "it is important that we be made fully cognizant of that impending disaster."<sup>288</sup>

In Fitzpatrick's editorials, however, there is no need to parse his prose for evidence of racism. Using the UDHR as an indicator of the nature of the rights that would follow in the enforceable covenant, Fitzpatrick, warned that the latter, if adopted, "would strike down laws of many States and social customs of wide acceptance among the people."<sup>289</sup> First, it would affect immigration. Article 14 (1) of the UDHR states that "Everyone has the right to seek and to enjoy in other countries asylum from persecution." If this provision were part of a covenant, he argued, it would "open the gates wide" to people from all over the world to come live in the United States.

Second, Article 16 (1) of the UDHR which covers the right to marry "without any limitation due to race, nationality or religion," would prohibit anti-miscegenation laws. Fitzpatrick argued that "There are on the statute books of 29 States, laws forbidding miscegenation or marriage between different races. In most other States which do not by law ban such unions, the social customs of the people forbid it." So that those who resided in such states could understand that the UDHR affected them, he listed each.<sup>290</sup> To drive this point home, and place the implications in a more private context of the family, he argued that these provisions, not only alter existing laws governing marriage and racial mixing, but fundamentally alter the basic structures of parental authority in the

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<sup>288</sup> (F. Edward Hébert (LA). 1949. "Declaration of Human Rights: Extension of Remarks." 95 Cong. Rec. A1706-07 at A1706.)

<sup>289</sup> 95 *Cong. Rec.* A1927, 1949.

<sup>290</sup> "The States prohibiting miscegenation are Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming."

American family. “Should any mother try to prevent the marriage of her child because of objections to a suitor on racial, national, or religious grounds, that parent would be answerable to an international court of human rights,” and would be found “guilty of incitement to discrimination.”<sup>291</sup> Finally, he argued, that the principle of non-discrimination which figures prominently in the UDHR, would, if incorporated into an enforceable covenant, “obliterate” the segregation laws of seventeen states and the District of Columbia, while impairing the six additional states that give discretionary powers to their school boards to segregate.<sup>292</sup> For his efforts (and perhaps his connections) Fitzpatrick would later receive a Pulitzer Prize for his editorials opposing international human rights treaties.<sup>293</sup>

Updating the longstanding arguments supporting institutionalized Southern racism to include international elements was a new trend.<sup>294</sup> Fitzpatrick leveraged a complex of ready-made ideas, laws, and political connections to help defeat the international treaty laws that threatened the version of social ordering they prized. His editorials for example, brandished familiar rhetoric about states’ rights and the limits of the law—only now the agents forcing change came from the United Nations. Most importantly, though, influential voices of opposition often had strong social and political connections at the highest levels. In this way, the social implications of human rights treaties were sounded out for audiences that actually controlled the treaty making

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<sup>291</sup> 95 *Cong. Rec.* A1927, 1949.

<sup>292</sup> He lists the former grouping as including: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. The latter grouping of six states included: Arizona, Indiana, Kansas, New Mexico, New York, and Wyoming.

<sup>293</sup> See *Pulitzer Prize Editorials: America's best writing, 1917-2003*, eds. William David Sloan, Laird B. Anderson.

<sup>294</sup> Lewis, George. 2004. *The White South and the Red Menace*, at 47.

process. In September, members of the American Bar Association met with members of the US Senate and suggested that a better strategy than fighting every international treaty in turn, would be to create a constitutional amendment that would prohibit international treaties from becoming the “supreme law of the land”—i.e. applicable at both federal and state levels.<sup>295</sup> The opposition which was now banding together against international human rights treaties, was focusing on several well-known issue areas to drive its cause: states’ rights, racial segregation, hostility towards social and economic rights, US sovereignty, and anti-communism.

### *Expelling Black Advocacy Groups from the American Nation*

The social implications of the Genocide Convention were rendered through this association with lynching. The latter was a vile and insidious crime that both symbolically and in practice prevented African Americans from becoming integrated into the public sphere; from voicing opinions or taking actions on their own behalves. Now, in its rejection of the Genocide Treaty (a treaty that took the US another four decades to finally ratify), Southern power was asserting itself over the international sphere—the very sphere that African Americans had placed their hope. The places where African Americans could possibly live out their rights and create the attachments necessary to achieve their own human rights were closing down one by one.

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<sup>295</sup> Kaufman, N. H., and D. Whiteman. 1988. "Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment." *Human Rights Quarterly* 10 (3):309-37, at 312; Tananbaum, Duane. 1988. *The Bricker Amendment Controversy*, at 14. Also see: US Congress. Senate Committee on Foreign Relations, Subcommittee on the Genocide Convention, Hearings on the International Convention on the Prevention and Punishment of the Crime of Genocide. 81st Cong., 2d sess., 1950. S. Rept. 472.

Anti-communism was a potent and destructive force of American nationalism. Because any link with communism—real or supposed—could be so devastating, charging black advocacy groups with communist affiliation became a powerful weapon of the white supremacists.<sup>296</sup> What was so damaging for all of these groups in this moment of anti-communist hysteria, were their *actual* organizational connections with communism. The National Negro Congress and the Civil Rights Congress (two prominent black advocacy groups), for example were both open about their communist ties.<sup>297</sup> And now with their petition strategy at the UN, the NAACP appeared to some to be working more with the Soviets than with the Americans in the State Department. This was more than enough ammunition to destroy their efforts at internationalizing their efforts for human rights and racial equality.

The opposition broke down the legitimacy of these private civil society groups, enlisted agents of the state to monitor and publicize their communist associations and condemn their un-American activities.<sup>298</sup> This ruthless campaign (that also captured many others in its net), had black groups scrambling to preserve their remaining social and political connections. But the resulting organizational disarray led to infighting, conflicting allegiances, and left their human rights strategy ransacked and in a tangle of fractured alliances—but most importantly, with no protected sphere from which to repair them. To salvage the remnants of their political projects they were forced to make a series of dead-end decisions to prove their Americanism: the former head of the National Negro Congress became an FBI informant and downplayed South African racism, while

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<sup>296</sup> Lewis, George. 2004. *The White South and the Red Menace*, at 26-29.

<sup>297</sup> Anderson, Carol. 2003. *Eyes off the Prize*, at 21, 168.

<sup>298</sup> In 1949, the FBI released a report that tallied all of the supposed Communist Party USA members on a state-by state basis, for example (Lewis 2004:27).



the NAACP tried to duck the charges of un-Americanism by joining the communist purges.<sup>299</sup> For these African American advocacy groups, these events raised substantial doubt about the viability of an international human rights strategy at all, or whose human rights they were now fighting for. As black advocacy organizations were now unable to participate in the United Nations and were charged with being anti-American, the spaces in which they could define and shape the terms of the emerging human rights concept and create the attachments necessary to achieve their own human rights, were lost one by one. The tragedy of this episode in the social struggle over race, however, is how systematic (and *tried*) this process of social dislocation already was.

Around the same time, the *Modern Review* published an article by the philosopher, Hannah Arendt. She wrote of the inability of international treaties to protect minorities who had lost the protection of their governments. She, however, was not speaking about African Americans in the United States, but the stateless minorities in interwar Europe, who under the Minority Treaties apparently had rights, but lacked the most fundamental human right of all—a guaranteed “place in the world which makes his opinions significant and his actions effective.”<sup>300</sup> She worried that the ongoing United Nations human rights project was similarly continuing to “overlook and neglect the one right without which no other can materialize—the right to belong to a political community.”<sup>301</sup> Once the Jews were stripped of political membership, the preconditions for social disaster were set—and finalized, ironically with an idea of *right*. Right was

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<sup>299</sup> Anderson (2003) details the unraveling of the African American human rights movement. The struggle continued on, however, in the frame of the civil rights movement.

<sup>300</sup> Hannah Arendt (1949) “The Rights of Man: What are They?” *Modern Review* 3(1), at 29.

<sup>301</sup> Arendt, Hannah. 1949. “‘The Rights of Man’: What are they?” *Modern Review* 3 (1):24-37, at 37.

what was “good for Germany.”<sup>302</sup> What makes this historical parallel so chilling is that just a few years after the “final solution” was laid bare for the world to see in all its horrific detail, the *Prevention and Punishment of the Crime of Genocide* was a promise the US would not make for its own minority population. What was right for the American people remained an open question.

### *The US in the International Arena*

Before the General Assembly meetings convened in September of 1950, State Department officials met to work through the US’s plan for the Draft of the Covenant on Human Rights.<sup>303</sup> In light of the US Congress’ refusal to support the Genocide Convention it was the general consensus at this meeting that there “was no chance that the United States Senate would accept the Covenant without the federal-state clause.” And how things were turning out, the State Department officials conceded that “even with a federal-state clause there would be difficulties.”<sup>304</sup> So despite its great unpopularity in the General Assembly, the State Department decided to keep its course. They decided, that even with all of the opposition they faced over the clause, to actually gain the Senate’s approval to ratify the Covenant, it was a fight they would have to win.

In General Assembly debate, almost anything was fair game—and even if it was not fair game, if mentioned it went on public record. These dynamics changed the rules of international relations substantially. Now smaller states, less powerful by orders of magnitude, rivaled the US in political debate. It was a new type of diplomatic warfare

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<sup>302</sup> Robert Ley, “Schicksal — ich glaube!,” *Wir alle helfen dem Führer* (Munich: Zentralverlag der NSDAP, 1937), pp. 103-114.

<sup>303</sup> *Foreign Relations of the United States*, 1950 (1976), Vol. II, The United Nations, The Western Hemisphere, at 518.

<sup>304</sup> *Id.*

that actually caught State Department officials quite off-guard.<sup>305</sup> Though the US delegation approached its federal state clause plan with the combination of diplomatic dexterity and brute force that it was known for, the public opinion battle had it scrambling.

As indicated by a subsequent State Department report, the US did not fare as well as it would have liked in these General Assembly meetings.<sup>306</sup> One by one, various delegations took turns launching thinly (and not so thinly) veiled barbs at the US. Azmi Bey of Egypt, for example, cryptically suggested that in the US's federal state clause proposal, there was an element of legal "algebra" at play, full of "equations and unknown factors." Some states or provinces, he speculated, "might perhaps cling to somewhat erroneous and outmoded traditional views which were contrary to the principle of the equality of all individuals." Perhaps, he wondered, there were some "undisclosed considerations [that] lie at the root of the federal clause."<sup>307</sup> While he spared the United States the explicit mention of the domestic variables that were behind its position, his inferences were blunt and without a doubt not lost on anyone at the meeting.

What the Egyptian delegation might have left to the imagination the Polish representative painted in clear and vivid detail. Mr. Altaian used the floor to wonder out loud what the consequences would be for the US if the federal state clause was included. What if "for example, in the United States of America, such southern states as Georgia, Mississippi and South Carolina known for their racial legislation and for their racial discrimination would not be obliged to implement the draft covenant when it was of the

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<sup>305</sup> *Foreign Relations of the United States*, 1950 (1976), Vol. II, The United Nations, The Western Hemisphere, at 575.

<sup>306</sup> *Id.* at 581.

<sup>307</sup> UN Doc A/C.3/SR.292/p.139.

utmost importance that those states in particular should be bound by that instrument?”<sup>308</sup>

His argument—valid, on-point and logically sound—highlighted the Southern racism that in such debates had become a perennial thorn in the side of the US delegation.

The US’s federal state clause was but one of many issue areas that served to bolster the Soviet Union’s propaganda line that the US was simply just another colonial oppressor. To honor all of its competing domestic and foreign policy imperatives, the US continued to make decisions that put it in an unfavorable light in the international arena. For instance, the State Department had just banished NAACP from the United Nations, the Senate was sitting on the Genocide Convention, while the US delegation to the UN was expending political capital in several other ongoing drafting battles. Its steadfast support for Great Britain’s colonial clause (something of a quid pro quo for its own federal state clause), as well as its hugely unpopular desire to keep socioeconomic rights from the Covenant all conspired to present the US as an uncooperative and disingenuous participant in the drafting of the Covenant.<sup>309</sup>

At the close of the Third Committee’s 5<sup>th</sup> session, the State Department provided an *ex post* analysis of the US’s record in the heated debates. One of the most telling passages of the report explains that the opposition the US experienced was in large part unexpected: “We had not anticipated the vigor and bitterness of their disagreement with United States policies on almost every item.”<sup>310</sup> The US was socially and politically out of touch with the developing world. The State Department officials who produced some

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<sup>308</sup> UN Doc A/C.3/SR.293/p.141.

<sup>309</sup> The initial stirrings of a US approach to supporting two covenants date back to December of 1949 and is outlined in, *Foreign Relations of the United States*, 1950 (1976), Vol. II, The United Nations, The Western Hemisphere, at 513-515.

<sup>310</sup> Memorandum by the Deputy Director of the Office of United Nations Economic and Social Affairs (Green) to Mr. David H. Popper, Principal Executive Officer of the United States Delegation to the General Assembly, December 22, 1950, p. 575.

of the most eloquently written, insightful appraisals of US foreign policy and geopolitics were, in this area, remarkably uninformed. Though on the defensive and in need of Cold War allies, the US continued to make policy decisions that distanced itself from much of the developing world.

As outlined in State Department memos and reports, there were now four options: (1) join the smaller and non-Western states in their fight against colonialism (which would anger its most important NATO allies); (2) join with the “administering powers” (which would anger the developing world and endanger those potentially valuable Cold War alliances); (3) become a strong advocate of human rights (which would enrage domestic opponents and endanger the human rights project altogether); or (4) oppose human rights at the UN (and disappoint progressive human rights supporters at home and abroad).<sup>311</sup>

The fourth option—to walk away from the Covenant if it became too difficult to manage—was definitely a serious option. In a fall meeting at the State Department, Eleanor Roosevelt said that the Covenant probably could not survive if US dropped it.<sup>312</sup> Because this was no doubt known by the other delegations, the US could drive a hard bargain. There were, however, limits. A State Department memo reveals that quitting the Covenant was actually considered as a serious option (though at this time such a solution was not endorsed). The memo acknowledged that the smaller and non-western states in Latin America and the Middle East were extremely serious about creating a strong Covenant. If the US were to withdraw from the Covenant, these geopolitical relations would suffer dramatically and “countries unfriendly to the United States,

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<sup>311</sup> *Foreign Relations of the United States, 1952-1954 Vol. III, United Nations Affairs*, at 142 (1979).

<sup>312</sup> *Foreign Relations of the United States, 1950 (1976), Vol. II, The United Nations, The Western Hemisphere*, at 518.

particularly the Soviet bloc, would be presented with a propaganda weapon for use in the cold war, which we could expect them to exploit particularly in under-developed areas.”<sup>313</sup> But nevertheless, as political constraints increased, so too did the possibility of the US walking away from the table. This, however, would prevent the US from taking the moral high ground and perhaps even put it in the same camp as the one state that had refused to sign the UDHR on account of its own racial issues—South Africa.

Ironically, the US seemed to be moving closer to South Africa quite well on its own. The need for allies in the Korean War pushed the US closer to South Africa as it turned a blind eye to its instituted system Apartheid.<sup>314</sup> At the end of 1950, the State Department chose a course and outlined its policy directive:

“...in order to limit the formation of opposing blocs of underdeveloped countries and prevent their playing the other highly developed countries off against the United States,” the report concluded, “we need particularly to try to reduce to an absolute minimum our differences with the United Kingdom, the old Dominions, and the Western European countries.”<sup>315</sup>

#### *The US Goes on a Public Relations Campaign at Home*

If the US State Department was losing the public relations campaign in the UN to the smaller and non-western states, it could always fall back on its political might to forge its desired path. But at home, the Eisenhower administration was out-muscled in both the political realm (via the Senate’s filibuster) and the public relations arena. For the better part of the past two and a half years, domestic opponents of the US’s involvement in treaty-making at the UN had been speaking out in the public media, academic journals,

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<sup>313</sup> *Foreign Relations of the United States, 1952-1954 (1979)*, Vol. III, United Nations Affairs, at 1552-54.

<sup>314</sup> Noer, Thomas J. 1998. “Truman, Eisenhower, and South Africa,” in *Race and US Foreign Policy From the Colonial Period to the Present*, ed. Michael L. Krenn. pg. 139-40

<sup>315</sup> *Foreign Relations of the United States, 1950 (1976)*, Vol. II, The United Nations, The Western Hemisphere, at 581.

and speeches. By 1952, the domestic opposition to international treaty making and human rights had swelled from a number of isolated voices to a bona fide movement which was now pressing for a Constitutional amendment to limit the president's ability to enter into treaty agreements. The strength of the movement had grown considerably in the past year and was something the State Department believed could "no longer be dismissed, as some have urged, as isolated misinterpretations."<sup>316</sup> The Assistant Secretary of State for United Nations Affairs, John D. Hickerson suggested that the State Department initiate its own domestic public relations campaign.

In February of 1952, he wrote, "I believe that some positive action by the Department is required...a statement by the Secretary, a letter to a Senator, or any other medium appropriate for placing the legal views of the Department before the public..." He thought it was essential to forcefully reassure the public that their fears about the changes that would be brought to the US through the Covenant were completely unfounded.<sup>317</sup> Roosevelt agreed that there was,

"a great need for the State Department to undertake a general public relations program to meet the attack on U.S. participation in the United Nations which is now concentrated on the work in the human rights field. Something needs to be done at home to make for understanding of the U.S. position...It is time to meet the attacks being made on the United Nations which take the line that it is a highly dangerous organization."<sup>318</sup>

Unfortunately for the advocates of racial equality and human rights, the public relations campaign amounted to a program of capitulation. When discussing the Covenant at a June 6, 1952 press conference, Eleanor Roosevelt said that the objective of the federal state clause was to "insure that the constitutional balance between the powers

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<sup>316</sup> See Foreign Relations of the United States, 1952-1954, Vol. III, United Nations Affairs, at 1548-49 (1979).

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 1537-1538.

delegated under the Federal Constitution to our federal government in Washington...and the powers reserved to the states... are not altered.” This was the standard line of argumentation that she had been giving at the UN for the past several years. But she also offered a concrete example that she hoped would allay the fears of the conservative (and racist) Southerners who opposed the Covenant by appealing obliquely to their fears of the Covenant’s jurisdiction over lynching.

“For example, under our constitution, the authority to enact laws against murder rests for the most part with the several states. The ‘federal state’ clause would ensure that authority remains with the several states and is not transferred, even in part, to the National Government by the operation of the covenants. The federal-state balance would be preserved: the national power would not be increased.”<sup>319</sup>

The US’s position on the Covenants hit a new moral and political low. The US’s *realpolitik* strategy had forced Eleanor Roosevelt and the Department of State to write off Du Bois, banish the NAACP along with any of its petitions (present or future) from the halls of the UN, stand by the side of South Africa’s sovereign right to discriminate, while attempting to legally guarantee its own right to do the same. But when Eleanor Roosevelt, the apparent champion of human rights at the UN, the Chair of the UDHR drafting committee, and the most recognizable face at the UN made the promise that lynching could continue as a matter beyond the purview of human rights, surely something was amiss. Perhaps in trying to support human rights, the US was actually causing irreparable harm. Though Eleanor Roosevelt believed that the US should lead the world “in standing for the rights of human beings,” the social pressures against doing so were proving to be overwhelming.<sup>320</sup> She did find solace in the fact that during the first

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<sup>319</sup> Quoted in *New York Times*, “Federal-State Issue Clarified at UN, Jun 9, 1952; pg. 11; also see (Anderson 2003:201, footnote 109).

<sup>320</sup> See *Foreign Relations of the United States, 1952-1954, Vol. III, United Nations Affairs*, at 1538 (1979).



part of 1952, her mail from concerned individuals and advocacy groups supporting the US's human rights efforts had tripled. Such perspectives, however, were muted under the weight and political strength of the domestic opposition. Unless things changed dramatically, any hope that the Covenant could immediately rectify longstanding racial injustice in the US was pure fantasy. And even the hope that the US would offer nominal support for human rights was quickly fading.

## Chapter 6

### The United States' Unequivocal Ambivalence towards Socioeconomic Rights

At the very first meeting of the Commission on Human Rights on April 29, 1946, Henri Laugier, the Assistant Secretary-General in charge of Social Affairs, instructed the Commission to include socioeconomic rights in the bill of human rights they would soon draft. Because modern industrialization inflicts “intolerable servitude” on otherwise free individuals, Laugier informed the Commission that “the declaration of the rights of man must be extended to the economic and social fields” to include rights such as labor rights, the right to education, social security, and adequate medical care.<sup>321</sup> A year later during the First Session of the Commission on Human Rights Drafting Committee, Eleanor Roosevelt reminded the representatives that because of their importance (and because they had been instructed to include them), socioeconomic rights, “could not be omitted.”<sup>322</sup> But beneath the US’s apparent support for these rights that enjoyed widespread backing amongst many other members of the United Nations, there existed deep anxieties about actually including them in a binding Covenant. So Roosevelt, who knew that the US Senate was likely to reject a Covenant with strongly-worded socioeconomic rights, hedged. She added, socioeconomic rights, should remain

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<sup>321</sup> This is only a partial list of rights that typically fall within the category of socioeconomic rights. UN Doc E/HR/6, pp. 1, 3.

<sup>322</sup> UN Doc E/CN.4/AC.1/SR.9, p. 11. First Session of the Commission on Human Rights Drafting Committee, Ninth Meeting, Held at Lake Success, New York, on Wednesday, 18 June 1947, at 10:30 a.m.

minimally articulated and “could not be expanded too much in a Declaration.”<sup>323</sup> This was one of the early signs of what John Humphrey—the Canadian legal scholar responsible for creating the first draft of the UDHR—later recalled was the “considerable opposition in the Drafting Committee to their inclusion.”<sup>324</sup>

The competing desires to (1) keep socioeconomic rights out of the Covenant, while (2) appearing as a cooperative and progressive leader in international politics had the US in a difficult position. As Eleanor Roosevelt wrote in a letter to Secretary of State George Marshall, the great political concern was having to state openly at the UN that the US, “in view of the fact that Congress would have to ratify such treaties, can not [*sic*] agree to wording which goes beyond our own Constitution.”<sup>325</sup> Accordingly, the US delegation to the UN advocated for a series of covenants—first, one on civil and political rights, and then others in areas such as socioeconomic rights. In this way it could give its full support for the initial Covenant, while not worrying as much about subsequent ones. In 1948, the US State Department remained “satisfied” that socioeconomic rights were not being considered for incorporation within the Covenant.<sup>326</sup>

On the domestic front, after Truman’s reelection in 1948 many opponents of progressive social reform began to voice their concerns about his national healthcare proposal. Though this opposition was focused on the narrow topic of healthcare, it was

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<sup>323</sup> UN Doc E/CN.4/AC.1/SR.9, p.11.

<sup>324</sup> Humphrey, John P. 1983. "The Memoirs of John P. Humphrey, the First Director of the United Nations Division of Human Rights " *Human Rights Quarterly* 5 (4):387-439, at 407.

<sup>325</sup> Foreign Relations of the United States. May 11, 1948.

<sup>326</sup> From a research perspective, taking the US’s political statements at face value, without contextualizing them or engaging in an analysis that runs deeper than the surface level rhetoric can lead to conclusions that run entirely contrary to the actual history—a mistake made by Whelan and Donnelly (2007:910) when they claim that “the West was not in any way opposed to establishing binding obligations with respect to economic and social rights.” The comprehensive analysis that follows provides an abundance of evidence to the contrary. See Whelan, Daniel & Jack Donnelly. 2007. “The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight.” *Human Rights Quarterly* 29:4, pp. 908-949.

emblematic of an antipathy towards social welfare programs, and a loathing of the stronger, universal category of socioeconomic rights. A certain amount of opposition to his national healthcare proposal was not unexpected. The New Deal programs enacted by Truman's predecessor certainly had their share of opponents (and universal healthcare provisions were not popular enough at the time to gain inclusion). Like previous health bills that had failed to garner support over the past decade, Truman's proposal called for the expansion of hospitals, an increase in public support for mothers and children, and a system that would provide federal aid for medical education and research. But Truman's proposal was far more robust than the Wagner healthcare bill of 1939 or the Wagner-Murray-Dingell bill of 1943, for instance. The crux of Truman's plan was a single insurance system that would cover not just the needy, elderly, veterans, children, or mothers.<sup>327</sup> It would include all Americans—even those who were too poor to pay the premiums themselves.<sup>328</sup>

Though in 1948 the Truman Administration believed there would be enough support for such a proposal to become law, conservative forces both in Congress and within the general public were strong and well-organized. These opponents viewed Truman's healthcare proposal as part of a broader social and political trend that upset existing social relations as the government encroached into sacrosanct areas of social, economic and personal life. Increasingly, this opposition against social welfare was becoming enmeshed in the anti-communist mood that was then gathering strength in the United States.

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<sup>327</sup> See generally Skocpol, Theda. 1995. *Protecting Soldiers and Mothers: The Political Origins of Social Policy in United States*.

<sup>328</sup> See Starr, Paul. *The Social Transformation of American Medicine*. Also see Monty M. Poen. 1979. *Harry S. Truman Versus the Medical Lobby*; Harry S. Truman. December 1945. "A National Health Program: Message from the President," *Social Security Bulletin*.

The domestic response to Truman's healthcare plan (as well as to his other domestic social welfare proposals) became something of a political bellwether for gauging the support for an international human rights treaty that contained socioeconomic rights. Those members of the US Senate who opposed a universal healthcare system and similarly objected to piecemeal, non-universal, domestic welfare initiatives, would certainly oppose the stronger, universal socioeconomic rights that would be included in a binding Covenant. Procedurally, if Truman could not garner a filibuster-proof two-thirds majority of the US Senate to support his domestic health proposal, he certainly would not be able to reach the same super-majority threshold to ratify a Covenant that included socioeconomic rights.<sup>329</sup> The State Department watched attentively as a groundswell of opposition surged against Truman's national healthcare proposal. But because the fate of an international covenant on human rights soon became inseparable from the domestic battle over social welfare, Eleanor Roosevelt and her State Department colleagues were thrown headlong into this tumultuous struggle.

### *The Opposition Forms*

Under fear of universal healthcare, in 1948 the American Medical Association (AMA) went into high gear. It was one of the most powerful and influential organizations to oppose Truman's health plan. Its ability to mobilize quickly and efficiently was in part due to its already strong and well-organized, dues-paying membership base. It also maintained connections with high-ranking governmental officials, media outlets, and had its own high-profile publication (*The Journal of the*

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<sup>329</sup> In the present chapter, the case study of the domestic resistance against Truman's health proposal is used as a proxy for the opposition against socioeconomic rights. Article II, Section 2 of the Constitution requires two-thirds of the Senate's approval on international treaties before they can be ratified.

*American Medical Association [JAMA]*) in which it could disseminate its message widely. With these existing resources it soon became a formidable opponent of Truman's healthcare plan.<sup>330</sup>

In December of 1948, the AMA House of Delegates—the organization's policy making body—voted to initiate a “national education campaign” to inform the public about the danger of national healthcare legislation. Its stated goal was to fight “the enactment of a compulsory sickness insurance act covering every person in the United States.”<sup>331</sup> In its view, the government had no place in this sphere of human relations. Healthcare was a private matter that should be governed by the free market of healthcare providers and patients.

In terms of social relations, domestic social welfare and the stronger socioeconomic human rights were actually quite similar. They both called for the government, acting in a protective capacity, to mediate aspects of social existence that were then often governed by the market, the Church, the family, or simply by life chances. For some this offered much-needed protection from the vicissitudes of a market-based civic existence. For the opponents, however, increased government involvement in these areas of society amounted to social tyranny. There were already many in the US Congress who opposed Truman's domestic social welfare agenda. But its connection with the ongoing human rights project that the State Department was then involved with at the UN was not yet a legislative concern, nor was it a matter of public consciousness.

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<sup>330</sup> Organization materials put the membership at 140,000 in 1950 (JAMA, July 15, 1950).

<sup>331</sup> AMA Tells; How It Will Use \$3,500,000 To Fight Ewing's “Health Nationalization,” *New York Times*, Dec. 11, 1948, pg. 13.

It was William Fitzpatrick however—the City Editor of the *New Orleans States* newspaper (discussed in previous chapters)—who linked the parallel and ongoing debates about socioeconomic rights at the United Nations and Truman’s domestic proposals as part of the same “pincer movement” to force alien laws and social customs upon the American people.<sup>332</sup> As Fitzpatrick saw it, there were now two fronts to the battle—one that came from domestic and other from the international. It was the latter movement, largely occurring outside of the public’s view, which he was particularly concerned about in his editorials. Now the potential for social and economic reforms came not only from legislative fiat, but from potentially binding human rights treaties.<sup>333</sup>

All one had to do, he warned, was read the Universal Declaration of Human Rights—upon which the Covenant would be based—to see that the UN had a “plan for worldwide socialism.” He cited Article 22 (the right to social security) and Article 25 (e.g. the right to an adequate standard of living for health and well-being, including food, clothing, housing, medical care, social services, and the right to security in the event of unemployment, sickness, disability, widowhood, or old age). In addition to imposing revolutionary changes to the freedoms associated with the “American way of life,” US citizens would be forced to care for foreigners—this was “social security for all the world, with Uncle Sam... footing most of the bill.”<sup>334</sup> As absurd as this last assertion sounds, Fitzpatrick was quite in sync with the pressing debates of the day. At the time, there were ongoing discussions in Congress questioning the wisdom of the Marshall Plan

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<sup>332</sup> Fitzpatrick, William. 1949. Editorial reprinted in, *95 Congressional Record* A1926.

<sup>333</sup> As mentioned in the previous chapter, Representative F. Edward Hebert (D-LA) was Fitzpatrick’s patron and congressional advocate. He reprinted dozens of Fitzpatrick’s editorials and speeches in the *Congressional Record* over the next several years to alert his colleagues in the US Congress about the specter of “government by treaty.”

<sup>334</sup> Fitzpatrick, William. 1949. Editorials reprinted in *95 Congressional Record* A1927.

and whether it was being used to fund socialist governments in Europe—such as Great Britain, France and Germany—with American tax dollars.<sup>335</sup>

At this point, there were actually very few opponents who were speaking to a broad public audience about the connections between human rights treaties and domestic law. Most of the opposition was preaching to limited audiences of academics, legal professionals, and politicians. Increasingly, though, other journalists, activists, and organizations would soon join Fitzpatrick, and connect the United Nations with social welfare and communism. For his editorials on the dangers of human rights treaties, Fitzpatrick would soon be awarded a Pulitzer Prize.<sup>336</sup>

Given the early indications of opposition Truman was concerned (quite rightly) about the Senate's filibuster. One potential way around this was to amend the rules of the Senate to disempower the Southern Democrats by limiting the use of their procedural weapon of choice. Truman initiated the push for a Senate rules change that would allow a simple majority vote for cloture to debate. His attempt, however, was quickly foiled by a bipartisan coalition of Southern Democrats and Midwestern Republicans.<sup>337</sup> This setback—which amounted to maintenance of the legislative status quo—imperiled Truman's agenda. Soon after, Truman struck a conciliatory chord and faced the reality that he would have to compromise with the conservatives or suffer defeat. Truman assured both his opponents and his allies that, “the Congress and the President are working together and will continue to work together for the good of the whole country.”

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<sup>335</sup> 95 Cong. Rec. 10060 (1949)- Senate - Monday, July 25, 1949.

<sup>336</sup> See *Pulitzer Prize Editorials: America's best writing, 1917-2003*, eds. William David Sloan, Laird B. Anderson.

<sup>337</sup> <http://www.trumanlibrary.org/chron/49chron2.htm#fair>



In his own prophetic words, he promised that he and the Congress were “going to agree on a lot more things than we disagree on.”<sup>338</sup>

Throughout 1949 the AMA continued to publish articles in its journal that offered scathing critiques of Truman’s National Health Plan. The arguments that appear in these *JAMA* articles, as well as the statements and speeches of the AMA’s president, typically counter-posed themes such as compulsory insurance program versus a voluntary one; socialized medicine versus a free-market program; foreign socialism versus the “American way”; government domination versus liberty and independence. In this campaign, these arguments were boiled down to several well-used phrases, such as “socialized medicine,” and “the voluntary way is the American way.”<sup>339</sup>

The goal of their “education campaign” was to put pressure on elected officials by raising the fear and ire of the general public through a well-coordinated grassroots movement. By July of 1949, the AMA had produced 25 million copies of 25 different information brochures, each meant to appeal to a different target audience, shipping millions of copies to various state and county medical societies. Over 40,000 doctors had ordered color posters for their offices that implored the government to “Keep Politics Out of the Picture.”<sup>340</sup> In its opposition to national healthcare, the AMA claimed the support of over 800 other organization such as The American Farm Bureau Federation, the American Legion, the American Bar Association, the National Grange, the National Association of Small Business Men, the National Fraternal Congress, and the General

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<sup>338</sup> March 21, 1949. Address to the United States Conference of Mayors, Cited in: <http://www.trumanlibrary.org/chron/49chron2.htm#fair>. Last accessed 6.2010.

<sup>339</sup> “Report of Coordinating Committee,” *JAMA*, Vol. 140, No. 8. p. 695

<sup>340</sup> *Id.* at 695-97.

Federation of Women's Clubs (the latter boasting 5,000,000 members).<sup>341</sup> In the political arena, several state legislatures (e.g. Delaware and Michigan) had already drafted resolutions to submit to the US Congress opposing national healthcare.<sup>342</sup> At this point, however, the AMA had not yet even begun to ramp up its campaign.

### *International Support / Domestic Opposition*

In early 1949, the State Department was pleased with the draft covenant since it was limited to only civil and political rights. By the close of the Fifth Session of the Commission on Human Rights though, things changed dramatically for the US when Australia and the USSR submitted detailed proposals calling for the inclusion of socioeconomic rights.<sup>343</sup> The Australian proposal included the right to work, fair wages and reasonable working conditions, the right to social security, limitations on working hours, and the right to education, while the Soviet proposal included the right to work, gender equality with respect to pay, the rights to rest and leisure, social security and social insurance, decent living accommodations, access to education, trade union rights, and the right to strike.<sup>344</sup> These two proposals were a very important development for the Commission on Human Rights since they raised the possibility that socioeconomic rights—which were already popular with a large portion of UN member states—would be placed alongside civil and political rights in the Covenant. The fact that Australia joined the Soviets showed that such proposals were not simply Cold War propaganda items—

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<sup>341</sup> *Id.*

<sup>342</sup> The Delaware resolution was vetoed by the governor (Reported in JAMA, May 28, 1949, Vol. 40:4, at 414).

<sup>343</sup> The Fifth Session of the Commission on Human Rights met at Lake Success, New York from May 9, 1949 through June 20.

<sup>344</sup> See UN Doc E/1371, pp.48-49.

socioeconomic rights were of genuine importance to Western nations as well. This was a troubling development for the State Department.

*Opposition Surges and Brands Social Welfare a “Socialist Threat”*

By the end of the First Session of the 81st Congress in October of 1949, the House and the Senate had failed to act upon (or had rejected outright) much of the social legislation bills that Truman had endorsed. In addition to the civil rights legislation he failed to pass, he did not muster the necessary support for the Point Four program of assistance to underdeveloped areas, the Brannan Plan (aid for farmers’ incomes), or the extension of Social Security coverage.<sup>345</sup> Finally his health plan, though not entirely dead in the water, was floundering on dry pavement. The American Medical Association, nevertheless, was unremitting.

According to AMA literature, government incursions into the private lives and business relationships of citizens was an alarming trend in the US—one that had already swept through many European nations. Such invasions were apparently destroying not only market productivity and business innovation, but were responsible for spoiling the soul of American individualism and personal autonomy. In this campaign to “educate” Americans about healthcare, the AMA often used social democratic nations (Great Britain in particular)—as social and economic foils of the US. Great Britain, the one-time dominant world-power, had apparently made a wrong turn down what Hayek had recently called “the road to serfdom”—a warning, lest the US do the same.<sup>346</sup> In this

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<sup>345</sup> The Point Four Program was approved by Congress the following year. <http://www.trumanlibrary.org/chron/49chron2.htm#fair>. Last accessed 06.2010.

<sup>346</sup> For examples of articles and speeches using foreign state economic systems such as Great Britain as a foil for the US, see Koontz, Amos R. “The Government Cannot Force Socialized Medicine on Us,” *JAMA*,

respect, the AMA campaign capitalized on the American public's familiarity with the post-war difficulties many other nations were experiencing. Though not necessarily a function of state socialism, the food shortages, rationing, and even starvation in Eastern Europe had been impressed upon the American public by the Truman Administration's recent efforts to garner support for the Marshall plan.<sup>347</sup> While the AMA's central concern remained with domestic healthcare, the fear of such international social and political forces was becoming a strong undercurrent in its campaign rhetoric.

Even more menacing than social democracy—though for the AMA only one step away—was the threat of communism. During this period the campaign began to borrow the language and rhetoric of the anti-communist movement that was beginning to sweep through America. What in hindsight can be referred to as mass hysteria or a “moral panic,” for the AMA was simply an opportunity.<sup>348</sup> The AMA—like so many others during this period—could just point to a handful of current events to stir the fear and fancy of the nation's civic imagination. In the fall of 1949, for instance, eleven members of the United States Communist party were convicted of attempting violent insurrection and attempting to overthrow the US government. In January of 1950, as the AMA was beginning to ramp up its campaign, a former State Department employee, Alger Hiss, was convicted in a case surrounding state secrets and a communist spy ring.<sup>349</sup> And finally with the outbreak of the Korean War in the summer of 1950, communism became

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Vol. 143, No. 12, pg. 113; Hutcheson, William L. 1950. “Socialized Medicine is No Bargain,” *JAMA*. Vol. 144, No. 15, p. 1269; Dec. 15, 1951- *JAMA*- House of Delegates. Hayek, F A. 1944. *The Road to Serfdom*.

<sup>347</sup> Both Truman and Secretary of State George Marshall gave influential speeches in which they outlined the economic and social suffering in European nations (e.g. Truman Address to Joint Session of Congress, March 12, 1947; George Marshall, speech at Harvard on June 5, 1947).

<sup>348</sup> For more on moral panic, see Young, Jock. 1971. "The Role of the Police as Amplifiers of Deviance." In *Images of Deviance*, ed. S. Cohen; Cohen, S. 1972. *Folk Devils and Moral Panics*.

<sup>349</sup> The fact that Hiss had served as Secretary General of the United Nations founding conference in 1945 did not ease the associations that many Americans had between communism and the UN. See Holmes, T. Michael. 1994. *The Specter of Communism in Hawaii*, at 14.

the official enemy of state. Never mind that there was absolutely no connection with Truman's desire to provide adequate health care to all Americans and these events; they all provided the AMA with the ammunition to make the case that the communist infiltrators already had breached America's ramparts. The greater fear, however, were those home-grown enemies within the government who shared Truman's social welfare aspirations.

### *The American Medical Association's Massive Campaign Blitz*

The American Medical Association (AMA) focused its campaign efforts on influencing the outcome of the 1950 midterm elections by replacing supporters of healthcare reform with steadfast opponents. This effort grew considerably throughout the year as influential organizations such as the National Association of Manufacturers and the Chamber of Commerce joined the effort to warn Americans about the dangers of a "state-managed economy."<sup>350</sup> The culmination of this endeavor was a massive media blitz timed to coincide with the November elections. In this unprecedented \$1.1 million advertisement campaign, the AMA placed large, five-column ads in 11,000 daily and weekly newspapers, bought airtime from 300 radio stations, and placed full-page advertisements in 30 magazines. The organization boasted that during the week of October 8, 1950, every "bona fide daily and weekly newspaper" in the US would carry its ads.<sup>351</sup>

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<sup>350</sup> "UN Condemned as Socialistic in Job Theory," *Chicago Tribune*, Feb. 16, 1950- Feb. 16, 1950- UN Condemned as "Socialistic in Job Theory"- Chic. Trib.

<sup>351</sup> AMA Advertizing Program," JAMA June 24, 1950, p. 744; For example of advertisements see e.g., Display Ad 116, New York Times, Oct 11, 1950, pg. 27.

The AMA's campaign was designed to reach not just doctors and legislators, but to alert every American about the dangers of "socialized medicine" and the broader "threatening trend toward state socialism" in the United States.<sup>352</sup> Accordingly, the organization created and promoted a wide variety of campaign materials to ensure that by the November elections virtually every major demographic category in the US would know about the perils of "politically controlled socialized medicine."<sup>353</sup> As an AMA official explained, those who did not read the more "formal treatises" on the subject, would find quite illuminating the sixteen-page color comic book entitled, *The Sad Case of Waiting-Room Willie*. This publication—for which the talents of a preeminent graphic artist were solicited—tells the story of a sympathetic patient who is unable to receive medical care in the "New Utopia" because all of his doctors are overrun by "unsick" patients.<sup>354</sup> On the other hand, the professional-types who took national publications such as the *New York Times* would find the AMA's imposing full-page advertisements asking its readers in large, bold face print, "Who Runs America? The Congress? The President? OR YOU AND THE MAN NEXT DOOR?"<sup>355</sup> At its heart, this was a massive effort to shape public opinion and motivate civic action.

Following the elections, the AMA claimed victory in two related fields. First, it claimed victory in creating a grassroots campaign of unprecedented size and power. They enlisted over 65,000 individuals and organizations that together spent an

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<sup>352</sup> AMA Advertizing Program," JAMA June 24, 1950, p. 744.

<sup>353</sup> AMA Advertizing Program," JAMA June 24, 1950, p. 744.

<sup>354</sup> Will Eisner, "The Sad Case of Waiting-Room Willie" (American Visuals Corp., 1950), published by the Committee on Public Medical Education of the Baltimore City Medical Society. For description of comic, see JAMA Sept 2, 1950, Vol 144. No 1. See Appendix for a reproduction of this comic.

<sup>355</sup> A.M.A. Sets \$1,100,000 Ad Drive To Kill Truman's Health Program, by William L. Laurence, Special to the New York Times, Jun 27, 1950, pg. 1; AMA Tells; How If Will Use \$3,500,000 To Fight Ewing's "Health Nationalization," New York Times, Dec. 11, 1948, pg. 13; also see AMA vs. Truman. See Appendix.

unprecedented \$2 million dollars in a two week period on the effort. Second, the AMA believed that the massive mobilization of opposition had influenced the elections. The number of advocates of national health insurance who had been replaced by opponents in the elections was cited as such evidence. Though it is difficult, if not impossible, to disaggregate the actual causal factors in this series of defeats, the scientific analysis of electoral politics was not of great concern to the AMA's leadership.<sup>356</sup> Senators Claude Pepper (FL), Frank Graham (NC), Elbert Thomas (UT), and Glen H. Taylor (ID), as well as Representatives Andrew Biemiller (WI), and Eugene O'Sullivan (NE)—all supporters of healthcare reform—had each lost their seats.<sup>357</sup> By the end of November, the AMA had members of the US Senate on notice: support social welfare initiatives at their own peril. These, of course, were the same individuals who eventually would be providing their “advice and consent” on the Covenant. Whether or not it included socioeconomic rights would very likely determine its fate in this legislative chamber.

#### *AMA Influences Public Opinion- Brands “Socialized Medicine”*

In a March 4, 1949 Gallup poll taken during the early days of the AMA's campaign, about 60% of those polled had heard or read about Truman's national health plan. 50% favored the AMA's “voluntary” insurance plan, while only 32% favored Truman's plan that was being branded by the opposition as “socialized” or “compulsory.” Interestingly, the vast majority of those who were familiar with the ongoing healthcare debates (over 72%), did not know any specifics about Truman's plan, yet still knew

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<sup>356</sup> Henderson, Elmer L. “President's Address to the House of Delegates”. *JAMA*, Dec. 9, 1950- Vol. 144; No. 15. (1268-1269, at 1268).

<sup>357</sup> <http://www.ssa.gov/history/corningchap3.html>. Last accessed 05.2010.

which plan they favored.<sup>358</sup> In less than two months, the percentage that had heard or read about the national health plan had increased by 16% to over 76% of the respondents.<sup>359</sup>

Ironically, the public was still broadly *supportive* of social welfare programs—and continued to be so throughout the campaign. By July of 1949, 54% of respondents supported the creation of a new Department of Public Welfare which would preside over social security, public health, and education matters, while only 28% disapproved.<sup>360</sup> In March of 1950, when asked about government spending on social welfare, health, and social security, 41% of respondents believed spending should be increased, 16% thought it should be decreased, while 36% believed it should remain the same.<sup>361</sup> Despite the greater support for government involvement in health and welfare, the public continued to oppose Truman's national health plan, with 60% disapproving of it (versus 23% approving of it), by October of 1950.<sup>362</sup> The AMA's campaign had done something. By the end of 1950, when asked what best argument *against* Truman's National Health plan was, the highest percentage of respondents replied that it was "socialist" or "communistic."<sup>363</sup>

The type of social welfare legislation being promoted by Truman domestically (as well as the stronger universal human rights that were being considered at the UN) was now politically toxic. It so thoroughly bore the taint of communism, internationalism,

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<sup>358</sup> Or offered no response. Gallup Poll Survey #438, March, 4, 1949. Questions qn4a, qn4d, qn5a.

<sup>359</sup> Gallup Poll Survey #441 April 30, 1949. Question qb12a.

<sup>360</sup> Gallup Poll Survey #444, June 30, 1949; Question qn18.

<sup>361</sup> Gallup Poll Survey #454, March 26- March 31, 1950; Question qn13\_4.

<sup>362</sup> Gallup Poll Survey #463, Oct. 6, 1950; Question qn8b.

<sup>363</sup> Gallup Poll Survey #467, Nov. 12- Nov. 17, 1950; Question qn9c. Other reasons provided by respondents were categorized: doctors would lose initiative, incentive; unfair to doctors, and would limit the doctors' income; lower health standards and inefficient service; cannot choose your own doctor; the cost of program; too much power for government; working poorly in England; politics would enter into it, lay the medical profession open to graft; would be abused/make people lazy and irresponsible.



and un-Americanism that the fleeting moment in which such policies had a chance of survival in Congress was all but over. In 1950, Truman dropped any serious push for health reform as his attention turned toward the Korean War.<sup>364</sup>

The “socialized medicine” epithet that was thrown about so liberally by the AMA finally stuck. It represented a conceptual basket within which the uncertainties of the moment, as well as a broad spectrum of fears, social anxieties, and prejudices could be placed. This strategy permitted something as valuable and universally necessary as access to decent medical care to become a “threat” to all Americans. The organization positioned itself as a last defense against the ill-conceived socialist mood that was “infecting” the world and now was threatening to destroy America. By joining the AMA and its growing network of supporters in the fight against national healthcare (now *socialized medicine*) Americans were taking part in a much larger battle against “the alien philosophy of a government-regimented economy.”<sup>365</sup>

#### *The US’s Unsuccessful Attempt to Keep Socioeconomic Rights Out of the Covenant*

Given the fervor of the domestic opposition against Truman’s social welfare proposals, the US State Department was hard-pressed to ease its own opposition to incorporating socioeconomic rights in the Covenant. In preparation for the General Assembly meetings that were to convene on September 19, 1950, the State Department met with the US delegation to the UN and distributed briefing papers that outlined a two-prong strategy for approaching the issue of socioeconomic rights in the Covenant. First the US delegation was instructed to support the creation of a Covenant that mirrored the

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<sup>364</sup> Starr 1982:286-89.

<sup>365</sup> AMA Advertizing Program,” JAMA June 24, 1950, p. 744.

principles and rights within the US Constitution—i.e. one that did not contain any socioeconomic rights. James Simsarian, advisor to the US delegation at the UN, discussed the Covenant in a State Department briefing session. He explained to those present—which included Eleanor Roosevelt, Senator Cabot Lodge, and John Foster Dulles, who was then a delegate to the UN General Assembly, and would later become Secretary of State under Eisenhower—that the US State Department wished to maintain the general *status quo* with respect to the Covenant. Importantly, at this point “only a limited number of rights were covered—fundamentally the same area as that included in the United States Constitution's Bill of Rights.” Thus, as far as the State Department was concerned, the Covenant remained in “satisfactory” shape “since loose language covering economic and social rights had been excluded.”<sup>366</sup> But because it appeared that many other states would try to push for the inclusion of socioeconomic rights, however, the State Department conceded it was “particularly anxious.”<sup>367</sup>

With Cold War tensions rising, the State Department deemed the cultivation of geopolitical relationships to be an important part of its UN activities. So the second prong of the State Department’s strategy emphasized the importance of working *with* other member states and not appearing obstructionist. In addition to its increasingly unpopular position on socioeconomic rights, the ongoing (and very unpopular) federal state clause battle opened the US up the charge that it was intentionally impeding not only the development of the Covenant, but the extension of its provisions as well.<sup>368</sup> The State Department stressed that the delegation should be prepared “to join with other

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<sup>366</sup> Foreign Relations of the United States, 1950, Vol. II, at 513-17 (1976).

<sup>367</sup> *Id.* at 513-15.

<sup>368</sup> The US’s proposed (FSC) was a proposed article that in would have effectively barred many of the Covenant’s provisions from applying within its federal states (see Chapter 5).

countries in inviting the Commission on Human Rights to consider the desirability and feasibility of developing further covenants or taking other measures concerning economic, social and cultural rights as well as other categories of rights in the civil and political field.”<sup>369</sup>

Merely discussing the feasibility of socioeconomic rights at future meetings was far from what other member states had in mind, though. In this respect, the US—though wishing to “work” with other states on the issue—vastly underestimated the value of socioeconomic rights for many of the UN member states. Consequently, the two strategic goals were in many respects mutually exclusive of one another. If the US adhered rigidly to its strategy of creating a Covenant that mirrored the US Constitution, it would be forced to oppose the inclusion of *any* socioeconomic rights at all. But if a significant number of states strongly endorsed socioeconomic rights, this strategy would run headlong into its second goal of working with other states and not appearing obstructionist. So from the start, the US boxed itself into a contradictory policy approach.

At the General Assembly meetings, the US’s satisfaction with the limited rights in the Covenant stood in marked contrast to many of the other delegations’ opinion of it; it soon became clear to the US that its stance on socioeconomic rights did not sit well with the majority opinion of the General Assembly. The State Department expected the usual Cold War diatribes from the members of the communist bloc who were amongst the most steadfast supporters of these rights. In this regard they did not disappoint. Stephan Demchenko from the Ukrainian Soviet Socialist Republic said the draft Covenant appeared to be rather a digest of limitations of human rights than a catalogue of such

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<sup>369</sup> Foreign Relations of the United States, 1950, Vol. II, at 510 (1976).

rights.”<sup>370</sup> The Polish representative, Henryk Altman’s comments echoed those of the other communist representatives who all in turn voiced their revulsion that socioeconomic rights—the “very foundations of democracy [which] could not in any way be separated from the recognized civil and political rights”—had not been incorporated into the Covenant.<sup>371</sup>

But what caught the US off guard was the number of non-communist states such as Mexico, Uruguay, Syria, Saudi Arabia, and Chile that shared the communist delegations’ desire to see socioeconomic rights incorporated into the Covenant.<sup>372</sup> What was so disturbing for these delegations, though, were the broader implications of producing an inadequate Covenant. Omitting socioeconomic rights, many believed, raised serious doubts about the future of the Covenant altogether. Dr. Raul Noriega, from Mexico, for instance, voiced his concern over the Covenant by arguing that “it would be better to have no covenant at all if the economic and social rights were not included in it.” Omitting socioeconomic rights from the binding Covenant would only send the message that they were of little importance, and thereby “destroy the value of the Universal Declaration of Human Rights.”<sup>373</sup> Carlos Valenzuela of Chile voiced his disappointment, saying that in its present shape, the Covenant was wholly inadequate. Like so many of the other members of the General Assembly, “the delegation of Chile could not imagine a covenant on human rights worthy of the name which did not include economic, social and cultural rights and particularly the right to work and the right to social security.” Perhaps, Valenzuela wondered, the Committee should admit that attempting to draft an

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<sup>370</sup> UN Doc A/C.3/SR.291, p.125-26

<sup>371</sup> UN Doc A/C.3/SR.290, p.117

<sup>372</sup> This is not at all an exhaustive list of UN member states who wished to see socioeconomic rights in the Covenant.

<sup>373</sup> UN Doc A/C.3/SR.298, p.178.

enforceable Covenant was an “over-ambitious project and even a dangerous one in that it risked compromising the moral prestige enjoyed by the Universal Declaration of Human Rights.”<sup>374</sup> It was not, of course, the hope or intention of these states to abandon the human rights project altogether. Much of the disappointment with the Covenant was of course directed towards the US delegation which was the chief resister. The type of diplomatic gamesmanship played here—blaming without naming—was a staple at the UN, particularly when confronting a much more powerful adversary such as the US.

As in so many of the contentious debates in the General Assembly, the now-very familiar division between colonial powers and the smaller and non-Western states was a central element. The Saudi Arabian representative, Jamil Baroody, said, “It was not surprising that most of those who took that cautious position were representatives of colonial Powers. It was plainly not in their interest to accelerate the implementation of an effective covenant, since the result in dependent territories might be to awaken the population from its lethargy.”<sup>375</sup> Nizar Kayali of Syria, like many of the other delegations, voiced the opinion that the Covenant would be quite incomplete without socioeconomic rights. With the US in his crosshairs, Kayali suggested that the opposition to such rights that came from some of the powers, “arose either from a superiority complex or from a keen sense of selfish colonial interest... Those imbued with the colonial mentality could argue that such rights were good for the inhabitants of the metropolitan country but not for the natives of the colonies.” The colonial powers’ steadfast resistance to including socioeconomic rights in the Covenant, he continued,

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<sup>374</sup> UN Doc A/C.3/SR.290, p.121-22.

<sup>375</sup> UN Doc A/C.3/SR.299, p.187

could be explained because these rights would interfere with the ongoing “exploitation” of non-western states.<sup>376</sup>

The US did not have much to say that directly addressed any of these arguments. Roosevelt provided a short statement of the US position that held tightly to the State Department’s “playbook.” Namely, the US did not support the inclusion of additional articles in the Covenant, it supported completion of the document without delay, and finally, it supported the future examination of socioeconomic rights for subsequent covenants.”<sup>377</sup> The US position in no way swayed the other delegations, for on December 4, 1950, the Assembly passed Resolution 421(V) which stated in no uncertain terms that because the current draft of the Covenant was limited to just civil and political rights, it lacked the most basic and “most elementary.” Accordingly, the Resolution called upon the Commission on Human Rights, “in accordance with the spirit of the Universal Declaration, to include in the draft Covenant a clear expression of economic, social and cultural rights.” The Resolution, which passed 23 to 17 with 10 abstentions, not only delivered a major blow to the US delegation’s hopes of avoiding socioeconomic rights, it also painted a picture of a nation that was out of touch with much of the world’s people and governments.

### *Domestic Opponents Target International Treaties*

Throughout 1951, the opposition against domestic social welfare reform continued to press on. The isolated voices of the early opponents such as William Fitzpatrick and Frank Holman, were now joined by a resounding chorus of detractors

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<sup>376</sup> UN Doc A/C.3/SR.299, p.189-90

<sup>377</sup> UN Doc A/C.3/SR.298, p.178.

who—now mobilized and primed—trained their sights on the dangers of international human rights treaties.<sup>378</sup> All the same arguments that had been used in the previous years to object to Truman’s Fair Deal programs (e.g. the importance of a free market, the “dangers” of socialism, and so forth) were still being hurled about—only now, the prime targets were the United Nations and the Covenant the US was then drafting.

The associations with communism and socialism that the AMA had conjured in its campaign the year before were even more apparent, not because they were actually present, but because of the growing distortions of the anti-communist perspective. Many watched as the US was sat at the drafting table with communist and socialist nations—not only considering their proposals for socioeconomic rights, but actually succumbing to their demands (e.g. General Assembly Resolution 421[V]). Business leaders recoiled against what was now framed as encroaching limitations upon their various industries by UN mandate. Alexander Summer, president of Real Estate Boards, for example, lashed out against the US’s involvement with the United Nations on behalf of its work on housing, which he believed would lead to “socialized housing in the United States.”<sup>379</sup> Conservative Chicago Daily Tribune editorial writer, Chesly Manly, warned about a “rising school of thought” that believed that United States law was subordinate to international treaty law and the dictates of the United Nations.<sup>380</sup> Another reporter wrote that within the United Nations people do not believe in capitalism and individual freedoms—the “United Nations is one world, and that world is international

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<sup>378</sup> “Dangers are Seen in UN Rights Code,” Special to The New York Times, Apr 24, 1951, pg. 6; UN Spreads Every Ism But Americanism, by Norma Lee Browning, Chicago Daily Tribune, Dec 16, 1951, pg. 9; “Byrd Criticizes Truman,” Jun 26, 1951 The New York Times, pg. 2; “Truman’s Socialism Attacked by Byrd,” *The New York Times*, Feb 1, 1952, pg. 10; U.N. Promotion of Socialized Housing Scored, Los Angeles Times, September 2, 1951, pg. E3.

<sup>379</sup> U.N. Promotion of Socialized Housing Scored, Los Angeles Times, September 2, 1951, pg. E3.

<sup>380</sup> Manly, Chesly. “U.N. Aid Holds American Law is Subordinate,” *Chicago Daily Tribune*, Jul 29, 1951, pg. 18

socialism...[y]ou can read the same thing in the Soviet literature that circulates freely inside the UN.”<sup>381</sup> William Fitzpatrick received widespread acclaim for his work, was awarded the Pulitzer Prize for a second series of editorials against “Government by Treaty,” and stormed onto the conservative lecture circuit as a plebian prophet.<sup>382</sup>

There was still support for human rights, social welfare, the United Nations, and socioeconomic rights—it was just drowned-out by the opposition and silenced by the rising mood that condemned all things international. A “leading American lawyer” quoted in the New York Times, bemoaned “you could not get a treaty incorporating our own Federal Bill of Rights ratified by the United States Government today.”<sup>383</sup> Referencing the disheartened human rights advocates from various labor, religious, and cultural groups who were monitoring the UN meetings on the Covenant, an April article in the New York Times expressed great doubt as to whether the Covenant would ever amount to anything, since there was little, if any, chance it would pass the US Senate.<sup>384</sup>

The Senate opposition was now focused and fierce. One year after the AMA declared its campaign victory, it invited two US Senators to speak to its policy making body, the House of Delegates—the den of doctors who had first “educated” the American public, molded opinion, and helped sink Truman’s domestic health proposal. Still strong, mobilized, and rabid, on a flag-draped stage in Los Angeles’ opulent Shrine Auditorium, they welcomed Senators Robert Taft (R-OH) and Robert Byrd (D-WV) to speak to an audience of over 6,800 doctors and members of the public.

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<sup>381</sup> UN Spreads Every Ism But Americanism, by Norm Lee Browning, Chicago Daily Tribune, Dec 16, 1951, g. 9.

<sup>382</sup> After receiving his Pulitzer, Fitzpatrick spoke at many state bar association meetings. See e.g., 38 *Women Law. J.* 12 (1951-1952) “NAWL Members Participate in Arkansas Bar Association Convention,” at p. 12; 38 *A.B.A. J.* 250 (1952).

<sup>383</sup> “Dangers are Seen in UN Rights Code,” Special to The New York Times, Apr 24, 1951, pg. 6.

<sup>384</sup> *Id.*



Just how strong the opposition was against virtually *any* form of social welfare—let alone socioeconomic rights—was made clear. As the informal leader of the “anti-Truman Southern Democrats,” Senator Byrd (D-VA) maintained that the President was destroying America’s system of free enterprise—a system that was “a more dependable guardian of peace than the United Nations [would] ever be.” For Byrd, the “vague altruism” of Truman’s social programs and policies was influenced by socialist and communist principles. As he saw it, the Covenant (which now included socioeconomic rights) would destroy the US’s best asset against Russian aggression—a strong economy.<sup>385</sup> Taft offered the standard warnings about the misguided path Great Britain had taken—a critique quite familiar to any of the doctors who had attended past AMA meetings or had even just glanced at the organization’s campaign materials. For Taft, it was more than obvious how outrageous and shockingly dreadful things had become in Great Britain where “the government furnishes free service for the birth of babies, for the support of children, for burial at death, and for every misfortune of life.” This, Taft forewarned was also the goal of the US Federal Security Administration. This type of government control, he argued, destroys businesses freedom, individual incentives to innovate, while reducing “everyone to the dead level of mediocrity.”<sup>386</sup> For Byrd, the type of programs in Truman’s Fair Deal would irrevocably put the US on the “road to socialism.” What Byrd saw at the end of this “one-way street” was the welfare state. This, he told the doctors as he drifted into a poetic lilt, was a “state of twilight in which

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<sup>385</sup> “Byrd Criticizes Truman,” Jun 26, 1951 *The New York Times*, pg. 2; “Truman’s Socialism Attacked by Byrd,” *The New York Times*, Feb 1, 1952, pg. 10.

<sup>386</sup> Taft, Robert. “Address to the AMA House of Delegates, on Dec. 5, 1951”, reprinted in *JAMA* Dec. 15, 1951, pg. 1576-1579, at 1577.

the glow of democratic freedoms is fading beyond the horizon, leaving us to be swallowed in the blackness of socialism, or worse.”<sup>387</sup>

Short of a major existential conversion, there was absolutely no chance of changing the minds (and voting behavior) of such Senators. Accounting for all the others in the Senate like them, as Eleanor Roosevelt saw it in 1951, the US “would never ratify economic and social rights in a treaty.”<sup>388</sup> Though conversions do happen, Roosevelt’s prognostication still holds sixty years later.<sup>389</sup>

#### *US Redoubles its Efforts at the UN*

As the domestic opponents painted vivid images reminiscent of Hayek’s allegorical return to serfdom, and the pending dissolution of America’s market society, the US Department of State struggled to maintain its position of moral and political leadership at the UN. Having lost the battle to keep socioeconomic rights out of the Covenant the State Department chose to focus much more intensely on the first of its two-prong United Nations strategy (creating a Covenant that mirrored the US Constitution) while using “creative” legal drafting techniques to honor the second prong (not appearing obstructionist). To do so, it focused heavily on employing legal mechanisms that would limit the reach and strength of socioeconomic rights while maintaining the outward appearance that the US did in fact support socioeconomic rights. If successful, the US would appear to be a willing and cooperative participant in the drafting process.

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<sup>387</sup> Byrd, Harry F. “Address to the AMA House of Delegates, on Dec. 5, 1951”, reprinted in *JAMA* Dec. 15, 1951, pg. 1579-1581, at 1579.

<sup>388</sup> *Foreign Relations of the United States, 1951, Vol. II*, at 767 (1979).

<sup>389</sup> Although signed by President Jimmy Carter in 1977, the International Covenant on Economic, Social and Cultural Rights has not been ratified by the US.

A State Department memo entitled, “Instructions to the United States Delegation” outlined the specifics of this approach. This memo stated that the Draft Covenant should be limited to “general language” that related to the *promotion and development of socioeconomic principles* rather than any articulation of them as actual enforceable *rights*. To this end (and depending on the general sentiment of other states at the Commission), the Department of State proposed three options of various proposals that varied in specificity and strength. Each option was intended to show other states that the US was “prepared to support the inclusion of such language in the Covenant,” while in substance creating a definition that would be as consistent as possible with the US Constitution.<sup>390</sup> The first proposal, designed to substitute for the explicit mention of any substantive socioeconomic rights (e.g. right to work, right to strike, right to adequate medical care, etc.) referred to as “Option A,” read:

"Each State party hereto undertakes to promote conditions of economic, social and cultural progress and development for a higher standard of life in larger freedom for all, with due regard to the organization and resources of the State; and to cooperate for effective international action in economic, social and cultural matters with organs of the United Nations and with specialized agencies established by intergovernmental agreement and brought into relationship with the United Nations under the provisions of the Charter of the United Nations."<sup>391</sup>

Note the legal sleight of hand: The proposed article mentions “economic, social and cultural *progress*,” “economic, social and cultural *matters*,” but never anything concerning “economic, social and cultural *rights*.” With the above text, in reality, the US would not be ceding any ground at all. Legally, such a statement could not even be classified as a “statement of rights.” This, of course, was the entire purpose of the statement—to establish a working definition of socioeconomic rights that did not actually

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<sup>390</sup> Foreign Relations of the United States, 1951, Vol. II, at 735 (1979).

<sup>391</sup> *Id.* at 737-38.

constitute “legal rights.” The US delegation was after a definition that amounted to progressive realization of principles and goals, rather than legally binding rights. If however, the other members of the Commission on Human Rights did not support such a vague, thin articulation of socioeconomic rights, the State Department provided the delegation with a second and a third statement (referred to as “Option B” and “Option C”), each increasing in strength and specificity. Even with the most forcefully worded “Option C,” however, socioeconomic rights were still articulated as goals, or principles, rather than being raised to the level of “rights.”

In the event that the Commission on Human Rights rejected all three of the US’s vaguely worded proposals and opted to list specific socioeconomic rights, the fourth contingency plan outlined by the State Department was to limit the “language as far as possible along practical lines generally in harmony with American practice and constitutional principles.”<sup>392</sup> Fifth, the Department of State also reminded the US delegation of another legal backstop it could rely upon—any socioeconomic rights that did enter the Covenant would be subject to the limitations created by the Federal State Clause (see chapter on Race). According to the sixth and final contingency plan to defeat socioeconomic rights proposals, the State Department instructed the delegation to emphasize that much of the work on socioeconomic rights is being, and should be, completed by specialized agencies such as the International Labour Organization (ILO), the World Health Organization (WHO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO).<sup>393</sup>

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<sup>392</sup> *Id.* at 735-36.

<sup>393</sup> *Id.* at 737.

The US delegation carried out its mission with great faithfulness to the State Department playbook, deploying its mechanisms to limit or forestall the adoption of specific provisions on socioeconomic rights one by one.<sup>394</sup> With respect to the actual drafting of proposals, at times the delegation was allowed to “freelance.” But typically the US delegation, which kept in close contact with Washington during each of the sessions, was guided by the State Departments’ policy papers, memos and *ad hoc* instructions.

In addition to the official plan, another method the US regularly employed in its attempt to weaken what the State Department referred to as “extremist” socioeconomic rights resolutions was to submit a series of US-sponsored amendments that little by little, whittled away at the strength and force of the initial resolution.<sup>395</sup> For example, when discussions turned to healthcare, the USSR submitted a proposal stating that all states had the duty, “To provide conditions which would assure the right of all to medical service and medical attention in the event of sickness.”<sup>396</sup> The US countered with a much more delicately worded proposal that read, “The States parties to the Covenant recognize the right of everyone to the enjoyment of the highest standard of health obtainable.”<sup>397</sup> The tactic of waging “proposal battles” was quite common at the UN and other delegations certainly practiced it just as fiercely as the US.<sup>398</sup>

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<sup>394</sup> The Seventh Session of the Commission on Human Rights, Palais de Nations, Geneva, met from April 16 through May 19, 1951.

<sup>395</sup> Foreign Relations of the United States, 1952-1954, Vol. III, at 93, 95 (1979).

<sup>396</sup> UN Doc E/CN.4/583.

<sup>397</sup> UN Doc E/CN.4/SR.223.

<sup>398</sup> Foreign Relations of the United States, 1952-1954, Vol. III, at 93, 95 (1979).

Having assessed the support for socioeconomic rights amongst the other delegations, the US decided that it would need to submit its proposal of last resort, its most strongly worded “Option C,” which read,

“Each State party to this Covenant undertakes, with due regard to its organization and resources, to promote conditions of economic, social and cultural progress and development for securing” education, improved standards of living, “measures of social security,” “effective recognition of trade unions,” labor rights, and “the preservation and development of science and culture.”<sup>399</sup>

What on the surface presents as a respectable list of socioeconomic rights, was severely limited for two reasons. For one, just as with the aforementioned “Option A,” the “rights” within this proposal cannot in fact be considered legal rights at all. They were articulated as important social, economic and cultural *goals* that states should “promote.” Nowhere in the proposal are these principles raised to the level of a right—i.e. establish an affirmative duty that signatory states are under legal obligation to ensure. Over the next several years, the Department of State would continue to speak of socioeconomic rights as not constituting “true legal rights,” using quotation marks around the word “rights” whenever mentioning socioeconomic rights in its writings.<sup>400</sup> Second, the US soon after submitted a “limitations clause” that further eroded the strength of this already weak proposal. It read:

“Each State Party to this Covenant recognizes that in the enjoyment of those rights provided by the State in conformity with this Part of the Covenant, the State may subject such rights only to such limitations as are determined by law and solely for the purpose of securing due recognition and respect for the rights and

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<sup>399</sup> Submitted on April 25, 1951. E/CN.4/539/Rev.1

<sup>400</sup> For examples of this practice, see Simsarian, James, Economic, Social, and Cultural Provisions in the Human Rights Covenant: Revisions of the 1951 Session of the Commission on Human Rights, June 25, 1951, 24 *Dep't St. Bull.* 1003-1015 at 1003; Simsarian, James 1952. “Progress in Drafting Two Covenants on Human Rights in the United Nations.” *The American Journal of International Law*, Vol. 46, No. 4, pp. 710-718; Roosevelt, Eleanor. 1952. “Progress toward Completion of Human Rights Covenants.” *Department of State Bulletin*, Vol. 26, No. 679, pp. 1024-1028.

freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”<sup>401</sup>

Thus, any state that would be obligated to enact socioeconomic rights would also be able to limit its obligations to guarantee such rights only to the extent it determines that the socioeconomic rights do not conflict with others’ rights and freedoms. Since rights usually, if not always, conflict with other existing provisions of law, this limitations clause would essentially give a signatory *carte blanche* ability to derogate from its socioeconomic rights obligations. The general purpose of a Bill of Rights is to establish a set of rights that rise above the dictates of other laws—not a set of rights that is subordinate to them. However, with this proposal (which did not survive the drafting process) the US essentially would be able to decide whether any of the socioeconomic rights applied. The State Department later wrote that the US delegation “urged the inclusion of this provision...to make it clear that the economic, social, and cultural rights recognized would not be absolute but subject to reasonable limitations. In the case of social security, for example, it is sometimes necessary to condition disability benefits payable to disabled workers on their willingness to take vocational rehabilitation courses.”<sup>402</sup>

The State Department later wrote about its strategy in the State Department Bulletin that was published just after the Commission’s meetings. It maintained that the Covenant was being drafted in the image of the US Bill of Rights; “The basic civil and political rights set forth in the draft covenant are well known in American tradition and

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<sup>401</sup> UN Doc E/CN.4/610/Add.2. This limitations clause was discussed at E/CN.4/SR.234-SR.236.

<sup>402</sup> Simsarian, James, Economic, Social, and Cultural Provisions in the Human Rights Covenant: Revisions of the 1951 Session of the Commission on Human Rights, June 25, 1951, 24 Dep’t St. Bull. 1003-1015, at 1004-1005).

law.”<sup>403</sup> The socioeconomic rights, in the draft Covenant, however, “were recognized as objectives to be achieved ‘progressively.’”

“The term ‘rights’ is used with respect to both the civil and political provisions as well as the economic, social, and cultural provisions. This term is used, however, in two different senses. The civil and political rights are looked upon as ‘rights’ to be given effect almost immediately. The economic, social, and cultural rights although recognized as ‘rights’ are looked upon as objectives toward which states adhering to the covenant would undertake to strive.”<sup>404</sup>

Just as the US had done with its reservation in the Commission, the State Department used the *Bulletin* to publicize its position that socioeconomic rights did not constitute “real rights.”

Thus, largely through the submission of substantive proposals the US set up a legal gauntlet, hoping that these socioeconomic rights would become skewered upon one or more of its procedural barbs.

UN deliberations are typically treated by historians as matters of politics and law—and indeed these were. But from the perspective taken in the present study, they are also the *indicators* of the underlying domestic and international social struggles of the day. The use of what the State Department termed “creative” legal drafting was part of the very same social struggle that the smaller and non-Western states, William Fitzpatrick, the AMA, and Senators Taft and Byrd were all engaging in. Though each fought in their own theater they were all attempting to create structures (be they legal, ideological, political, or institutional) that permitted a certain type of social ordering to take root within their confines. Once these structures became a reality and took form, they would shield certain, specific desired social relationships (e.g. a market-centered

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<sup>403</sup> *Id.* at 1003.

<sup>404</sup> *Id.* at 1004.



society) from outside assault by competing social configurations (e.g. a state-centered society).<sup>405</sup>

In form, the social and economic rights that were being drafted at the UN permitted particular *international* relationships to develop. For the US they allowed key Cold War alliances between itself and the smaller and non-Western states. For the smaller and non-Western states, socioeconomic rights represented a progressive alternative to the past era of colonial domination. On the domestic side, with its legal drafting techniques the US delegation was also attempting to carve out an institutional sphere within which a particular class of *domestic* social and political relationships could flourish. These social relationships in large part were the ones that the domestic opposition had already defined: a relatively small, non-interventionist government and a free-market environment.<sup>406</sup> In essence, the US sought to draft social and economic rights, *without* social and economic “rights” (and perhaps this is why the State Department referred to its drafting techniques as “creative”).

Once the US delegation had defined socioeconomic rights, not as “rights” but as “goals” or “principles,” it had paved the way for its next move. On May 19, 1951 it informed the Commission that it was “now of the view that the provisions in the [Draft Covenant] dealing with economic, social and cultural rights—being loosely drafted and

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<sup>405</sup> Recall the previous Chapter 1 discussion: In this regard, the three most common intellectual approaches to the study of human rights (and the sub-debates within) are not politically innocent. The structuring imposed by these frameworks represents important strategies of action—and indeed, a certain form of *collective action*—in the struggle over human rights. In this history, proponents and opponents alike often latched onto one or more of these orientations to frame their positions.

<sup>406</sup> To explain such dilemmas, political scientists often invoke Putnam’s two-level game model that explains state action as a function of both external and internal political constraints (Putnam, Robert D. 1988. "Diplomacy and Domestic Politics: The Logic of Two-Level Games," *International Organization*, 42:427-460). But this two-level game model, however, focuses entirely on the *state* as the central actor. While the state is an extremely important actor in such histories, it is not the only one, and in certain cases not even the most important one. An alternate causal mechanism called the “dual imperative,” accounts for such dilemmas, but operates within an analytic framework of social relationships (see Chapter 7).

not being expressed in terms of legal rights and with different implementation and undertaking—should be dealt with in a separate legal instrument.”<sup>407</sup> What the Department of State had not anticipated fully, however, was that the strength and force with which it executed its agenda might in fact lead to its own undoing.

### *The US Finds it is Quite Vulnerable to Public Opinion*

While the US’s comparatively vast diplomatic resources permitted a powerful approach and a technical dexterity over matters of law that was virtually impervious to attack, it was quite vulnerable to public opinion. For when members of the UN excoriated the US over its human rights drafting policies, they were talking—through the media—to people the world. Charles Malik of Lebanon (now Chairman of the Commission on Human Rights), for example, lamented that the draft Covenant embodied a “certain lack of balance” between civil and political rights and socioeconomic rights. This of course was the very lack of balance that Eleanor Roosevelt and the State Department were fighting for.<sup>408</sup> But suddenly, what in the UN was simply a matter of legal and political difference, in the *New York Times* became an epic struggle between the two titans of the UN—a news story wonderfully fit for print.

As reported in the *Times*, the problem for Malik was that certain rights such as “social security” were only listed in the vaguest of terms, while signatory states only agree to “progressively” strive for the socioeconomic rights within the limits of available

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<sup>407</sup> UN Doc E/1922/p.29. This desire to reconsider the inclusion of socioeconomic rights within a single Covenant was incorporated into a formal resolution (Res 349 [XII]) that was ultimately defeated.

<sup>408</sup> UN Doc A/C.3/SR.298, p.177.

resources. Both items were entirely consistent with the State Department's policy approach discussed above. In the same New York Times article, Eleanor Roosevelt is cited (off the record) as saying that progress has been made towards defining the difference between civil and political as legal *rights*, and socioeconomic rights as “no more than aspirations or norms...to aspire to.” Second, that no matter how these rights are defined, the US would not sign any covenant without a federal state clause that would prevent socioeconomic rights from being implemented in the US federal states. And finally, that “with such a clause the convention would have very little practical impact on United States law or practice.”<sup>409</sup>

This debate was difficult enough to navigate within the confines of the UN. Now, it was on display for the world—a world that often interpreted the very same human rights, in entirely different ways. US opponents, for example, were outraged at *any* mention of socioeconomic rights which implied a wide ranging mix of social evils ranging from increased government involvement in their lives, to full fledged state-run economy, socialism, communist infiltration, and the end of American life as it was. The smaller and non-Western states saw socioeconomic rights as indicating the end of a long era of imperialism in which human livelihood was sacrificed for the economic gain of the metropole. A power such as the US refusing to abide by such basic principles that the rest of the world supported indicated a broad chasm between the “West and the rest” and was reminiscent (if not an outright reproduction) of the very systems of imperialism they were

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<sup>409</sup> “Rights Covenant Partly Drafted,” Special to the New York Times, May 20, 1951, pg. 18. Though these are not direct quotes, and the *Times* article does not provide the source of these assessments, it closely associates them with Roosevelt. These assertions are consistent with relevant State Department papers, private meetings among delegation officials, and other State Department publications written both by Roosevelt and others (e.g. Simsarian). “U.S. in the U.N. Urges Two Rights Pacts,” Special to the New York Times, Dec 6, 1951, pg. 22]

trying to shed. Finally, the communist states had based their entire economy and social order on related principles—that if subordinated in the Covenant to the civil and political rights the US prized—would send a message to the world about the appropriateness of their own system. The very same human rights had a wide range of disparate civic meanings and social translations. In the UN debates, the representatives were speaking about the same subject, using the “universal” language of human rights to do so, while engaging in familiar diplomatic conventions, and well-trying legal drafting techniques. But they were universes away from one another once human rights were given social meaning.

Less than two weeks after their differences had been aired to the world in the *New York Times*, Malik and Roosevelt were sitting together trying to locate common ground. Malik explained the deeply important social meaning of the human rights that the US was now opposing. Their conversation revealed a major blind-spot for the US. Many of the lesser-developed nations, he explained, were experiencing degrees of social and political turmoil. Endemic political “corruption and incompetence,” as well as “tremendous social and cultural problems,” created a situation in which they looked towards the UN for leadership. Within the UN it was the US in particular that could provide such leadership. As Malik and other representatives confided in Roosevelt, “the Economic and Social Articles had become a symbol of the aspirations and needs of these countries.”<sup>410</sup>

That these conversations left an impression on Eleanor Roosevelt, was revealed in a subsequent letter she wrote to President Truman. She began by saying she believed that the US must “understand that there is a feeling in the world of a desire to attain some kind of a better standard of living and they feel that particularly the United States has an

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<sup>410</sup> Foreign Relations of the United States, 1951, Vol. II, at 741 (1979).

obligation to make the plans and help them to carry them out to apply those standards.” She went on to explain that the US was missing key opportunities to win the support of such smaller states which generally had “mixed feelings” about the US, and might even be leaning towards the Soviet Union. “They are afraid of the USSR,” she continued, “but in some ways most of these nations have never known freedom and therefore it is almost easier to accept the type of totalitarian system that tells them definitely what to do than it does to accept the democratic system which seems to require so much of them.” With respect to the nations of the Near East, Malik had assured her that “unless [the US was] going to take hold, the USSR undoubtedly would.” Unfortunately for the US, socioeconomic rights—an important issue-area where it could cultivate important allies—was the precise area in which it was actively creating opponents. Roosevelt closed her letter by outlining the bind the US was in. For the developing states, socioeconomic rights were of utmost importance—“those are the rights that mean something tangible to them in their every day lives.” On the other hand, the domestic opposition against the Covenant—and certainly a Covenant with socioeconomic rights—was strong and active. “How are we going to explain all this to the American Bar Association and Congress I really do not know, but somehow it has to be got across because everywhere the emphasis is going to be on how they are going to get a sense of hope of attaining even one notch on the upward path.”<sup>411</sup>

### *The Two Covenant Solution*

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<sup>411</sup> Letter from Eleanor Roosevelt to Harry S. Truman May 27, 1951, Harry S. Truman Library, <http://www.trumanlibrary.org/eleanor/1951.html>.

When the Economic and Social Council (ECOSOC) met for its Thirteenth Session later in the summer of 1951, the US delegation sensed that there might be a small opening for it to lobby again for two Covenants. Though the two-Covenant solution remained hugely unpopular with many of the delegations, there were several now that backed the US's efforts. The US saw it as its job to influence, sway, and actually "create" the majority that would go along with it. Given its power and resources, one method the US was quite adept at, and acknowledged in State Department papers, was "armtwisting." Though the US was often accused of "throwing its weight around" too much at the UN, it was a price it was willing to pay to prevail on such matters.<sup>412</sup> On February 5, 1952, the General Assembly adopted the GA Resolution 543 (VI) which called for two Covenants by a vote of 27 to 20 with 5 abstentions. The US prevailed in its effort to see two Covenants created by the UN, but not without inflicting significant collateral damage. John Humphrey later wrote that this decision split not only the Covenant into two, but the UN, itself."<sup>413</sup>

Though the State Department's ability to execute its strategies and achieve its goals was unrivaled, when it came time to define what human rights actually were, it was often reading from a script that was not its own. So despite the momentous role that the US delegation played in the actual drafting of the International Bill of Human Rights, much of the human rights formation process (perhaps the majority of it) took place far afield from the halls and backrooms of the United Nations where ink and parchment met.

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<sup>412</sup> Foreign Relations of the United States, 1952-1954, Vol. III, at 93, 95 (1979).

<sup>413</sup> Humphrey, John P. 1984. Human Rights and the United Nations: A Great Adventure. Transnational Publishers. Dobbs Ferry: New York, at p. 162.

In significant measure, human rights were defined by members of the conservative vanguard who connected the ongoing domestic and international struggles over the role of the market and the place of the government in society. They grounded for the American public economic ideas espoused by Adam Smith and Friedrich Hayek. They translated the impenetrable complexities of international law into a social verse that mothers and fathers recited to their sons and daughters while reading about the hardships of “Waiting Room Willie.” A right was taking form. When the AMA and its supporters spent several million dollars to change the words “national healthcare” to “*socialized medicine*” a right was being made. And when the US delegation to the UN, no matter how hard it tried, could not shed its colonial image, the most basic aspects of existing social relations and divisions moved ever closer to becoming *right*.

Four months after the Covenant was split, Eleanor Roosevelt outlined for the American public the nature of the human rights that the State Department was then fighting for. As she spoke to members of the press with script in hand, it might have seemed as if these human rights were created not by the State Department, but by Senators such as Robert Taft (R-OH) and Robert Byrd (D-WV).<sup>414</sup> Indeed they were. Having accepted their advice and now beseeching consent, Roosevelt promised that none of the human rights that the US was sponsoring at the UN would allow anyone a “free ride through life at the expense of the government.”<sup>415</sup>

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<sup>414</sup> Recall the blistering condemnations leveled by these senators at the AMA House of Delegates meeting the year before.

<sup>415</sup> Roosevelt, Eleanor. 1952. “Progress toward Completion of Human Rights Covenants: Mrs. Roosevelt’s Press Statement, June 13, 1952.” Department of State Bulletin, Vol. 26, No. 679, pp. 1024-1028, at 1024. Attaining Senate input can occur informally long before an actual treaty is officially put to vote in chamber (Article 2, §2, *US Const.*).

The human rights she spoke of could also be found in the text of William Fitzpatrick's editorials and the AMA's campaign materials. She declared that the Covenants would not impress upon the US "any provisions which depart from the *American way of life*"; a promise that would be kept, no matter what social arrangements that phrase invoked.<sup>416</sup>

Roosevelt continued on, informing all those who had taken part in these struggles of the State Department's plan to enshrine the human rights they had just created. The draft Covenants also contained the rights of those who had come to abhor the UN and fear that international human rights would limit American liberty. Roosevelt explained that the State Department was busy fighting for the inclusion of several "special provisions" to prevent any "dilution or diminution of our rights and freedoms." First, because the Covenants were non-self executing, she explained to her fellow Americans, they would not and *could not* automatically become enforceable law in the US. Then turning to the hordes of states' rights stalwarts, she assured them that with the Federal State Clause in place, the Covenants would have no impact on matters that fell into the jurisdiction of the individual states. All such affairs—whatever they might be—"will remain with the states."<sup>417</sup>

Roosevelt revealed that the State Department was also fighting for the human rights of those who feared communism. She promised that human rights in no way contained any traces of "communism, socialism, syndicalism or statism."<sup>418</sup> As for social and economic rights—the rights championed by so many non-Western states, though

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<sup>416</sup> *Id.* at 1026 (italics mine). The "American way of life" was a phrase often invoked by conservatives and segregationists.

<sup>417</sup> *Id.* at 1025.

<sup>418</sup> *Id.* at 1026.



most strongly associated with the Communist Bloc—she assured the American public that they were not actually “rights” but merely goals or aspirations to be achieved over time.<sup>419</sup> These principles were in fact of such a different species they did not belong together with the type of civil and political rights that were in the American Constitution.<sup>420</sup>

The State Department could not ignore the fact that the smaller and non-Western states (potential Cold War allies for the US) had also named what was right for *them*. Indeed, in a previous press statement, Roosevelt circled round and said that though they should be housed in separate quarters, “each group of rights [was] of equal importance”<sup>421</sup>

And as for its own notion of right, the State Department chose a definition that would help it maintain its position of moral and political leadership in the international sphere: Human rights were “part of an international effort designed to acquaint the world with the ideas of freedom.”<sup>422</sup>

But amidst this spectacle of a supposedly natural concept turning positive, the US’s recent political victory over socioeconomic rights amounted to a great concession: the center of the human rights project had not held. And so the Covenant was drawn and bifurcated. The supposed organic unity and universality of its constituent parts was no match for the competing social forces that wrenched right from right and fractured the

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<sup>419</sup> *Id.* at 1024. Note: In the official text of her press statement quotation marks are used around the word “rights” when discussing socioeconomic rights, but not when mentioning civil and political rights.

<sup>420</sup> Roosevelt made other similar statements to the press about the need for two Covenants. See e.g. Roosevelt, Eleanor. December 31, 1951. “Statement by Mrs. Franklin D. Roosevelt.” *State Dep’t Bull.* 1059-1061, 1064-1066

<sup>421</sup> Roosevelt, Eleanor. December 31, 1951. “Statement by Mrs. Franklin D. Roosevelt.” *State Dep’t Bull.* 1059-1061, 1064-1066; At 1065.

<sup>422</sup> Roosevelt, Eleanor. 1952. “Progress toward Completion of Human Rights Covenants.” *Department of State Bulletin*, Vol. 26, No. 679, pp. 1024-1028, at 1026.

nascent human rights concept along the fault lines that had been present from the start. This was not just about law, politics, or ideas—this most fundamentally was about people. So clearly imprinted on the face of the human rights that were born from these struggles are the invisible lines that at the time cut swaths through the terrain of the social, as the global West pulled from the East and North from South, separating prosperity and poverty, and people from people. These are the social struggles that in the late 1940s and early 1950s created the foundation of the modern international system of human rights.

## **Chapter 7**

### **From Social Struggles to Human Rights**

In the United States, during the early 1950s the powerful forces of opposition banded together under common cause to see to it that human rights treaties would have no impact on domestic law. Between 1951 and 1953 there were at least four senate resolutions for constitutional amendments restricting the president's treaty-making powers.<sup>423</sup> By January of 1953, Senator John Bricker of Ohio—the leader of this movement—announced that he had garnered enough support amongst his colleagues for one such proposed amendment to pass. A February 1953 State Department memo dryly summed up the situation:

“The Covenants are under attack by large and important groups in this country such as the American Bar Association and a number of members of the U.S. Senate. For the administration to press ahead with the Covenants would tend to keep alive and strengthen support for the Bricker amendments to the Constitution.”

In this memo, the State Department outlined its increasingly slim range of options. The State Department saw three possible courses: First, the US could just end its support for the Covenants altogether. This might quell the rising tide of domestic opposition and quiet down the push for a constitutional amendment—if the US ceased its support for human rights treaties, removing the main object of Bricker's ire might deflate

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<sup>423</sup> S.J. Res. 102 (82nd Cong., 1st Sess, September 14, 1951) - Introduced by Senator Bricker; S.J. Res. 130 (February 7, 1952) - Introduced by Senator Bricker S.J. Res. 1 (January 7, 1953) - Introduced by Senator Bricker S.J. Res. 43 (February 16, 1953) - Introduced by Senator Watkins for the ABA.

the movement. Second, the US could focus only on the ICCPR, ignore the ICESCR, and work on shaping the former in the image of US Bill of Rights. To a certain extent, downplaying social and economic rights while attempting to limit the Covenants' provisions to those already articulated in the US constitution had always been a part of the US strategy—this angle of attack though, probably would not placate Bricker and company. The final option would be to stall the creation of the Covenants indefinitely by employing delay tactics.<sup>424</sup>

In the Spring of 1953, Eisenhower chose to quit the Covenants: the US would not attempt to ratify the Covenants, but it would continue to take part in their drafting. In rapid succession—first in the Senate on April 6, 1953, and then just a day later at the opening of the Ninth Session of the Commission on Human Rights—the US unveiled its new policy approach. The State Department and the US delegation to the UN scrambled to choreograph their movements, draft speeches, notify important allies ahead of time, and set meetings with the press. When the US alerted its strongest UN allies about its policy shift, the British representative replied matter-of-factly that the UK had little intention of signing the Covenants either...it just did not understand the need to make such a “public spectacle” out of it all. But both he and the French delegate said they understood the US's position and thought it was sound.<sup>425</sup>

By 1966 the fight to integrate colonial institutions into the human rights framework was a losing battle with the UN swelling in membership to 122. The fierce

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<sup>424</sup> *Foreign Relations of the United States, 1952-1954 (1979)*, Vol. III, United Nations Affairs, at 1552-1554. See Anderson, Carol. 2003. *Eyes off the Prize*, at 227-29.

<sup>425</sup> *Foreign Relations of the United States, 1952-1954 (1979)*, Vol. III, United Nations Affairs, at 1562-63, 1567-78.

colonial opposition to the automatic extension of the Covenants to colonial dependencies gave way to quiet resignation as the strength of the colonial empires faded and the global trend towards decolonization made the colonial clause a non-issue. In 1960 the UN passed a resolution granting independence to colonial territories,<sup>426</sup> and the Twenty-First Session of the General Assembly adopted the Covenants in 1966 without the inclusion of any such colonial clause. The adoption of the UDHR and its Covenants represented a titanic shift: the unprecedented political and legal recognition granted to individuals and former colonies had in many important ways transformed international law and geopolitical relations.

*Theory: The Constitutive Capacity of Social Struggles*

Below, I offer a brief restatement of the multiple (and seemingly disparate) research goals that were outlined in the first chapter. I then integrate this project's findings into a cohesive theory that addresses each of these research goals. In Chapter 1, the thematic goal of bridging the well-known gap between the rhetoric and the reality of human rights was identified. Shoring up this "chasm" into which socially dislocated populations fall, between the comforting assurances of universal human rights and the devastating capriciousness of their application, has been the overarching theme of this project. Next, a preliminary observation and an initial hypothesis provided the foundation of a possible research approach for addressing this issue. The observation related to the fact that there was a great deal of (overlooked) resistance against various aspects of the modern international human rights concept during its most formative

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<sup>426</sup> The Declaration on the Granting of Independence to Colonial Countries and Peoples was adopted in 1960 under Res. 1514 (XV).

moments of development. The initial hypothesis was that this opposition might have been integrated into the human rights concept from the start; and this perhaps can explain some of the contemporary problems surrounding human rights. From here, I set out to answer two research questions: What was the nature of the opposition and what was its impact on the foundation of the modern international system of human rights, the *International Bill of Human Rights*?

But methodologically, the project was stalled before it even began, since none of the typical orientations for examining human rights—e.g. through law, politics, or philosophy—provided access to the relevant empirics. They each in their own way neglect the social aspects of rights formation. So now, in addition to the aforementioned thematic goal of reconnecting the socially dislocated populations with their human rights, as well as answering the two research questions, I added one more task: to identify a social scientific methodology for accessing the social aspects of human rights formation. As it turns out, all of these seemingly disparate goals have the same solution.

Already in the first chapter it seemed that there might be a relationship between the overarching thematic problem of socially dislocated populations and the intellectual question surrounding the “missing social” elements in contemporary studies of human rights.<sup>427</sup> Addressing this association, however, had to be put on hold while the two research questions—*what was the nature of the resistance, and what was its impact?*—were examined.

Studying the nature and impact of the resistance required a different approach than simply looking at law, politics, or ideas. The chosen alternative was to adopt a

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<sup>427</sup> For discussion of the missing social in contemporary understandings and practices of citizenship, see generally, Somers, Margaret R. 2004. "Citizenship Troubles: Genealogies of Struggle for the Soul of the Social." In *The Making and Unmaking of Modernity*.

widely accepted (though rarely implemented) understanding of human rights: human rights as statements of social relationships. This definition of human rights, when paired with the initial hypothesis that the opposition might have had an impact on rights formation, represents the beginning of both a theory and a methodological approach.

Opposition requires an adversary—it is impossible to have resistance without having something to resist. If there was resistance over certain statements of social relationships, there must have been support for contrary notions. So formalizing the initial hypothesis, I surmised that the modern human rights concept has been shaped by both positive support *and* (paradoxically) its opposition. Following World War II, the human rights concept fostered a vital consensus-building process by absorbing oppositional elements into its unitary frame. Thus from its inception, the concept has been encumbered by a series of “internal contradictions” that have created enduring structures that today enable rhetorical praise for human rights, while constraining their enforcement.

This hypothesis moved the project closer to a method. In the search for causal relationships, causal mechanisms, and crucial historical contingencies in the human rights formation process, the overall approach taken in this project has been one that focuses on the process through which competing forces (i.e. supporters *and* the opponents) engage in “social struggles” over human rights. And within these social struggles (if the hypothesis is correct) reside the causal mechanism(s) whereby the struggles transcend their existence as social *action*, and become a structural entity that in law, politics, and philosophy is known as “human rights.”

Under this “social” orientation, the more common understandings of human rights as seen through the lenses of the law, politics and philosophy, are just as vital and important as ever. They, however, become the empirical indicators of the underlying social struggle. The difficulty for accessing the underlying social elements, is that a surface reading of the law, politics or normative ideas, often leaves the reader of constitutions, human rights treaties, declarations and covenants with a set of normative concepts that obscure the hidden social relationships that reside within.

What is key—in both the history that has been outlined above and the social scientific method for interrogating it—is to identify the social meanings that these concepts are given (and not allow the normative strength and universal aspects of the concepts to obscure the underlying social struggles). For example, modern constitutions can scarcely escape reference to the principle of “equality.” But by itself, equality has little (or no) meaning. The social relationship that was to be protected by the “separate but equal” notion of equality was of course very different than the social relationship that civil rights activists fought for under the same term. Similarly, the type of equality fought for on either side of the affirmative action debates (outcome vs opportunity) relates to a completely different set of social relationships as well. To access the underlying social struggles in these cases, it is essential to understand all of the disparate social meanings of “equality” that are at stake. Human rights is similarly an empty concept—within which (and depending upon the social meaning granted) a certain set of social relationships can flourish, while competing social configurations falter.

The disparate questions this project seeks to unite are now moving closer to one another. Identifying this human rights formation process leads to a social scientific



definition that integrates the “social” elements that have been relegated to the margins of other academic approaches to the center. It creates a methodological orientation where causal mechanisms for human rights formation are found not just in the law, politics, or philosophy of human rights, but within the framework of this process of social struggle. It shows what effects the disparate strands of resistance had, and links them up in a way that, finally begins to point to a set of factors (and perhaps solutions) for reconnecting those socially dislocated populations with their actual human rights.

So did the resistance actually have an impact on the International Bill of Human Rights? The short answer is, “Yes.” But to avoid subverting the overall thematic goal of reconnecting the human rights concept with its social foundations, this research question will not be answered here simply through a textual analysis of the International Bill of Human Rights. So as opposed to identifying the impact by simply reciting line by line the textual consequences of the opposition, this research question will be answered as it exists within a social theory of human rights formation. This theory reveals the process through which the constitutive capacity of social struggles is realized.

### *Rights Formation Process*

The first step is simply to recognize that the underlying social meaning of human rights is of paramount importance. In the first chapter the point was made that the “price of admission” for the study of rights is to *define* what a human right is. This is also very true at the level of social action. As the intervening chapters have shown, for those fighting for human rights, defining human rights in terms of their meaning with respect to

a specific configuration of social relations is the “price of admission” for having any rights at all.

This is what made the city editor of the *New Orleans States* newspaper, William Fitzpatrick, so notable. He was one of the first individuals amongst the opposition who gave the language of international human rights law social meaning for the American public. Part of the social meaning, meant connecting the proposed human rights in the Covenant with the segments of American society who would become the duty holders. Because the State Department and other members of the UN were largely silent on the issue of duties, people like Fitzpatrick filled in the details with their own (often bigoted) conjecture. As the bearers of such duties, Americans would inevitably lose other freedoms. He articulated explicitly what a binding human rights convention would mean in the private sphere of the American family, in the realm of public school education, and race relations, for example. These social meanings (quite terribly) inflamed passions, rallied the opposition and *defined* what human rights then were.

The AMA did precisely the same thing—though the bulk of its campaign was focused on the meaning of national healthcare, the social meanings conjured in its campaign applied even more readily when it shifted its focus to international treaties. At the United Nations, the smaller and non-Western states (with the substantial help of the communist bloc) also did this by associating the disdain for socioeconomic rights and the objections for an unequivocal position on racial equality as indicative of the colonial relationship.

*A Place to Define Human Rights as One's Own*

Second (and a close correlate to number one) to actually define what a human right is—that is to give it the social meaning that makes the empty signifier into a social reality, it is necessary to have a social place from which to do the defining. This is essential, for it is only by having a place where one's actions count and opinions matter (to paraphrase Arendt) that any social meaning of one's own can be imputed upon the concept. The battle for access to this sphere, in fact, is where the *most important* battle for human rights occurs.

In combination, Step 1 and Step 2 (which are not necessarily stages in a sequence as much as they are essential elements in a phenomenon) represent the most fundamental aspect of human rights formation. Though it is often overlooked, many writers and advocates do acknowledge the primacy of this part of the process. For Arendt, it is the “right to have rights”—the political membership necessary to have any rights at all. For Gandhi, it is the duty of “global citizenship.” Though not necessarily “global” in a literal sense, this represents a place that effaces the preexisting structural barriers—such as the boundaries of state or empire—that prevent the creation of a social location where, in Michelman's (1996) words, the “social production of moral consciousness” can take place. This is the lived process through which human rights emerge and become one's own.

Such battles transpired long before the Covenants were completed, and in places far away from the high-level diplomatic meetings that are typically the focus of such histories. The AMA for example secured its lock on this sphere of relevance when it fought to keep the government out of what it saw as private business relationships.

Through enormous force of capital, the strength of its business associations, and extent of its political connections it actually acted out the terms of the very social relationship it was fighting for.

The nation state is often given full credit for “creating” human rights through international treaty making. But neither the state (nor its representatives) creates human rights from scratch. They do however *record* them as best they can given the constraints imposed. The Truman Administration, for example, certainly did not take the lead in defining its domestic Fair Deal policies as “communistic.” This was a definition that was fought for and won against Truman’s will. But once this social conception was created and became entrenched, it was a reality that had to be dealt with on its own terms. Similarly, the Truman Administration did not set out to define its opposition against socioeconomic rights at the UN as being fundamentally a “colonial” position. But once it was defined as such, it created constraints that the State Department was forced to navigate.

For smaller and non-Western states, institutionally, this sphere was represented by the Third Committee of the General Assembly. Early on at the UN the smaller and non-Western states were at a great disadvantage because the structures of the UN were designed largely for the larger, more powerful states.<sup>428</sup> But by using the framework of the UN in a way in which was not originally intended, the smaller states were able to carve out a sphere for their own politics within the Third Committee of the General

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<sup>428</sup> The smaller states were underrepresented in the Trusteeship Council, the Security Council, and only the five permanent members of the Security Council had the veto power over binding resolutions, for example.

Assembly (much to the consternation of the larger states, whose own interests were at times subverted by the smaller states).

The social struggle of the black advocacy groups in the US, however, represents the other side of this story. One by one the spheres in which they could wage their struggles were shut down by their opponents. Ultimately, they found themselves fighting for a set of human rights that were not their own. For Gandhi, these were the human rights “hardly worth fighting for.” But even Gandhi—in his radical inversion of the accepted liberal, state-centric, natural understanding of human rights—puts it far too mildly. For as the present narrative reveals, when a people is removed from this sphere of social attachments and political relevance in which global citizenship can be lived, their fight for human rights can quickly devolve into a bitter fight for the rights of others—a twisted parody of the human rights they first set out to achieve. Human rights—as in the International Bill of Human Rights—are a record of the outcomes of such social struggles. And as written, embody the social connections and political attachments that *are* the very human rights being fought for.

As just mentioned, once social meaning is given to the concept, the struggle in many ways takes on a life of its own. Once the communist bloc and the smaller and non-Western states defined racial discrimination as being inseparable with colonialism, for example, the United States was forced to rethink both its domestic and international policy strategy. Similarly, once the Southern white supremacists defined the Genocide Convention in terms of domestic race relations and lynching (as opposed to anything about World War II or the Holocaust), the historical trajectory of human rights treaties in

the United States was altered for decades. Any subsequent US push for human rights treaties would necessarily be forced to contend with such associations.

*The Social Struggles are Recorded in Human Rights Law*

These social struggles are recorded in the International Bill of Human Rights — though abstracted away from the particularities of the actual struggle and translated into the universalized language of the law. On the surface of the written law, is recorded a winner’s history of the concepts that have gained such normative value and rhetorical strength that neither side of the social struggle is able to argue against them—and in fact *must* argue within their frames to achieve any success at all. This is why Great Britain, almost comically (if it were not of such serious social consequence) had to argue that the colonial clause was about the freedom and autonomy of colonial inhabitants.

If the International Bill of Rights is read from a strict political or legal perspective, the underlying social struggles over colonialism likely remain hidden. And perhaps, because the conceptual winners often occupy a central place in the language of law (e.g. “autonomy,” “freedom,” “dignity,” etc.) a well-drafted limitations clause will sound quite virtuous and altruistic on its surface. But if read as the outcome of a social struggle over the appropriate way to organize social relations, the nobility of legal pronouncement gives way to the particularities of the actual social struggle. The federal state clause, for instance, represents a framework in which in which a social relationship defined by racial inequality could flourish while others social relationships—e.g. those embodying racial equality—would falter. The intensity of debate over the colonial clause

and the federal state clause reveal the underlying social battles that were fought through legal proxy.

### *The Dual Imperative*

While states do not necessarily *create* human rights, they are the most important actors in recording the overall social struggles in international treaties. Within the overall social struggles that have been focused on in this project, there exists a subsidiary causal mechanism that is exclusive to state action. During the drafting of the International Bill of Human Rights, Great Britain and the United States were often forced to act upon two conflicting imperatives: the first imperative was to support certain human rights in the international sphere for the sake of geopolitical interests and friendly relations between states. But as described throughout this project, the very human rights principles that fostered international unity, also threatened their domestic spheres with monumental upheaval. As a result, the second imperative was to prevent human rights from having a strong impact in the fields where they were most threatening. From the forces exerted by this *dual imperative* came lasting solutions that were integrated into the very foundation of the modern international system of human rights.

One way that UN member states such as Great Britain and the United States responded to this dual imperative was through compromise. As shown above, throughout the drafting debates delegations sparred over the particular rights that would be included in the legal texts in an effort to locate a comfortable middle ground in which human rights could be named without endangering existing domestic practices. This dynamic of compromise is of course a mainstay of virtually any collective drafting project.

There was however, a second drafting battle being waged—a concurrent struggle in which the stakes were higher and the terms of victory absolute. Great Britain and the United States responded to the dual imperative to simultaneously confirm and contest human rights, through a campaign to develop a human rights framework that could flip back and forth between alternate, conflicting modes of social organization. If “successful,” this had the power to not only neutralize the prerogatives of the human rights instrument, but through various legal mechanisms, to allow entirely contrary practices to flourish amidst a state’s apparent support for a human rights treaty.

For instance, states often sign treaties with extensive lists of “Reservations, Understandings and Declarations” (RUDs). These are legal footnotes that can limit, alter, or negate entire portions of the treaty’s text with respect to a particular signatory (but from a social reading, they also identify where the boundaries of the lost social struggles exist). Though the matter of colonial application might have seemed long-settled in 1976 when the International Covenant on Economic, Social, and Cultural Rights (ICESCR) was ratified by Great Britain, its application with respect to certain remaining British territories was still an issue. While no colonial clause appears in the actual body-text of the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR, Great Britain ratified the instrument while slipping in the following declaration,

“Lastly the Government of the United Kingdom declare that the provisions of the Covenant shall not apply to Southern Rhodesia unless and until they inform the Secretary-General of the United Nations that they are in a position to ensure that the obligations imposed by the Covenant in respect of that territory can be fully implemented.”

Like Great Britain with respect to the Colonial Clause, the US incorporated a series of RUDs to go along with its ratification. One of which, that in substance is a



virtual carbon copy of the original federal state clause proposed on November 26, 1947, reads:

“That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.” Both solutions permitted Great Britain and the United States to maintain strong

rhetorical support for human rights principles without being forced to implement the provisions that were dangerous to existing social configurations. The use of such RUDs is quite common. Viewed as evidence of an institutionalized social struggle, these RUDs reveal a great deal about the buried social struggles (and the shortcomings in legal process).

### *The Social Divisions are Naturalized*

These dual imperatives, as recorded within the International Bill of Human Rights, reflect the various social divisions that powerful states were responding to. The social division between the East and the West, for instance, was most notably recorded within the International Bill of Human Rights through the decision to split it into two Covenants—each Covenant is representative of one side of the social struggle. Similarly, such social divisions are recorded through the use of legal implementation mechanisms such as the colonial and federal state clauses.

The social struggles (and the social divisions) that are recorded in the International Bill of Human Rights are the social struggles of an era that has been left behind—one of Jim Crow, The Cold War and colonialism. Once recorded into law, the

great problem is that these social divisions become naturalized—social fractures turn into accepted rifts. Over time, it may be assumed that those who are not covered by a human rights treaty, should *not* be covered. One of the greatest factors in splitting the Covenants into two, for example, was the Cold War. What began as a social struggle between the West and the East, over time is assumed to be a natural difference. Now over sixty years later, and two decades since the Cold War ended, the charge of “socialized medicine” is still hurled at US legislation to offer adequate and guaranteed healthcare to all.

The Eisenhower Administration set a course that has since become the foundation of contemporary US human rights policy: America would champion human rights at the UN, but in no way would human rights influence domestic affairs. Today in international matters, the US government pursues a strong human rights agenda by imposing political pressure on foreign governments and placing conditions on foreign aid, but reserves no place in domestic law for human rights. This is not the inevitable or natural state of affairs. In the United States, the rejection of human rights has been naturalized. As revealed within this study, it was the result of a confluence of various social struggles that caused the US to oppose human rights—the Cold War, Jim Crow, and decolonization. None of these social struggles is relevant in today’s foreign and domestic policies, yet in national politics government representatives rarely, if ever, even *utter* the term with respect to US citizens.

So finally, how can researchers, advocates, and lawmakers reconnect human rights with the underlying social elements that are so often dislocated from the language of law, the practices of politics, and the abstractions of ideas? Here the social process of rights formation is the theory, and the theory is the method. This process begins by first

shifting the analytic lens towards the social, to see human rights as statements of social relationships that are formed through social struggles. By locating a place where social meaning can be given to the rights through lived experience, those human rights can be fought for and won.

This process outlines the theory of the *constitutive capacity of social struggles*, in which the latter transcends its existence as a form of social action to become the very human rights being fought for—not merely in the sense of written law (though this is key), but as a lived reality in which a sphere of human inviolability first emerges. This notion of human rights stands in marked contrast to the all too common situation in which people who apparently have human rights by virtue of their humanity, inherent dignity, or by international treaty, have their rights violated with impunity. This “embodied” notion of human rights refers to having a robust set of social and political attachments that allow the lofty and noble sounding ideas defining “human rights” to exist not just as written words, but as a lived reality.

## Appendix

### *The International Bill of Rights Drafting Overview*

#### **1945 -- United Nations Charter**

The United Nations was created in 1945 at the United Nations Conference on International Organization (UNCIO) in San Francisco. The most important document to come out of this meeting was the UN Charter which outlines the procedures, rules, and structures and purposes of the new international organization. Importantly, human rights are mentioned seven times in the charter—though at the time, the exact meaning and definition of the concept had yet to be determined. Article 68 of the Charter calls for the Economic and Social Council (ECOSOC) to establish commissions “for the promotion of human rights.” Thus, the Charter is the foundational text that gave life to the Commission on Human Rights which was established on February 15, 1946, and was largely responsible for the drafting of the UDHR and Covenants.

#### **1946 – 1948 -- UDHR**<sup>429</sup>

##### **Nuclear Commission on Human Rights-** Apr. 29 – May 21, 1946

The Nuclear Commission proposed the size, functions, and duties of the Commission on Human Rights that would be responsible for drafting the UDHR. The report of the Nuclear Commission (E/38/Rev.1) was presented to the Second Session of the Economic and Social Council.

##### **Second Session of the Economic and Social Council-** May 25 – Jun. 21, 1946

The Council adopted the Nuclear Commission’s report and established the Commission on Human Rights.

##### **First Session of the Commission on Human Rights-** Jan.-Feb. 1947

The Commission on Human Rights, which was responsible for drafting the UDHR and its Covenants, was a subsidiary body of the UN Economic and Social Council (ECOSOC), and was formed pursuant to Article 68 of the UN Charter.<sup>430</sup>

With Eleanor Roosevelt as its chair, John Humphrey was asked to prepare an initial draft. During this period the Drafting Committee enlarged from three executive representatives to eight

##### **First Session of the Drafting Committee (8-member)** Jun. 9 – 25, 1947

The Drafting Committee was a subsidiary body of the Commission on Human Rights, and was responsible for creating the main text of the documents. During this phase it had four texts to consider: (1) Humphrey’s draft; (2) Annotated

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<sup>429</sup> For detailed overviews of the UDHR drafting process see Morsink 1999; Waltz 2001; and <http://www.un.org/Depts/dhl/udhr/> (last accessed March 4, 2009).

<sup>430</sup> The Commission on Human Rights was dissolved in 2006 and was replaced by the United Nations Human Rights Council—a subsidiary body of the General Assembly.

outline of Humphreys draft (400 pages); (3) Basic list of Humphrey's rights; (4) United Kingdom Draft.

**Second Session of the Commission on Human Rights (18 member)-Dec. 1947**

This Session produced the "Geneva Draft"

**Second Session of the Drafting Committee (8 member) May 1948**

Here, the Committee mostly focused on whether it would create only a declaration, or a declaration along with a covenant.

**Third Session of the Commission on Human Rights- May- June 1948**

Here the focus was largely on reducing the size of the Geneva Draft

**Third (Social, Cultural, and Humanitarian) Committee of the General Assembly- Sept.- Dec. 1948**

The Commission on Human Rights worked with ECOSOC and the GA, transmitting drafts of the text back and forth for substantive input and engagement in broader debates surrounding the text of the IBR. This forum provided nations that were not members of the smaller Commission on Human Rights an opportunity for input. The third Committee adopted the Declaration 29-0 with 7 abstentions.

**Plenary Session of the Third General Assembly Session**

The GA adopted the UDHR on December 10, 1948 (48 states in favor, none opposing, and eight abstentions).

**1947 – 1966 -- The Covenants**

Discussions began at the first session of the Drafting Committee (a subsidiary body of the Commission on Human Rights) which met from June 9-25, 1947. It comprised members from Australia, Chile, China, France, Lebanon, USSR, the United Kingdom and the US. Work on the Covenant continued at the Second Session of the Commission on Human Rights (December 2-14, 1947).<sup>431</sup> Next, the Second Session of the Drafting Committee (May 3-21, 1948) met and created an updated draft of the Covenant (E/800, Annex).

Based on this draft, the primary drafting phase was initiated—this phase began with the Commission on Human Rights' fifth session (May-June 1949) and ended with its tenth session (February-April 1954). During the drafting process, the Commission on Human Rights did not act alone—ECOSOC and the General Assembly were also very much a part of the process.

The International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were originally intended to exist as a single covenant. In February of 1952 the General Assembly passed Resolution 543(VI) which reversed the earlier resolution calling for a single Covenant. From this Resolution the Commission on Human Rights was charged with drafting the two Covenants that became the ICCPR and the ICESCR. The Human Rights Commission completed its task in 1954, but it would be another 12 years before the General Assembly would unanimously adopt the two Covenants and open them for signature. They both entered force into international law in 1976 upon attaining the required number of state ratifications.

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<sup>431</sup> See the Commission's report (E/600).

*Resolution 37*, adopted by the Legislature of the State of North Carolina, relating to a world federal government with limited powers adequate to assure peace. Printed in the *Congressional Record*, Monday, May 23, 1949 pgs. 6587-88.

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**Resolution 37**

**Resolution memorializing the Congress of the United States concerning certain proposed constitutional amendments authorizing the United States to negotiate with other nations relating to a world federal government with limited powers adequate to assure peace**

Whereas war is now a threat to the very existence of our civilization, because modern science has produced weapons of war which are overwhelmingly destructive and against which there is no sure defense; and

Whereas the effective maintenance of world peace is the proper concern and responsibility of every American citizen; and

Whereas the people of the State of North Carolina, while now enjoying domestic peace and security under the laws of their local State and Federal Government, deeply desire the guaranty of world peace; and

Whereas all history shows that peace is the product of law and order, and that law and order are the product of government; and

Whereas the United Nations as presently constituted, although accomplishing great good in many fields, lacks authority to enact, interpret, or enforce world law, and under its present charter is incapable of restraining any major nations which may foster or foment war; and

Whereas the Charter of the United Nations expressly provides, in articles 108 and 109, a procedure for reviewing and altering the charter; and

Whereas in 1941 North Carolina was the first of many States to memorialize Congress, through resolutions by their State legislature or in referenda by their voters, to initiate steps toward the creation of a world federal government; and

Whereas several nations have recently adopted constitutional provisions to facilitate their entry into a world federal government by authorizing a delegation to such a world federal government of a portion of their sovereignty sufficient to endow it with power adequate to prevent war: Now, therefore, be it

*Resolved by the house of representatives (the senate concurring):*

**SECTION 1.** That application is hereby made to the Congress of the United States, pursuant to article V of the Constitution of the United States, to call a convention [*sic*] for

the sole purpose of proposing amendments to the Constitution which are appropriate to authorize the United States to negotiate with other nations, subject to later ratification, a constitution of a world federal government, open to all nations, with limited powers adequate to assure peace, or amendments to the constitution which are appropriate to ratify any world constitution which is presented to the United States by the United Nations, by a world constitutional convention or otherwise; and be it further

*Resolved--*

SEC. 2. That the Secretary of state is hereby directed to transmit copies of this application to the Senate and the House of Representatives of the Congress, to the Members of the said Senate and House of Representatives from this State, and to the presiding officers of each of the legislatures in the several States, requesting their cooperation.

SEC. 3. That this resolution be in full force and effect from and after its ratification.

In the general assembly read three times and ratified this the 20th day of April 1949.

**H. P. TAYLOR,**  
President of the Senate.

**KERR CRAIGE RAMSEY,**  
Speaker of the House of Representatives.

PHS/3(Rev) - page 3  
25 July 1948.

A LETTER ADDRESSED TO THE DIRECTOR-GENERAL  
OF UNESCO

BY MAHATMA GANDHI

Bhangi Colony,  
New Delhi.

25 May 1947

Dear Dr. Julian Huxley,

As I am constantly on the move, I never get my post in time. But for your letter to Pandit Nehru in which you referred to your letter to me, I might have missed your letter. But I see that you have given your addressees ample time to enable them to give their replies. I am writing this in a moving train. It will be typed tomorrow when I reach Delhi.

I am afraid I can't give you anything approaching your minimum. That I have no time for the effort is true enough. But what is truer is that I am a poor reader of literature past or present much as I should like to read some of its gems. Living a stormy life since my early youth, I had no leisure to do the necessary reading.

I learnt from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done. Thus the very right to live accrues to us only when we do the duty of citizenship of the world. From this one fundamental statement, perhaps it is easy enough to define the duties of Man and Woman and correlate every right to some corresponding duty to be first performed. Every other right can be shown to be a usurpation hardly worth fighting for.

Yours sincerely,

M. K. GANDHI

Dr. Julian S. Huxley,  
Director-General, Unesco,  
Paris.



*American Medical Association Campaign Materials, 1950.*  
“Waiting Room Willie” Comic - Front Cover



*American Medical Association Campaign Materials, 1950.*  
"Waiting Room Willie" Comic - Back Cover

**WRITE NOW! USE YOUR RIGHTS!!!**

WRITE A LETTER **NOW** TO YOUR REPRESENTATIVES IN WASHINGTON... TELL YOUR CONGRESSMEN HOW YOU FEEL...YES, WRITE TO THE PRESIDENT HIMSELF! **YOUR VOICE** AS A CITIZEN COUNTS!

ADDRESS SENATORS... SENATE OFFICE BUILDING, WASHINGTON, D.C.  
ADDRESS CONGRESSMEN... HOUSE OFFICE, WASHINGTON, D.C.  
CALL YOUR LOCAL POLITICAL CLUB FOR HIS NAME IF YOU DON'T KNOW IT!

Sample Letter →

Dear Senator (or Congressman) \_\_\_\_\_

As an American citizen, and very proud of a country where individual responsibility has been the backbone of our growth and strength, I wish to protest to you as my duly elected representative, against any legislation that will make us dependent on the government instead of on ourselves.

It may look like an easy road and have some popular appeal at first. But I believe it will hurt us morally and destroy our self-respect to lean on the government for medical care, housing, education, etc. I also believe that it will cost us more money. Taxpayers' money, which every worker will have to pay. This is proved by the history of similar experiments in other countries.

Please vote against all such socialistic bills. Americans do not want to change the form of government intended to be the servant of the people, into one where the people become slaves of the government.

Sincerely yours,



THIS IS A SUGGESTED LETTER FOR HELP IF YOU'RE IN A HURRY...IF YOU HAVE TIME, WRITE YOUR OWN. EVEN A POST CARD WILL HELP!!  
YOUR ELECTED REPRESENTATIVE WANTS TO KNOW WHAT YOU THINK.... HE WORKS FOR **YOU!!**

*American Medical Association Campaign Materials.*  
 "New York Times Advertisement, Oct. 1950"

# Who Runs America?



**RUNNING AMERICA** is the joint job of 150,000,000 people. It's the biggest job in the world today—keeping it running for liberty and for freedom. And the whole world's watching to see whether Americans can do it!

**IN MUCH OF THE WORLD** today, the people have resigned from running their own countries. Others have been quick to step in—first with promises of "security"—and then with whips and guns—to run things their way. The evidence is on every front page in the world, every day.

**FREEDOM COMES UNDER ATTACK.** The reality of war has made every American think hard about the things he's willing to work and fight for—and freedom leads the list.

But that freedom has been attacked here recently—just as it has been attacked in other parts of the world. One of the most serious threats to individual freedom has been the threat of Government-dominated Compulsory Health Insurance, falsely presented as a new guarantee of health "security" for everybody.

**THE PEOPLE WEIGH THE FACTS.** In the American manner, the people studied the case for Socialized Medicine—and the case against it.

They found that Government domination of the people's medical affairs under Compulsory Health Insurance means lower standards of medical care, higher payroll taxes, loss of incentive, damage to research, penalties for the provident, rewards for the improvident.

They found that no country on earth can surpass America's leadership in medical care and progress. They found that able doctors, teachers, nurses and scientists—working in laboratories where Science, not Politics, is master—are blazing dramatic new trails to health for Americans—and for the world.

**THE "GRASS ROOTS" SIGNALS CONGRESS.** In every community in the Nation, people stood up to be counted on this important issue. Thousands of local women's clubs, civic groups, farm, business, religious, taxpayer, medical, educational and patriotic organizations

spoke out—giving the great United States Congress its unmistakable Grass Roots signal from home!

And ever watchful, ever sensitive to an alert people, The Congress saw that signal, and heard the people speak out, loud and plain. That's democracy in action. That's the American way!

Today among the 10,000 great organizations on militant public record against "Compulsory Health Insurance" are:

- |   |  |
|---|--|
| General Federation of Women's Clubs       | American Legion                            |
| American Farm Bureau Federation           | National Association of Small Business Men |
| National Grange                           | United States Chamber of Commerce          |
| Veterans of Foreign Wars                  | National Association of Retail Grocers     |
| National Conference of Catholic Charities | National Retail Dry Goods Association      |
| American Protestant Hospital Association  | American Bar Association                   |

• Doctors of this Nation are grateful that the people refused to be wooed by the fantastic promises of this un-American excursion into State Socialism. • Doctors of America are dedicated to serve their fellow citizens at home and their comrades in uniform, wherever service to this Nation may take them. • And the thing they stand ready to fight for—to sacrifice for—to die for—is not the alien way of life of Socialism, but the prideful security of a free and self-reliant people!

## THE VOLUNTARY WAY IS THE AMERICAN WAY!

• Throughout the Nation, free men and women, working and playing together, are finding the American answer to every question of medical service, care and cost. Hundreds of Voluntary Health Insurance Plans are in healthy competition—sponsored by doctors, insurance companies, hospitals, fraternal organizations—by industry, agriculture and labor. • Today

in America—70 million people are protected by Voluntary Health Insurance! • Throughout the Nation, families are insuring themselves against the major cause of illness—in reasonable, budget-basis prices. Voluntary Health Insurance takes the economic shock out of illness. Protect your family now. • For information, ask your doctor—or your insurance man.

An American's greatest heritage is the right to learn the facts—and to speak his mind. Maintained with honor and used with sincerity—that right will guarantee forever that

# You and Your Neighbor Run America!

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