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The Failure of the Universal Declaration of Human Rights

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Source: *The University of Miami Inter-American Law Review*, Vol. 47, No. 2 (Summer 2016), pp. 164-199

Published by: University of Miami Inter-American Law Review

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## ARTICLES

# The Failure of the Universal Declaration of Human Rights \*

Jacob Dolinger\*\*

*The UN Human Rights Commission dedicated over two years to the drafting of the Universal Declaration of Human Rights, which was approved by the General Assembly in 1948.*

*The underlying reason for the Declaration was the genocide executed by Hitler's Nazi Germany against the Jewish people throughout Europe during the Second World War. The fundamental mistake of the Commission was that the persecution by the Nazis was not directed against individual persons, but against an entire people, whereas the Declaration deals exclusively with the rights of the individual human being, no reference whatsoever made in the document to collectivities.*

*Moreover, the Declaration has no force of law as it is a mere declaration with no effect over the horrors suffered by many peoples since its adoption by the UN. Therefore it is not correct to incorporate it in the realm of International Law.*

*Considering that the majority of the UN state members do not comply with the principles of the Declaration, and that the international organization has practically never come to the help of communities under the most cruel persecutions, victims of terrible atrocities, real genocides, the author concludes - despite a series of United Nations proclamations and in disagreement with illustrious authors of international law - that the Universal Declaration of Human Rights has been a total failure.*

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\* The present essay is a shortened version of a chapter of "THE CASE FOR CLOSING THE UNITED NATIONS – International Human Rights – A Study in Hypocrisy" to be published by Gefen Publishing House.

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## I. THE ORIGINS OF THE UNIVERSAL DECLARATION ON HUMAN RIGHTS

The supposedly basic inspiration for drafting the Universal Declaration of Human Rights (the “UDHR” or “Declaration”) was the cruel persecution, horrors, and atrocities perpetrated by the Nazi regime against the Jews of Europe during the Holocaust. Johannes Morsink, who examined the records of hundreds of meetings of the different United Nations’ (UN) bodies whose efforts resulted in the final draft of the Declaration, wrote the most thorough report on the origins, drafting, and intent of the Declaration. Morsink affirms that the integral factor for the drafting of the Declaration was the Holocaust because “without the delegates’ shared moral revulsion against that event the Declaration would never have been written.”<sup>1</sup> In support, he refers to the statement in the Declaration’s Preamble, which states that the “disregard and contempt for human rights [has] resulted in barbarous acts which have outraged the conscience of mankind,” and affirms that this shared outrage explains why the Declaration has found such widespread support.<sup>2</sup>

The drafting of the Declaration lasted almost three years and occupied various commissions, sub-commissions, committees, and permanent organs of the UN.<sup>3</sup> With the participation of dozens of country delegations holding UN membership, participants entertained discussions about all aspects related to the dignity of the human being and his fundamental rights, while always keeping in mind the tragic events of the Second World War. In his meticulously detailed report, Morsink states that the drafters were aware of how far the nazification of the German legal system had developed and they felt that only a clear statement of the separate issues involved could set the record straight.<sup>4</sup> This meant putting on paper all of the legal

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<sup>1</sup> JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING & INTENT* 14 (1999).

<sup>2</sup> *Id.* at 90-91

<sup>3</sup> In May 1946, the eight-member Nuclear Committee held eighteen meetings. On its proposition, an eighteen-member Commission was created, which held eighty-one meetings over two years and three sessions. Simultaneously, an eight-member Drafting Committee held forty-four meetings over two sessions. Then, from September 21 to December 8, 1948, the Third Committee on Social, Humanitarian, and Cultural Affairs held another 150 meetings. Finally, on December 10, 1948, the Third General Assembly adopted the Declaration. *Id.* at 28.

<sup>4</sup> *See id.*

rights that, by the middle of the twentieth century, had become part of the jurisprudential system of all civilized nations.

And yet, nothing resulted from the Declaration regarding the protection of people of the world against genocide or systematic atrocities, as no clear authority was given to the UN or any group of member states to interfere in order to save populations under barbaric persecution. All of the UN resolutions, starting with the Declaration, followed by the two basic Covenants, and continuing with the various Conventions approved during the following decades, concentrated on statements of principles, legal concepts, or general rules aimed to protect individual persons; however, they are silent with regard to saving collectivities doomed by the powers of evil. The only exception is the Genocide Convention, which prescribes protection of human groups through prevention and punishment. Notwithstanding, the failure of this fundamental convention is its concentration on punishment, leaving the prevention aspect undefined and inoperative, rendering it, essentially, ineffective.

Two aspects should be taken into consideration. First, even after Hitler's racial theories and murderous plans became known, the nations that had inscribed in their constitutions and other fundamental documents most of the principles that would later be included in the Declaration, failed to respond. These nations, including the United States, United Kingdom, Canada, and many others, sat idle while the Nazis persecuted and murdered millions. Second, while the Declaration was being drafted, its principles and rules were discussed and voted on by some of the most important members of the UN. These participants involved in the preparation of the Declaration were committing atrocities of their own upon innocent victims. For example, Britain sent Jewish war survivors trying to reach Palestine back to Europe and its camps or interned them in Cyprus.<sup>5</sup> In addition, British troops massacred twenty-four unarmed villagers during the Malayan emergency in Batang Kali.<sup>6</sup> With regard to its colonies,

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<sup>5</sup> See *Postwar Refugee Crisis and the Establishment of the State of Israel*, U.S. HOLOCAUST MEM'AL MUSEUM: HOLOCAUST ENCYCLOPEDIA (Jan. 29, 2016), <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005459>.

<sup>6</sup> See Christopher Hale, *Batang Kali: Britain's My Lai?*, HISTORY TODAY (July 2012), <http://www.historytoday.com/christopher-hale/batang-kali-britain%E2%80%99s-my-lai>.

Belgium engaged in some rather cruel policies in Congo<sup>7</sup> and France in some atrocious measures in North Africa.<sup>8</sup> Furthermore, Russia's murderous treatment of dissenters<sup>9</sup> and the United States' severe discrimination of African Americans<sup>10</sup> also ran afoul of many human rights principles. Irrespective, the delegates of these countries were among the most vocal in the meetings that took place on the drafting and planning of the Declaration.

Morsink, based on the official registries of the Human Rights Commission's work on the Declaration, explains how the various articles of the Declaration were drafted in response to Hitler's racist theories and how the delegates that worked on the Declaration stressed this purpose.<sup>11</sup> However, there is no article in the Declaration addressing anti-Semitism, the incitement of hate towards other people, or principles in favor of tolerance and respect for other religions and races (only guarantee of freedom of religion as a right of each individual).

In addition, everything in the Declaration is set in the singular; nothing is in the collective. I am not suggesting that a collective approach would have necessarily avoided subsequent genocides and atrocities. However, at the very least, it would have been a more exact repudiation of the Nazi's bestiality and made an eventual contribution to the Genocide Convention, as far as prevention is concerned.

Simple questions arise: Does the Declaration carry more authority or more enforceability than the legal system of each country, as far as the behavior of their people and the policies of their governments in the internal matters of that nation? Did the civilized nations respect the principles of their legal systems beyond their own territories, such as in their respective colonies? If not, would the Declaration have a stronger effect than the principles enshrined in their

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<sup>7</sup> See generally ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* (Sep. 3, 1999).

<sup>8</sup> See Julia Clancy Smith, *Imperialism in North Africa*, THE CENTER FOR HISTORY AND NEW MEDIA AT GEORGE MASON UNIVERSITY (June 2006), <http://chnm.gmu.edu/whh/modules/lesson9/lesson9.php?s=0>.

<sup>9</sup> See David Satter, *Soviet Dissent and the Cold War*, HOOVER DIGEST (Apr. 30, 2003), <http://www.hoover.org/research/soviet-dissent-and-cold-war>.

<sup>10</sup> See generally JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965* 18-87 (1987).

<sup>11</sup> See MORSINK, *supra* note 1, at 40.

own constitutional systems? Perhaps the “internationalization of human rights” was the hope of the drafters, which would have a stronger effect than any domestic human rights rule. If so, this is no more than mere wishful thinking. On the other hand, for the nations that had not inscribed these principles in their legal system, would the Declaration have any effect over them?

From the discussions surrounding the drafting of the articles and which took place in the various organs of the UN, it is evident that the Declaration is a direct consequence of the Fuhrer’s nazification of Germany’s legal system.<sup>12</sup> The various articles were created to counter the actions and rules espoused by the Nazis. Rarely did a rule of one of the state members, constitutional or otherwise, serve as a model. Instead, the model was always to contradict or oppose Hitler and his Nazi regime.

Article 8 guarantees a remedy “for acts in violating the fundamental rights,”<sup>13</sup> which was referred to in various meetings as being incompatible with national rules and was a direct response to what occurred in Hitlerite Germany.<sup>14</sup> Article 9 provides that “[n]o one shall be subjected to arbitrary arrest, detention or exile”<sup>15</sup> as a result of “the readiness of the [Nazi] courts to bow to the wishes of their political masters . . . .”<sup>16</sup> Article 10 requires that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”<sup>17</sup> This was drafted precisely to counteract the lack of independence of Nazi courts.<sup>18</sup> Article 11 forbids punishment based on retroactivity of the law<sup>19</sup> because Nazis constantly violated this principle.<sup>20</sup>

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<sup>12</sup> *See id.* at 43.

<sup>13</sup> Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III), at art. 8 (Dec. 10, 1948).

<sup>14</sup> MORSINK, *supra* note 1, at 48-49.

<sup>15</sup> G.A. Res. 217, *supra* note 13, at art. 9.

<sup>16</sup> MORSINK, *supra* note 1, at 49 (citation omitted).

<sup>17</sup> G.A. Res. 217, *supra* note 13, at art. 10.

<sup>18</sup> MORSINK, *supra* note 1, at 50.

<sup>19</sup> G.A. Res. 217, *supra* note 13, at art. 11.

<sup>20</sup> MORSINK, *supra* note 1, at 53-54.

Thus, Hitler and his Nazi regime were the guidelines of the drafting and redrafting of the Universal Declaration. The outrage resulting from the barbarity of the war was the drafters' main motivation for proclaiming the Declaration.<sup>21</sup>

In reality, the connection between the Declaration and Hitler is very weak because, where the Declaration proclaims that "[a]ll human beings are born free and equal in dignity and rights,"<sup>22</sup> Hitler's campaign was based on the extravagant contention that Jews, Romanis, and other cultural groups were sub-humans. As such, what would a future Hitler declare? What about a Muslim who considers Jews to be pigs, according to his holy sources? Because the Declaration does not define who a human being is, it does not preclude the return to the Nazi absurdities or affect the radical Muslim views.

Articles 13 and 14 guarantee "the freedom of movement and residence,"<sup>23</sup> "the right to leave any country,"<sup>24</sup> and the right to asylum.<sup>25</sup> Morsink says that the adoption of the rights contained in these articles can also be traced directly to the experience of the Second World War.<sup>26</sup> He continues, "For many Jews, gypsies, and others hunted down by the Nazis, to be able to leave Germany and be granted asylum elsewhere was a matter of life or death and therefore a question of their human rights."<sup>27</sup>

However, if we go back to the historical development of the Nazi regime and of World War II, we will verify that the denial of asylum for the Jews and persecution by the Nazis was due to the policies of the United States, Canada, and other countries in the Americas, as well as the fact that Great Britain practically closed the doors of Palestine to the Jews. Thus, the need to establish an international right to asylum has much less connection to Nazi Germany than to the cruel policy of the so-called "Allies."

The first meeting of the Commission on Human Rights of the Economic and Social Council was held on Monday, April 29, 1946. Henri Laugier, Assistant Secretary General of the UN, said,

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<sup>21</sup> *Id.* at 329.

<sup>22</sup> G.A. Res. 217, *supra* note 13, at art. 1.

<sup>23</sup> *Id.* at art.13, par. 1.

<sup>24</sup> *Id.* at art.13, par. 2.

<sup>25</sup> *Id.* at art.14.

<sup>26</sup> MORSINK, *supra* note 1, at 332.

<sup>27</sup> *Id.* at 329.



You will have to look for a basis for a fundamental declaration on human rights, acceptable to all the United Nations, the acceptance of which will become the essential condition of the admission in the international community. You will have before you the difficult but essential problem to define the violation of human rights within a nation, which would constitute a menace to the security and peace of the world and the existence of which is sufficient to put in movement the mechanism of the United Nations for the maintenance of peace and security. You will have to suggest the establishment of machinery of observation[,] which will find and denounce the violations of the rights of man all over the world. Let us remember that if this machinery had existed a few years ago, if it had been powerful and if the universal support of public opinion had given it authority, international action would have been mobilized immediately against the first authors and supporters of fascism and nazism. The human community would have been able to stop those who started the war at the moment when they were still weak and the world catastrophe would have been avoided.<sup>28</sup>

This subsequently mobilized immediate action in order to stop the warmongers and avoid human catastrophe. The various drafts that were composed in the different stages of the preparatory work never got near the point of formulating a structure that would observe, find, and denounce violations of human rights.<sup>29</sup> With the exception of a reference in the Preamble of the final text to “peace

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<sup>28</sup> U.N. SCOR, Comm. on Human Rights, 1st Sess., 7th mtg. at 2-3, U.N. Doc. E/HR/6 (Apr. 29, 1946); MORSINK, *supra* note 1, at 14.

<sup>29</sup> MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 271 (2001) (the “Humphrey Draft”); *id.* at 275 (the “Cassin Draft”); *id.* at 281 (the June 1947 Human Rights Commission Draft); *id.* at 289 (the Geneva Draft); *id.* at 294 (the Lake Success Draft); *id.* at 300 (the Third Committee Draft); and *id.* at 310 (the Universal Declaration of Human Rights).

in the world” and “development of friendly relations between nations,” nothing in the actual text of the Declaration relates in any way to “peace and security” as proposed by Laugier.

The cause and effect relationship connecting the atrocities committed during the Second World War and the Declaration became clear again during the final UN General Assembly debate in December 1948.<sup>30</sup> Charles Malik, the representative from Lebanon, said, “[T]he document was inspired by opposition to the barbarous doctrines of Nazism and fascism.”<sup>31</sup> Similarly, Lakshmi Menon, the delegate from India, said, “the Declaration was born from the need to reaffirm those rights after their violation during the war.”<sup>32</sup> Bogil Begtrup, from Denmark, stated, “the drafters wanted to avoid the horrors of a new war.”<sup>33</sup> Jorge Carrera Andrade, the representative from Ecuador, also said, “From the ruins of destruction wrought by the Second World War . . . man had once again fanned the immortal flame of civilization, freedom and law.”<sup>34</sup> Count Henri Carton, the Belgian delegate declared, “the essential merit of the Declaration was to emphasize the high dignity of the human person after the outrages to which men and women had been exposed during the recent war.”<sup>35</sup> René Cassin, from France, concluded, “[T]he last war had taken on the character of a crusade for human rights and the Declaration was the most vigorous and the most urgently needed of humanity’s protest against oppression.”<sup>36</sup> Geoffrey Wilson, the United Kingdom delegate, spoke of the historical situation in which the Committee met.<sup>37</sup> It was one where Germany and other enemy countries during the war had completely ignored what human rights and freedoms mankind had regarded as fundamental. The Committee met as a first step toward providing the maximum possible safe-

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<sup>30</sup> MORSINK, *supra* note 1, at 36.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 37.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

guard against that sort of thing in the future. After quoting these pronouncements, Morsink concluded that “the Universal Declaration was adopted to avoid another Holocaust or similar abomination.”<sup>38</sup>

Article 30 rules that “nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”<sup>39</sup> Various delegates argued forcefully for the inclusion of this article in order to check and prevent the growth of nascent Nazi, fascist, or other totalitarian ideologies.<sup>40</sup> It was understood that Article 30 provided “the indispensable elements of defense against the possible rebirth of Nazism or fascism,” as argued by the Lebanese, French, and Russian delegates.<sup>41</sup> This is illusory because if the Declaration does not create an instrument to avoid or remedy the infringement of any of the rights enumerated in its text, how does Article 30 provide a guarantee against the growth of a totalitarian ideology and consequential regime?

When a delegate in the Third Committee observed that the principles of liberty, equality, and fraternity set in the Declaration were well known and did not need to be stated again,

Cassin quickly responded that the argument “was invalid in light of recent events. Within the preceding years,” he said, “millions of men had lost their lives, precisely because those principles had been ruthlessly flouted.” He thought it “was essential that the U.N. should again proclaim to mankind those principles which had come so close to extinction and should refute the abominable doctrine of fascism.”<sup>42</sup>

The belief in the power of a mere proclamation was indeed the tonic of the assembled delegates.

The extent to which the Declaration has been interpreted to be related to the aftermath of Nazi Germany’s atrocities has reached a

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<sup>38</sup> *Id.*

<sup>39</sup> G.A. Res. 217, *supra* note 13, at art. 30.

<sup>40</sup> MORSINK, *supra* note 1, at 87.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 39.

point where we read, with reference to Articles 3,<sup>43</sup> 4,<sup>44</sup> and 5,<sup>45</sup> that these rules “are not simply Enlightenment reflexes, but profound reactions to what went on in the concentration camps.”<sup>46</sup> These rights had been established by the western world in different occasions and in different ways far before Hitler’s perversities; it is not implausible to connect them with the events of the war that had just ended at that time.

Another such grandiloquent, but equally equivocal, statement is that the nazification of the German legal system taught the drafters that the strongest protection against systematic human rights violations is the kind of legal system Articles 6 through 12 prescribe.<sup>47</sup> These are the articles that deal with the guarantees of legal protection inclusive in courts of law. The German Constitution carried all these guarantees and yet the German leadership, followed by the majority of its people, and mainly by the legal community, accepted the total corruption of its juridical system and the systematic violation of all human rights.

In a more realistic analysis, a cool look at the document leads to the consideration that

So far as the Great Powers of the day were concerned, the main purpose of the United Nations was to establish and maintain collective security in the years after the war. The human rights project was peripheral, launched as a concession to small countries and in response to the demands of numerous religious and humanitarian associations that the Allies live up to their war rhetoric by providing assurances that the community of nations would never again countenance such massive violations of human dignity. Britain, China, France, the United States, and

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<sup>43</sup> G.A. Res. 217, *supra* note 13, at art. 3 (“Everyone has the right to life, liberty and security of person”).

<sup>44</sup> *Id.* at art. 4 (“No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”).

<sup>45</sup> *Id.* at art. 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

<sup>46</sup> *Id.* at 331.

<sup>47</sup> *Id.* at 43.

the Soviet Union did not expect these assurances to interfere with their national sovereignty.<sup>48</sup>

History has proven that the Great Powers were right in their skepticism and that the idealists never got what they looked forward to.

The scholarly community generally accepted the connection between the Declaration and Nazism. The analysis of various authors demonstrates the generalization of the theory:

1) “The cruelties and oppression of the Nazi regime in Europe brought the conviction both during and after the Second World War that the international recognition and protection of human rights for people throughout the world is essential to the maintenance of international peace and order.”<sup>49</sup>

2) “[T]he Second World War and the suffering inflicted under the Nazi regime gave new impetus to those demanding international recognition and enforcement of fundamental human rights and freedom.”<sup>50</sup>

3) “[W]hat ultimately tipped the scale in favor of human rights after the Second World War was the ‘unimagined destruction of human life in the genocide of the Holocaust’s Final Solution that exceeded all previously known bounds.’”<sup>51</sup>

4) “The horrors of the Holocaust formed the background against which human rights norms and a host

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<sup>48</sup> GLENDON, *supra* note 29, at xv-xvi.

<sup>49</sup> Shigeru Oda, *The Individual in International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 469, 497 (Max Sørensen ed., 1968).

<sup>50</sup> ROBERT MACLEAN, *PUBLIC INTERNATIONAL LAW* 192 (2000).

<sup>51</sup> G. Daniel Cohen, *The Holocaust and the “Human Rights Revolution”: A Reassessment*, in *THE HUMAN RIGHTS REVOLUTION: AN INTERNATIONAL HISTORY* 53, 54 (Akira Iriye et al. eds., 2012) (citing PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 291 (1998)).

of other UN conventions initially established their legitimacy.”<sup>52</sup>

5) “[T]he horror of the Holocaust would shape new international humanitarian law for decades to come.”<sup>53</sup>

And yet, it is important to emphasize, there is not one line in the whole Declaration which guarantees that in the future, a persecuted person, racial tribe, or religious or ethnic group will be protected by the United Nations.

The Preamble of the United Nations’ Charter states,

To save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . .<sup>54</sup>

The first sentence is generic, referring to war in the traditional sense. It embraces humanity as a whole, and does not provide specific protection for minorities. The second sentence is directed to the individual and nations in very generic and abstract terms.<sup>55</sup>

In the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, the Russian delegate Alexander Borisov proposed that Article 7, which deals with discrimination,

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<sup>52</sup> *Id.* at 55 (citing Daniel Levy & Natan Sznajder, *The Institutionalization of Cosmopolitan Morality: The Holocaust and Human Rights*, 15 J. HUM. RTS. 143, 149 (2004)).

<sup>53</sup> *Id.* at 55 (citing MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* 241 (2004)).

<sup>54</sup> U.N. Charter pmbl.

<sup>55</sup> There was a proposal for an article on minorities but in a different sense: it was meant to give “people belonging to well-defined linguistic, ethnic, or religious minority groups the right to establish their own educational, cultural, and religious institutions and to use their own language in the courts.” GLENDON, *supra* note 29, at 119. The proposal originated from multicultural nations. *Id.* at 119-20. However, the United States and France opposed it strongly, because it went against the American culture of “melting pot” and the French assimilationist approach to diversity. *Id.* at 120.

should have an added paragraph stating that any advocacy of national, racial and religious hostility, national exclusiveness, or hatred and contempt, as well as any action establishing a privilege or discrimination based on the distinction of race, nationality, or religion, constitutes a crime and shall be punishable under the law of the state.<sup>56</sup>

In the same line, another Russian delegate, Alexandre Bogomolov, added,

The affirmation of equality of individuals before the law should be accompanied by the establishment of equal human rights in political, social, cultural, and economic life. In terms of practical reality, this meant that one could not allow advocacy of hatred or racial, national or religious contempt . . . Without such a prohibition, any Declaration would be useless. It could not be said that to forbid the advocacy of racial, national or religious hatred constituted a violation of the freedom of the press or of free speech. Between Hitlerian racial propaganda and any other propaganda designed to stir up racial, national or religious hatred and incitement to war, there was but a short step. Freedom of the press and free speech could not serve as a pretext for propagating views[,] which poisoned public opinion. Propaganda in favor of racial or national exclusiveness or superiority merely served as an ideological mask for imperialist aggression. That was how German imperialists had attempted to justify by racial considerations their plan for destruction and pillage in Europe and Asia.<sup>57</sup>

The Russian delegate was condemning what has become known as “hate speech.”

In addition, the Russian delegation insisted that the proposal was to test whether the UN was to be effective in its protection of minorities. On a later occasion, Alexei Pavlov, another Soviet delegate,

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<sup>56</sup> MORSINK, *supra* note 1, at 70.

<sup>57</sup> *Id.*

brought up his colleagues' proposition again. At the end, the Borisov/Bogomolov/Pavlov proposal was turned down.<sup>58</sup>

After many discussions in the innumerable bodies of the Commission and in the other organs of the UN until the Declaration reached final approval by the General Assembly, Article 7 finally states, "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."<sup>59</sup>

Morsink distinguishes the Russian proposal from the final redaction by "one crucial difference": the Russian version proposed the "outright prohibition of advocacy or incitement to hostility, hatred and contempt," while the final text only guarantees protection against incitement.<sup>60</sup> This is a display of prohibition versus protection.

Actually, there is a much wider distinction between the two formulations, which differ in two very important respects: 1) the Russian proposal was directed at minorities, as a collective group of human beings, whereas the final text of the Declaration merely protects individuals, as it starts with "all," meaning everyone; and 2) The Russian proposal characterized the violation of its precept as a crime, to be punished by the law of the state, whereas no such provision is found in the final text of the Declaration.

With all due remembrance and respect to the millions of victims of the cruel and criminal Russian regime of the time, it must be recognized that its delegation at the Human Rights Commission suggested a more historically, politically, and legally adequate proposition than the formula that was finally approved.

This is an accurate, but disappointing, description of the results reached by the highly praised "internationalization of human rights," which is devoid of any real meaning. Because the Declaration did not confront the great catastrophe that occurred during World War II, it added nothing to what the constitutional democracies already guaranteed, and it did not influence the states that do not respect human rights in their internal legislations.

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<sup>58</sup> *Id.* at 71.

<sup>59</sup> G.A. Res. 217, *supra* note 13, at art. 7.

<sup>60</sup> MORSINK, *supra* note 1, at 72.



Regarding the Declaration's Preamble, I have two remarks. First, the "*barbarous acts, which outraged the conscience of mankind*"<sup>61</sup> did not stem from a disregard for human rights. The unspeakable atrocities committed by the Nazis go well beyond the simple disregard of human rights. A state can disregard human rights and not commit genocide. There is no relationship or connection between the barbarity of the Second World War and the Declaration. Second, "*freedom of speech and belief and freedom from fear and want*"<sup>62</sup> are great ideals for which men and governments have to endeavor all possible efforts. However, these ideals do not constitute "*the highest aspiration of the common people.*"<sup>63</sup> The first, highest, strongest, all-encompassing, everlasting aspiration of the "common people" as well as the not so "common people" is the right to life, provided for in Article 3 of the Declaration. The right to life was so wildly disrespected in both World Wars, yet found no reference in the Preamble, which sets the fundamental philosophical, historical, social, political, and, in certain sense, the legal desiderata of the Declaration.<sup>64</sup>

The concept of human rights originated in the first chapter of the Bible, Genesis, and is an old conquest of civilization, as expressed in philosophy, theology, and religious and political literature. As it turns out from the work of the Commission that drafted the Declaration, and the subsequent literature, Hitler was the indirect cause of human rights instruments—specifically, the Declaration. This

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> The "Lake Success Draft" went even further stating, "Whereas disregard and contempt for human rights resulted, before and during the Second World War, in barbarous acts which outraged the conscience of mankind and made it apparent that the fundamental freedoms were one of the supreme issues of the conflict . . ." GLENDON, *supra* note 29, at 294. There is a long way between not respecting the fundamental freedoms and organizing the methodical, scientific, atrocious murder of an entire people or race or religion—any human group—dispersed all over a continent. The same critique applies to the "Cassin Draft," which stated in its Preamble, "Ignorance and contempt of human rights have been among the principal causes of the sufferings of humanity and particularly of the massacres which have polluted the earth in two world wars . . ." There is no correspondence between disrespect of human rights and organized, systematic massacres; the former does not necessarily lead to the latter. *See also* G.A. Res. 217, *supra* note 13, at pmbl.

amounts to a horrific view of history, as well as a preposterous historical and legal analysis of recent facts.

An important consideration regarding the drafters of the Declaration is that the nation states had no moral authority to respond to Nazism, as they represented countries that could have, but did not, avoid the Holocaust or at least save a considerable part of the victims. Actually, Hitler could not have materialized his perversion against the Jews were it not for the policy of the United States, followed by the allied states, of refusing entrance to the Jews when they were still able to escape from Europe. This was a policy that gave Hitler the green light to proceed with his barbarous objective, which he materialized against the majority of the Jews living in Europe.

Regarding the objectives of the Declaration, its Preamble proclaims that the “recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . .”<sup>65</sup> “Freedom” and “justice” are human rights as well. It would have been more precise to enumerate these two principles together with dignity and equality and not classify them as supportive elements of the others. It is not easy to understand the relation of individual human rights with “peace in the world,” or as the Preamble further adds, the essentiality of “promoting the development of friendly relations between nations.”<sup>66</sup>

At the ceremony of concession of the Nobel Peace Prize to René Cassin, the Chairman of the Nobel Prize Committee, who had been Norway’s representative to the UN from 1946 to 1965, stated, “Today, where there is no respect for human rights and freedom, there is no peace either.”<sup>67</sup>

What is the real connection between individual human rights and peace in the world? Where is the evidence that governments that

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<sup>65</sup> *Id.*

<sup>66</sup> CHARLES R. BEITZ, *THE IDEA OF HUMANS RIGHTS* 19 (2009) (“there are two distinguishable themes in the characterization given in the preamble of the declaration’s justifying aims: that international recognition of human rights is necessary to protect the equal dignity of all persons and that respect for human rights is a condition of friendly relations among states”).

<sup>67</sup> Aase Lionaes, Chairman, Nobel Committee, Award Ceremony Speech at the Nobel Peace Prize Award (Dec. 10 1968), *available at* [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/1968/press.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/1968/press.html).

abuse their people's human rights necessarily pose a greater threat to international peace? During the twentieth century, various Southern and Central American countries went through various periods of dictatorial regimes, which restricted the rights of their citizens and violated fundamental human rights. These countries did not represent a threat to peace in the world. The same goes for Portugal during the long regime of President António de Oliveira Salazar in the 1940s and 50s. Did Francisco Franco's Spain threaten peace beyond its borders, even in the years of the civil war that was waged there in the 1930s?

Iraq, Cuba, and Vietnam are often referred to as examples of human rights violating states that are likely to go to war. This does not prove anything, as there are dozens of states that do not respect human rights and never go to war. On the other hand, human rights observant states sometimes go to war, but never against another similarly observant state. Indeed, interventions that discuss the reestablishment of human rights have often times lead to war.

Without doubting the sincerity of the drafters of the Declaration, the analysis of the horrors of the Second World War and the subsequent occurrence of continuous world shaking tragedies demonstrates that the document does not connect with its declared causes and does not achieve its purposes. From that moment in 1948 starts a long history of self-delusions, fantasies, and lies, which eventually developed into a long chain of hypocritical situations, transforming the so-called campaign for international human rights into a theater of the absurd, led by the different organs of the UN through manifestations and grandiose events organized by the world entity. At the same time, tragedies of colossal proportions are going on, bringing about discrimination, persecution, human trafficking, torture, and, above all, genocides of all kinds and sizes.

The drafting of the Declaration lasted nearly three years, went through seven drafting stages, occupied hundreds of meetings, received hundreds of amendments, and more than a thousand votes in discussions about all kinds of matters, but nothing appears in its text regarding how to secure people of the world against genocide, systematic atrocities, or the empowerment of the UN or any group of member states to interfere immediately in order to save populations being persecuted and murdered.

The two basic Covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, followed by the numerous Conventions and the hundreds of resolutions of the UN approved during the following decades concentrated on statements of principles, legal concepts, general rules, multiple obligations, but nothing about saving the doomed by the powers of evil.<sup>68</sup>

## II. CHARACTERIZATION OF THE UNIVERSAL DECLARATION

“No talk about natural law has saved the Jews from Hitler”<sup>69</sup>

With this statement, Josef L. Kunz expressed his disagreement with the philosophical school that ties human rights to natural rights and contradicts his theory that human rights can only be achieved through positivism, by express legal rules. He goes against the belief that “human rights stand and fall with the recognition of natural law.”<sup>70</sup> Kunz proceeds to say “that they, exactly to the contrary, stand and fall with positive law guaranteeing them and giving an

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<sup>68</sup> MORSINK, *supra* note 1, at 20 (“[T]oday there are around two hundred assorted declarations, conventions, protocols, treaties, charters, and agreements, all dealing with the realization of human rights in the world. Of these postwar instruments, no fewer than sixty-five mention in their prefaces or preambles the Universal Declaration of Human Rights as a source of authority and inspiration.”); *see also* ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* 92 (2014) (more than 300 human rights are guaranteed in the major international human rights treaties).

<sup>69</sup> Josef L. Kunz, *The United Nations Declaration of Human Rights*, 43 AM. J. INT’L L. 316, 319 (1949).

<sup>70</sup> *Id.* (internal citations omitted); *see also* HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 127 (2d ed. 2008) (citing Louis Henkin, *International Law: Politics, Values and Functions*, 216 COLLECTED COURSES HAGUE ACAD. INT’L L. 208, 209 (1989) (“Both international law and domestic legal norms in the Christian world had roots in an accepted morality and in natural law, and had common intellectual progenitors (including Grotius, Locke, Vattel.”)); POSNER, *supra* note 68, at 11-12 (referring to the U.S. Declaration of Independence and the French Declaration of the Rights of Man as two major political documents that embodied the view that people could overthrow their government if it violated their rights, which used the term “natural rights” rather than “human rights” but “meant the same thing.”).

effective remedy against their violation in independent and impartial courts.”

Almost seven decades after the approval of the Declaration, we now know that even if we were to attribute a legal, positivistic character above natural law to the Declaration, it still would have failed to help the millions of victims to human rights violations. The victims include those who were tortured and murdered by the innumerable dictators that converted the second half of the twentieth century into one long succession of rivers of blood, the millions of women and children that have been, and continue to be, sold into slavery and sex, the millions of women cruelly discriminated in Muslim countries, or the hundreds of thousands of Christians discriminated and persecuted in those countries.

In a judgment by the Civil Tribunal of Brussels, the Declaration was characterized for what it really is—a mere declaration, without force of law.

The Court said,

[T]he Universal Declaration does not have the force of law. Its sole aim is to express the common ideal to be attained by all peoples and all nations, in order that by instruction and education respect for these rights and freedoms may be developed and that measures may be taken progressively to ensure that they are recognized and universally and effectively applied in the future.<sup>71</sup>

The opinion that the Declaration is not a legal instrument has been expressed by various authorities,<sup>72</sup> including Supreme Court

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<sup>71</sup> M. v. United Nations & Belgium, 45 *I.L.R.* 446 (Civ. Trib. of Brussels 1966), in *INTERNATIONAL LAW THROUGH THE CASES* 156, 157 (L.C. Green, 4th ed. 1978).

<sup>72</sup> A far cry from the proclaimed original intentions of the Commission of Human Rights when it began to draft the Declaration as a result of the atrocities of WWII and creating a document that would not allow history to repeat the human suffering caused by the Nazi regime. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 570 (4th ed. 1990) (“The Declaration is not a legal instrument, and some of its provisions, for example the reference to a right of asylum, could hardly be said to represent legal rules. On the other hand, some of its provisions either constitute general principles of law or represent elementary

Justice and United States Ambassador to the United Nations, Arthur J. Goldberg.

[The Universal Declaration] has received universal recognition, but it remains just that, a declaration. In these two words thus are reflected both the hope and the tragedy of human rights in our day. We agree all too often on principles, but practice and enforcement have not kept pace with pronouncements.<sup>73</sup>

The authors of the Declaration recognized that acceptance of a legally-binding treaty would prove very difficult to obtain, but that it would be relatively easy to reach agreement on the text of a hortatory declaration. Therefore, the UN Commission on Human Rights decided to work on a declaration and prepare one or more draft treaties thereafter. This resulted in the passage of the Declaration in 1948 and, many years later, the Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights, which entered into force in 1976.<sup>74</sup>

The Declaration was seen as having only moral force, binding only in the sphere of conscience. As such, every state is entitled to interpret its provisions in its own light as to the ethical rights and wrongs of any given situation.<sup>75</sup>

As a tendency developed to upgrade the meaning and the value of the Declaration, international scholars, though warning about the need to exercise restraint in describing it as a legally binding instrument, tried somehow to upgrade its value.<sup>76</sup> Actually, denial of its

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considerations of humanity.”); Cf. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, at 22 (Apr. 9).

<sup>73</sup> History has proven the Ambassador correct. ARTHUR J. GOLDBERG, *Our Concerns for Human Rights*, 32 Congress Bi-Weekly, Nov. 15, 1965, at 9 (Nov. 15, 1965); but see BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 629 (1990) (considering Ambassador Goldberg’s dictum as “somewhat exaggerated”).

<sup>74</sup> The Covenants hardly improved over the weakness of the Declaration. THOMAS BUERGENTHAL ET AL., INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 47 (4th ed. 2009).

<sup>75</sup> H. Lauterpacht, *The Universal Declaration of Human Rights*, 25 BRIT. Y.B. INT’L L. 354, 370 (1948).

<sup>76</sup> L. OPPENHEIM, INTERNATIONAL LAW 1002-04 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (“The Declaration has been of considerable value as

legal character appeared at the very moment of its approval by the General Assembly on December 10, 1948 when the delegate to the United States, Eleanor Roosevelt, said, "It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation."<sup>77</sup> On another occasion, at a meet-

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supplying a standard of action and of moral obligation. It has been frequently referred to in official drafts and pronouncements, in national constitutions and legislation, and occasionally—with differing results—in judicial decisions. These consequences of the Declaration may be of significance so long as restraint is exercised in describing it as legally binding instrument. However, in the years since its adoption, the widespread acceptance of the authority of the Declaration has led some to the opinion that while the Declaration as an instrument is not a treaty, its provisions may have come to be the embodiment of new rules of customary international law in the matter.”).

<sup>77</sup> Eleanor Roosevelt, Chair, Drafting Committee of the Universal Declaration of Human Rights, Statement to the United Nations' General Assembly on the Universal Declaration of Human Rights (Dec. 9, 1948), *available at* [https://www.gwu.edu/~erpapers/documents/displaydoc.cfm?\\_t=speeches&\\_docid=spc057137](https://www.gwu.edu/~erpapers/documents/displaydoc.cfm?_t=speeches&_docid=spc057137) (“In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as common standard of achievement for all peoples of all nations.”); Lauterpacht, *supra* note 75, at 358; U.N. SCOR, Comm. on Human Rights, 3d Sess., 48th mtg. at 5-6, U.N. Doc. E/CN.4/SR.48 (June 4, 1948) (“The Declaration should not be in any sense a legislative document. The General Assembly was not a legislative body . . . Further, it was clear that the Declaration, as envisaged, did not create legal remedies or procedures to ensure respect for the rights and freedoms it proposed to the world; that ideal would have to be achieved by further steps taken in accordance with international and domestic law. The Declaration would have moral, not mandatory, force.”); Joseph M. Sweeney et al., Cases and Materials on the International Legal System 630 (1988) (citing J.P. Humphrey, The UN Charter and the Universal Declaration of Human Rights, *in* The International Protection of Human Rights 39, 51 (Evan Luard ed., 1967) (“Even more remarkable than the performance of the United Nations in adopting the Declaration has been its impact and the role which it almost immediately began to play both within and outside the United Nations—an impact and a role which probably exceed the most sanguine hopes of its authors. No other act of the United Nations has had anything like the same impact on the thinking of our time, the best aspirations of which it incorporates and proclaims. It may well be that it will live in history chiefly as statement

ing of the Third Committee that preceded the UN's General Assembly vote to approve the Declaration, Mrs. Roosevelt made an enthusiastic statement about the document, in which she said,

This Declaration may well become the international Magna Carta of all men everywhere. We hope its proclamation by the General Assembly will be an event comparable to the proclamation of the Declaration of the Rights of Man by the French people in 1789, the adoption of the Bill of Rights by the people of the United States, and the adoption of comparable declarations at different times in other countries.<sup>78</sup>

These two representations by Mrs. Roosevelt do not necessarily conflict. In 1948, still under the impact of the catastrophic consequences of the war, there was a deep urge to create conditions for a better world. At the same time, there was a careful approach to respect the sovereignty of state members of the UN and not interfere with their basic legal principles. On the one hand, there was wishful thinking that the Declaration could bring about a world of peace and security, but on the other hand, it was realized that each state would have to establish, through its constitution and legal system, the necessary guarantees for reaching that goal. Mrs. Roosevelt addressed each position in her quoted manifestations.

When the Declaration was approved, the President of the General Assembly made a statement that expressed both aspects. He said the Declaration was simply a "declaration of rights that does not abide by international convention for States being bound to carry out and give effect to these rights, nor does it provide for enforcement."<sup>79</sup> On the other hand, the President of the General Assembly believed the Declaration to be

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of great moral principles. As such its influence is deeper and more lasting than any political document or legal instrument.")).

<sup>78</sup> Eleanor Roosevelt, Chair, Drafting Committee of the Universal Declaration of Human Rights, Statement to the United Nations' General Assembly on the Universal Declaration of Human Rights (Dec. 9, 1948), *available at* [https://www.gwu.edu/~erpapers/documents/displaydoc.cfm?\\_t=speeches&\\_docid=spc057137](https://www.gwu.edu/~erpapers/documents/displaydoc.cfm?_t=speeches&_docid=spc057137).

<sup>79</sup> MORSINK, *supra* note 1, at 33.



A step forward in a great evolutionary process. It [is] the first occasion on which the organized community of nations [has] made a declaration of human rights and fundamental freedoms. [The Declaration is] backed by the authority of the body of opinion of the United Nations as a whole and millions of people, men, women and children all over the world, [will] turn to it for help, guidance and inspiration.<sup>80</sup>

The intellectual level of the Declaration was well defined, as is made evident by the comments made at the time of its adoption. The “Universal Declaration was written for ordinary men and women, for people in all walks of life and in all the different cultures of the world.”<sup>81</sup> Mrs. Roosevelt was quite clear when she declared that the Declaration was not intended for philosophers and jurists but rather for the ordinary person.<sup>82</sup>

To some, the history of the Declaration’s title helps clarify the real nature of the document. René Cassin proposed that the original title, “International Declaration,” be changed to “Universal Declaration.” He later wrote that ‘universal’ meant that the Declaration was morally binding on everyone, not only on the governments that voted for its adoption, as it “was not an ‘international’ or ‘intergovernmental’ document; it was addressed to all humanity and founded on a unified conception of the human being.”<sup>83</sup> At the same time, this statement enhances the moral value of the document and recognizes its non-legal nature.

The development of this approach strengthened the general negation of legal characteristics of human rights documents. Hersch Lauterpacht made a realistic characterization of the Declaration. In an extremely legal/logical argumentation, Lauterpacht showed that

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<sup>80</sup> U.N. GAOR, 3d Sess., 183d plen. mtg. at 166, U.N. Doc. A/PV.183 (Dec. 10, 1948); *see also* Lauterpacht, *supra* note 75, at 356 (“The practical unanimity of the Members of the United Nations in stressing the importance of the Declaration was accompanied by an equally general repudiation of the idea that the Declaration imposed upon them a legal obligation to respect the human rights and fundamental freedoms which it proclaimed.”).

<sup>81</sup> MORSINK, *supra* note 1, at 33.

<sup>82</sup> U.N. SCOR, Comm. on Human Rights, 2d Sess., 41st mtg. at 9, U.N. Doc. E/CN.4/SR.41 (Dec. 16, 1947); MORSINK, *supra* note 1, at 34.

<sup>83</sup> GLENDON, *supra* note 29, at 161.

there is nothing in the document that limits the freedom of states and that proclaiming the rights of an individual while scrupulously refraining from laying down the duties of states constitutes a juridical heresy.

[T]here are, in these matters, no rights of the individual unless as a counterpart and a product of the duties of the state. There are no rights unless accompanied by remedies. That correlation is not only an inescapable principle of juridical logic. Its absence connotes a fundamental and decisive ethical flaw in the structure and conception of the Declaration.<sup>84</sup>

Despite all initiatives by states' legislatures, resolutions by international entities, and efforts by non-governmental organizations, the reality remains as Lauterpacht diagnosed.

The development of the UN's history has failed to show any international moral opprobrium towards the states that do not abide by the human rights principles, let alone any substantial legal consequences to their constant violations of the principles set in the Declaration and Covenants.

Pope John XIII, the great prince of the Catholic Church, the Pope of peace, fraternity, and reconciliation, praised the Declaration as "an act of the highest importance."<sup>85</sup> That could be so, provided it developed into concrete legal measures and international action, an aspect outside of the Church's jurisdiction.

The international situation immediately after World War II, the "iron curtain" formed by Soviet Russia around her satellites and the consequent tension that it caused, brought about the gradual vanishing of the wartime alliance. This made it difficult, if not impossible, to create an enforceable charter of human rights, though it is doubtful whether such ideal would have materialized under normal circumstances.

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<sup>84</sup> LAUTERPACHT, *supra* note 75, at 373; *see also* International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, at ¶ 2.1, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966) ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . .")

<sup>85</sup> GLENDON, *supra* note 29, at 132 (internal citations omitted).

The biographers of René Cassin expose a weighty reason for the unenforceable terms in which the Declaration was approved under.

Among the most powerful opponents of the Universal Declaration were the imperial powers of the time, Great Britain, France, the Netherlands, Portugal and Belgium. These states had absolutely no interest in helping colonized people to turn the Universal Declaration into a weapon to be used against their own supremacy. France opposed measures advanced by Cassin himself: the point at issue was the right of individual petition, which the Quai d'Orsay anticipated would produce an avalanche of claims from colonized people. Cassin made every effort to make the right of petition acceptable to French diplomats, but to no avail. Manifestly, the Universal Declaration was framed in such a way as to enable the colonial powers to sign it, but once signed, the fight for realizing the aspiration stated in it had just begun.<sup>86</sup>

A different characterization of the Declaration was pronounced by Louis Henkin, who included the United Nations Charter, Universal Declaration of Human Rights, and the two Covenants in the “International Human Rights Law” section of his textbook on International Law.<sup>87</sup>

The duty to “observe faithfully and strictly” not only the provisions of the Charter but also of the Universal Declaration was proclaimed by the General Assembly in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. Similarly, the 1963 Declaration on the Elimination of All Forms of Racial Discrimination recognized that every State shall “fully and faithfully observe the

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<sup>86</sup> JAY WINTER & ANTOINE PROST, *RENÉ CASSIN AND HUMAN RIGHTS: FROM THE GREAT WAR TO THE UNIVERSAL DECLARATION* 349 (2013).

<sup>87</sup> See LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 599-635 (1993); *but see* LAUTERPACHT, *supra* note 75, at 367 (“Not being a legal instrument, the Declaration would appear to be outside international law. Its provision cannot properly be the subject-matter of legal interpretation.”).

provisions of . . . the Universal Declaration of Human Rights.” Both declarations were adopted unanimously.<sup>88</sup>

Taking the above mentioned developments into account, the unofficial Assembly for Human Rights, which met in Montreal in March 1968, stated that the “Universal Declaration of Human Rights constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become a part of customary international law.” In the Declaration of Teheran, the official International Conference on Human Rights, which met at Teheran in April-May 1968, reached a similar conclusion and proclaimed that the “Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community.” The General Assembly of the United Nations in December 1968 endorsed the Proclamation of Teheran “as an important and timely reaffirmation of the principles embodied in the Universal Declaration of Human Rights.”<sup>89</sup>

Concluding his view of the Declaration, Henkin further stated,

It has been suggested that the Universal Declaration, after the U.N. Charter, is the most influential instrument of the second half of the twentieth century. It underlies the entire international law of human rights, but, as the Declaration itself contemplated, its principal influence may have been to secure the recognition of human rights by states and instill the idea and the principles of human rights into the national constitutions and laws of virtually all states.

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<sup>88</sup> HENKIN ET AL., *supra* note 87, at 606 (citing LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 518 (1973)).

<sup>89</sup> *Id.* at 606-07 (citing SOHN & BUERGENTHAL, *supra* note 87, at 518-19 (internal citations omitted)).

The Universal Declaration has been copied or incorporated in numerous constitutions of new states.<sup>90</sup>

This is the sweet illusion in which many legal scholars have lived throughout the second part of the twentieth century. The Declaration as well as the Covenants and the various Conventions on different aspects of human rights suffer from a basic failure: a sizable portion of the member states of the UN, more than half, live under dictatorial regimes. Some of these countries have intolerant religious legal systems that do not abide by the most elementary of principles and values contained in these international instruments. “One study by Freedom House counted 90 ‘free countries’ out of 194 in 2013, where a free country is ‘one where there is open political competition, a climate of respect for civil liberties, significant independent civic life, and independent media.’ The other countries experience a range of human rights abuses.”<sup>91</sup> One must conclude that despite the opinion of a few eminent scholars and the insistent proclamations of the UN, the Declaration, as well as the other documents that followed, are mere declarations, wishful resolutions, that are not put to practice in the larger number of states and do not protect the majority of humankind.

Saudi Arabia abstained from the General Assembly vote that approved the Declaration because of the provisions that equate men and women’s right to marry and sets the freedom to change one’s religion.<sup>92</sup> Previously, when the Declaration was being discussed in the Third Committee, the Saudi delegate accused the drafters of considering

Only the standards recognized by Western civilization and [ignoring] more ancient civilizations which were past the experimental stage, and the institutions

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<sup>90</sup> HENKIN ET AL., *supra* note 87, at 608.

<sup>91</sup> POSNER, *supra* note 68, at 4. Countries with the highest scores include the United States, Canada, Australia, New Zealand, and most European countries. Arch Puddington, *Freedom in the World 2013: Democratic Breakthroughs in the Balance*, FREEDOM HOUSE 4, [https://freedomhouse.org/sites/default/files/FIW%202013%20Booklet\\_0.pdf](https://freedomhouse.org/sites/default/files/FIW%202013%20Booklet_0.pdf). Israel, which has a highly developed, well-functioning democratic system, is not usually mentioned as a consequence of the generalized demonization campaign of the Jewish State.

<sup>92</sup> *Id.*

of which, for example marriage, had proved their wisdom through the centuries. It was not for the Committee to proclaim the superiority of one civilization over all the others or to establish uniform standards for all the countries in the world.<sup>93</sup>

This was an honest position taken by a state that did not respect, and continues to disrespect, human rights and makes no secret of it.<sup>94</sup> Similar charges of ethnocentrism were raised by other members of the UN such as the states that made up the Soviet bloc as well as the Union of South Africa.

The United Nations has grown more than three times since 1948. The Declaration has become a real ethnocentric document, as witnessed by the relative, often diminutive, application of human rights in the great, ever growing number of non-democratic states that became members of the organization. It is important to take into consideration that at the time the Declaration was approved, UN membership was composed of twenty-one countries in North and South America, sixteen countries in Europe, fourteen countries in Asia, four countries in Africa, and 3 countries in the South Sea Islands, for a total of 58 member states.<sup>95</sup> In 2014, the UN was composed of 194 members, the majority ruled by non-democratic, non-human rights respecting regimes.<sup>96</sup> Therefore, despite its title, the Declaration has limited applicability and attempts to extend globally are bound to fail. In theory, the Declaration reflects “a universal concern of mankind, [but] in fact, the disparity of standards, systems and

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<sup>93</sup> MORSINK, *supra* note 1, at 24.

<sup>94</sup> Saudi Arabia is not so honest anymore. In 2007 it ratified the treaty banning discrimination against women; however, by law, it subordinates women to men in all legal areas. The punishing system in Saudi Arabia follows Koranic patterns: “amputation of a hand for theft, stoning for adultery, one hundred lashes for sexual relations before marriage, [and] death by decapitation for apostasy . . .” Vivian Grosswald Curran, Book Review, 61 AM. J. COMP. L. 721, 724 (2013) (reviewing GILLES CUNIBERTI, *GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* (2011)).

<sup>95</sup> See *History of the United Nations*, UNITED NATIONS, <http://www.un.org/en/sections/history/history-united-nations/index.html> (last visited May 23, 2016).

<sup>96</sup> See *id.*

values is too great to make an effective international organisation possible in this field.”<sup>97</sup> Time has proved him right.

There was a clear, express manifestation of the lack of universality of the Declaration—not only de facto, but also de jure. In 2012, in a blunt statement by the Association of South East Asian States (ASEAN), the Human Rights Declaration was adopted by the countries belonging to the Association.

Articles 6 and 7 of the ASEAN Human Rights Declaration proclaim,

The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives. It is ultimately the primary responsibility of all ASEAN Member States to promote and protect all human rights and fundamental freedoms.<sup>98</sup>

All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.<sup>99</sup>

The United States Department of State issued a statement expressing concern at the limitations and qualifications of the ASEAN

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<sup>97</sup> WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 63 (1964).

<sup>98</sup> Association of South East Asian States (ASEAN) Human Rights Declaration art. 6, Nov. 18, 2012, *available at* [http://www.asean.org/storage/images/resources/ASEAN%20Publication/2013%20\(7.%20Jul\)%20-%20ASEAN%20Human%20Rights%20Declaration%20\(AHRD\)%20and%20Its%20Translation.pdf](http://www.asean.org/storage/images/resources/ASEAN%20Publication/2013%20(7.%20Jul)%20-%20ASEAN%20Human%20Rights%20Declaration%20(AHRD)%20and%20Its%20Translation.pdf).

<sup>99</sup> *Id.* at art. 7.

text, which “could weaken and erode universal human rights and fundamental freedoms as contained in the UDHR.”<sup>100</sup>

In a later manifestation, a United States Department of State’s Deputy Assistant Secretary explained,

[T]he [ASEAN] Declaration, as adopted ten days ago, subordinates respect for fundamental freedoms to an assumed cultural context. Yet universal human rights are just that—universal. These rights are not Western, or Eastern. These rights are not subject to regional and national limitation. These rights do not bear in mind political, economic, legal, social, cultural, historical, or religious backgrounds . . . .Subordinating universal rights to domestic law is a departure from more than 50 years of established international practice of human rights, going back to the UN Declaration.”<sup>101</sup>

The concerns and the critique of the State Department are naïve, if not hypocritical. The Declaration of the ASEAN countries does nothing more than honestly proclaim what has been known and practiced from the very beginning by the non-democratic states: either total or at least partial rejection of fundamental principles of human rights proclaimed in the various UN documents. There was

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<sup>100</sup> John Crook, *Contemporary Practice of the United States Relating to International Law*, 107 AM. J. INT. L. 207, 238 (2013) (citing Press Release No. 2012/1826, U.S. Dep’t of State, ASEAN Declaration on Human Rights (Nov. 20, 2012), available at <http://www.state.gov/r/pa/prs/ps/2012/11/200915.htm>) (“While part of the ASEAN Declaration adopted on November 18 tracks the UDHR, we are deeply concerned that many of the ASEAN Declaration’s principles and articles could weaken and erode universal human rights and fundamental freedoms as contained in the UDHR. Concerning aspects include: the use of the concept of ‘cultural relativism’ to suggest that rights in the UDHR do not apply everywhere; stipulating that domestic laws can trump universal human rights; incomplete descriptions of rights that are memorialized elsewhere; introducing novel limits to rights; and language that could be read to suggest that individual rights are subject to group veto.”).

<sup>101</sup> *Id.* at 238-39 (citing Daniel Baer, Deputy Asst. Sec., Dep’t of State, Keynote Address to the U.S.-ASEAN Symposium on the ASEAN Human Rights Declaration (Nov. 28, 2012), available at <http://www.state.gov/j/drl/rls/rm/2012/201210.htm>).



no “departure” from international practice, but rather a confirmation of an ongoing reality.

Thirty-five years after the adoption of the Declaration, Phillip Alston observes,

It is sometimes suggested that “the doctrines of human rights as embodied in the Universal Declaration of Human Rights may not be relevant to societies with a non-Western cultural tradition or a socialist ideology.” In its extreme form such an approach would thoroughly undermine the existing system for the international protection of human rights and create a “free for all” situation in which each dictator and each military junta, as well as each democratically elected but embattled government, could design its own bill of rights to suit not only local traditions but also its own self-interest.<sup>102</sup>

Alston and the Department of State personnel would do well to go back to the classic commentaries of the drafters of the Declaration in order to have a better understanding of the non-universality and non-enforceability of the Declaration. Besides, what is preferable: a simple hypocritical adhesion to the Declaration by a state or group of states that do not respect its principles, or an honest declaration that restricts human rights, so that the rest of the world knows exactly where a state or a group of states stand on the matter?

Against the belief that there can be no fully universal concept of human rights,

It is sometimes suggested that there can be no fully universal concept of human rights, for it is necessary to take into account the diverse cultures and political systems of the world. In my view this is a point advanced mostly by states, and by liberal scholars anxious not to impose the Western view of things on others. It is rarely advanced by the oppressed, who are only too anxious to benefit from perceived universal

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<sup>102</sup> Philip Alston, *The Universal Declaration at 35: Western and Passé or Alive and Universal*, 31 INT’L COMM’N OF JURISTS 60, 65 (1983).

standards. The non-universal, relativist view of human rights is in fact a very state-centered view and loses sight of the fact that human rights are *human* rights and not dependent on the fact that states, or groupings of states, may behave differently from each other so far as their political, economic policy, and culture are concerned. I believe, profoundly, in the universality of the human spirit. Individuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely; to practise their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know that they will not be tortured, or detained without charge, and that, if charged, they will have a fair trial. I believe there is nothing in these aspirations that is dependent upon culture, or religion, or stage of development. They are as keenly felt by the African tribesman as by the European city-dweller, by the inhabitant of a Latin American shanty-town as by the resident of a Manhattan apartment.<sup>103</sup>

The text reveals the hope of humanity, but it does not reflect the position of a great part of the member states of the UN, who are the ones deciding who will live and who will die, who will have a secured life and who will live in torment, who will enjoy the benefit of state security and who will be discriminated against, who will be free and who will lose his liberty and suffer torture, and who will practice his religion freely and who will be imprisoned, tortured and even killed for daring to stay loyal to his faith.

The major problem, however, lies elsewhere. As I have pointed out, the Declaration, as well as the two following Covenants, have a basic, fundamental deficiency: the Declaration and the Covenants are directed exclusively to natural persons,<sup>104</sup> without considering

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<sup>103</sup> ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 96-97 (1994).

<sup>104</sup> HENKIN ET AL., *supra* note 87, at 598 (“International Human Rights generally, the Universal Declaration, and, notably, the International Covenant on Civil and Political Rights, address the rights of natural persons only.”).

the protection of communities, peoples, or the collective in general, when the history, since its approval, has consisted of transgressions of catastrophic dimensions against human groups. Taking aside the atrocities committed during the Second World War, human rights were never so vilified, human life never so cheapened, and never so much suffering experienced by collectivities caused by other collectivities or tyrants as after the approval of the Declaration. Despite all the subsequent treaties, conventions, resolutions, declarations, commissions, councils, conferences, international and regional courts, and other initiatives of the society of nations—all pretending to protect people and individuals—these atrocities continue to exist.

The idealistic view that every human being on earth is entitled to protection could never be materialized based on a document that directs itself to the individual because the member states of the UN have different policies towards their citizens, as a result of their varying cultures, religions, and political systems. However, with a document that would clearly authorize the world community to intervene in any state committing atrocities against its own people, the African tribesman and the Latin American shanty-town resident may not be able to reach the standard of living of the European city dweller or the Manhattan apartment resident, but at least he would be able to enjoy the same freedom from persecution and atrocious behavior by his government or his compatriots. From one intervention after another, the states that do not respect their citizens would slowly, but surely, begin to consider the need to move to a policy that avoids interventions from the outside. The habit of abstaining from the worst acts would eventually lead these governments to a softer, kinder, and better way of treating their people.

In other words, by avoiding the worst, the leaders of the African tribesman and of the Latin American shanty-town dweller would get nearer and nearer to treating their people on a basis of human dignity and eventually, fully recognize human rights. Strong intervention, practiced with careful strategy, by the world community, and a respectful approach could change the “other side” of the globe.

An important consideration is the principle set in Article 2, paragraph 7 of the UN Charter, which provides, “Nothing contained in the present Charter should authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of

any state . . . .”<sup>105</sup> This principle has serious repercussions in the successive atrocities and genocides, as it waters down any improvement that could eventually derive from the fundamentals set in its Preamble and the rights enshrined in the Declaration.<sup>106</sup>

That the human rights promises fell far short of the expectations was to be expected, for each of the principal victorious powers had troublesome human rights problems of its own.

The Soviet Union had its *Gulag*, the United States its *de jure* racial discrimination,<sup>107</sup> France and Great Britain had their colonial empires . . . .it was not in the political interest of these countries to draft a Charter that established an effective international system for the protection of human rights, which is what some smaller democratic nations and non-governmental organizations advocated.<sup>108</sup>

On more than one occasion the Russians delegates “attacked the British colonial policies and made reference to the lynching of African Americans in the United States. [A U.K. delegate] responded with a long statement about the Russian concentration camps set up by Stalin, about which the Russian government was keeping absolute silence.”<sup>109</sup> Although both sides were correct, these reciprocal

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<sup>105</sup> U.N. Charter art. 2 par. 7.

<sup>106</sup> The exceptions for the application of enforcement measures include “the existence of any threat to the peace, breach of the peace, or act of aggression,” but do not include violations of human rights. *Id.* at art. 39.

<sup>107</sup> In actuality, the United States practiced *de facto* discrimination as well. From the 1940s through the 1960s, African Americans faced various forms of legally sanctioned discrimination on the basis of their race, including sitting in the back of buses and the denial of service at lunch counters. Allen Pusey, *Precedents: Students Spark Civil Rights Sit-Ins*, A.B.A. J., Feb. 2014, at 72. “Acting Secretary of State Dean Acheson wrote in 1946 that ‘the existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries.’” David Sloss, Book Review, 108 AM. J. INT’L. L. 576, 578 (2014) (reviewing RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013)).

<sup>108</sup> BUERGENTHAL ET AL., *supra* note 74, at 30-31.

<sup>109</sup> MORSINK, *supra* note 1, at 40.

accusations did not affect the progress of the work towards concluding a text that could be accepted by the members of the Human Rights Commission.

### III. CONCLUSION

The drafters of the Declaration committed a major historical and legal mistake by tying the principles and rules of the Declaration to Hitler's devilish regime. Scholars that followed this analysis have equally erred.

The Declaration was intended to protect individuals, but it does not deal with minorities or any kind of human collectivity that suffers under dictatorships or cruel regimes—where the real suffering of human beings is concentrated. Instead, the Declaration is nothing more than a mere declaration. It has no force of law, and was a wasted effort.

The majority of the States that make up the United Nations in our time are not human rights observant in their internal affairs. In fact, the states most involved in drafting the Declaration were violating basic human rights principles themselves, which only demonstrates the hypocrisy in which the Declaration was born. This hypocrisy has continued throughout almost seventy years, as, with a few rare exceptions, neither the UN nor a group of states have acted to bring real, effective help to a persecuted minority. To add insult to injury, democracies continue their commercial and economic dealings with the greatest human rights deniers.

Legal literature, many states', and later UN proclamations and declarations have vehemently urged the importance and validity of the Declaration, but are completely oblivious to the realities on the ground. Terrible sufferings, such as persecutions, discriminations, lack of basic liberties, ethnic cleansings, atrocities of all kinds, and actual genocides, have affected, and continue to affect, billions of people throughout the world. The Universal Declaration of Human Rights and the documents that followed have had no influence over those tragedies.