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978-1-107-01463-3 - The Contentious History of the International Bill of Human Rights

Christopher N. J. Roberts

Excerpt

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## INTRODUCTION

### I

THE GREAT HALL was transformed for the occasion. The theater was made over into an assembly hall, its balcony became the media gallery, and proscenium the speaker's rostrum where now in December of 1948 the United Nations representatives appeared in turn to offer their closing remarks about the Universal Declaration of Human Rights (UDHR) and the nature of the human rights within it. After nearly two years of drafting, hundreds of meetings, and countless proposed articles and amendments, the delegations would cast their votes in a matter of hours for the document that has become a symbol of human dignity, peace, and unity in the modern world. As unassailable, obvious, and natural as these principles now appear, it is easy to overlook the fact that every word and phrase within the Universal Declaration is awash in the conflict that defines the modern epoch.

A number of the UN representatives found their muses in a distant and turbulent past, reminding those in attendance that they were witnesses to an historic event in the very place where more than a century and a half before, the cries for liberty, equality, and fraternity rang out in the streets and squares calling the French Declaration of the Rights of Man into being.<sup>1</sup>

Speaking on behalf of the US delegation, Eleanor Roosevelt added to the historical scale and significance, suggesting that the document could

<sup>1</sup> UN Doc A/PV 180, 66, 76; A/PV 182, 101.

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one day be akin to the Magna Carta, the United States Bill of Rights, and “comparable declarations...in other countries.”<sup>2</sup> Rene Cassin, the representative of the French delegation, drew upon a classical architectural metaphor to provide a physical image of the abstract human rights of which he spoke. The various categories of rights within the Declaration, he proclaimed, were “fundamental pillars” within a larger “structure” of “equally important” universal rights. Beneath every pillar, he said, “lies the hidden treasure.”<sup>3</sup> As a new departure point for future endeavor, the UN representative from Paraguay said it would be “a flaming torch which will lead all mankind towards felicity.”<sup>4</sup> Apart from a few last minute proposed amendments, the text was complete.

Along with the press and spectators who had crowded into the Great Hall of the Palais to witness the event was John Humphrey, the Canadian law professor and Director of the United Nations’ Human Rights Division who had penned the initial draft of the document. Ahead of the final vote, he awaited with hope for what he called “the miracle” to occur.<sup>5</sup>

## II

THERE IS LITTLE SUSPENSE left within this well-known story. What began as a wartime alliance was in 1945 formally institutionalized as the United Nations.<sup>6</sup> In addition to maintaining international peace and security, under the UN Charter – the organization’s founding text – member states pledged to protect and honor human rights. In the organization’s earliest days, it was unclear exactly what human rights were – or what they would become. Nevertheless, by the end of 1948 the members of the UN cast their votes of 48 in favor with no states opposing to adopt the UDHR.

The subsequent outcomes of this watershed event are also well known. Two binding human rights treaties – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant

<sup>2</sup> UN Doc A/PV 180, 62.

<sup>3</sup> UN Doc A/PV.180, 77–78

<sup>4</sup> UN Doc A/PV.182, 101.

<sup>5</sup> John P. Humphrey, *On the Edge of Greatness: The Diaries of John Humphrey, First Director of the United Nations Division of Human Rights: 1948–1949*, Vol. 1, ed. A. J. Hobbins (Montreal: McGill-Queen’s University Press, 1994), 90.

<sup>6</sup> The alliance was formally instituted by the *Declaration by the United Nations, January 1, 1942*. For the history of the founding of the UN, see Townsend Hoopes and Douglas Brinkley, *FDR and the Creation of the U.N.* (New Haven: Yale University Press, 1997).

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on Economic, Social, and Cultural Rights (ICESCR) – now buttress the nonbinding UDHR. Collectively known as the International Bill of Human Rights, these three documents are considered to be the foundational human rights texts within the modern system of international human rights. They have opened the door for the hundreds of human rights treaties, charters, laws, governmental bodies, public and private organizations, groups, and individuals that now comprise this global regime.<sup>7</sup>

Human rights principles are today a leitmotif in international relations, a model for national constitutions, and a *raison d'être* for countless international and domestic nongovernmental organizations. Given their central place in contemporary society, human rights also have become a crucial topic of inquiry in academia for scholars representing a broad range of disciplinary perspectives. They have become a common language in the contemporary world. Yet, it is nevertheless no secret that all is not well with human rights today.

HUMAN RIGHTS are routinely violated with impunity. Even the strongest norms against slavery, torture, and genocide, for instance, compete with the parallel reality of transnational human trafficking networks, political prisoners, government-sanctioned torture, forced child labor, gender violence, and so forth. Alongside the soaring rhetoric and noble purpose are tragic and seemingly interminable abuses. This “gap” between the rhetoric and the reality of human rights is well known.

To help reconnect affected individuals with the rights they are promised within the growing numbers of international human rights treaties, concerned governments, advocates, and scholars pour untold resources into strengthening enforcement mechanisms, promoting treaty ratification, and pressuring violators into compliance with the international rule of law. For others, the yawning gulf between principle and reality raises questions that human rights are more idealist, utopian myths than they are prizes; rather than legal quantities, they are simply politics and self-interest sheathed in moral principle.<sup>8</sup> Violations, however, are only the most visible indicators that something is amiss at

<sup>7</sup> Until 1952 there was only a single Covenant, at which time it was split into the two aforementioned Covenants, which were completed in 1966 and entered into force in 1976.

<sup>8</sup> See, e.g., Oona Hathaway (2002), “Do Human Rights Treaties Make a Difference?” *Yale Law Journal* 111(8):1935–2042; Emilie Hafner-Burton and Kiyoteru Tsutsui (2005), “Human Rights in a Globalizing World: The Paradox of Empty Promises,” *American Journal of Sociology* 110(5):1373–1411; Harold Hongju Koh (1997), “Why Do Nations Obey International Law?” *Yale Law Journal* 106(8):2599–2659.

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a much deeper and systemic level; beyond abstract notions of dignity, inalienable rights, and basic moral principle, there is very little consensus surrounding *what* human rights actually are.

The very phrase *human rights* would seem to leave little room to debate the universality of its reach. Nevertheless, nations routinely place sovereign and domestic interests ahead of human rights. The United States, for example, pursues a strong human rights agenda in international matters, even as elected representatives rarely even utter the term with respect to US citizens. Others challenge the universality of the concept by suggesting that human rights, as a form of law, culture, and thought, represent particularized *Western* values and interests. Nations are divided on the question of whether socioeconomic rights are on par with civil and political rights, thereby challenging the notion that all the rights within the International Bill of Human Rights are equal and interdependent. These persistent debates about the nature and purpose of human rights bleed over from academic scholarship to international politics and foreign policy and back again, while individuals – if not entire populations – remain separated from the rights they apparently have by virtue of their humanity.

THE PARADOXES surrounding human rights are numerous. There is at once deep reverence and abject disregard for them. All humans apparently possess them by virtue of their humanity, but there remain significant barriers to their universal realization. In contrast to what we know of the clarity of principle and purpose within the postwar moment that gave rise to the UDHR, deep challenges and uncertainties about human rights mark the present moment. Although there has been much written on the history of human rights, to work through these persistent and pressing questions it is necessary to take a much closer look at the history to determine how the past and present align. The suspense within the story of founding exists in all that has been left out.

## III

AT THE PALAIS during the final plenary meetings in December of 1948, the representatives spoke not only to those present within the Great Hall; they also directed their words toward the inevitable doubts, problems, conflicts, and challenges that future generations would inevitably inherit from their forefathers. The stakes remained high. With memories of the failed League of Nations, two total wars, and a global

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depression, the members of the United Nations were now together for another attempt at healing, or at least covering, the divisions of the recent past. It was only eight years before that the German Chancellor had sauntered across the esplanade overhead with his retinue, pausing for a photograph to document his survey of the fallen city. With the Eiffel Tower at his back he leaned casually against the stone rampart looking up toward the Palais with frightening serenity, claiming right by presence alone to the city and the trees and the water below.<sup>9</sup>

It is not surprising that a number of the representatives spoke of war, Hitler, and fascism during their closing remarks. Nor was it an accident that many of them invoked past founding events surrounding the Magna Carta, the French Declaration, and the US Bill of Rights, for example, to inform the one just coming into being.<sup>10</sup> Founding stories provide guidance, clarity, and serve as moral touchstones for future generations. They each have their heroes and their villains. They remind a people of the obstacles they were forced to rise above while invoking in narrative form the foundational principles that define who they are and where they come from.

IN RECENT DECADES an important body of scholarship has documented the political accomplishments of human rights pioneers such as Eleanor Roosevelt, Rene Cassin, John Humphrey, and others as they worked tirelessly to bring the UDHR into being. The plenary meetings of the ninth and tenth of December 1948 are a major feature within this historiography. The standard narrative surrounding the birth of the modern international concept of human rights shows how the UDHR marked a revolutionary break from the past: a triumph over the horrors of World War II, the Holocaust, colonialism, and oppressive forms of political rule. Within this now-familiar history, there emerges a notion of human rights in which they represent fundamental, shared norms of inherent dignity and fundamental equality that emerged from a postwar consensus.<sup>11</sup>

<sup>9</sup> Hitler's tour of Paris took place on a June morning in 1940. James D. Herbert (1995), "The View of the Trocadero: The Real Subject of the Exposition Internationale, Paris, 1937," *Assemblage* 26:94–112, 108; Albert Speer, *Inside the Third Reich: Memoirs*, trans. Richard Winston and Clara Winston (New York: Macmillan Company, 1970), 170–72; "Hitler at Tomb of Napoleon, a Conqueror, Too," *Chicago Daily Tribune*, June 27, 1940; "Hitler Visits Napoleon's Tomb on Tour of Paris," *Los Angeles Times*, June 27, 1940, 1; "Dictators on Tour of Occupied France," *New York Times*, June 30, 1940, 28.

<sup>10</sup> UN Doc A/PV 180, 62.

<sup>11</sup> For example, Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001); Elizabeth Borgwardt, *A New Deal for the World: America's*

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Although the UDHR is generally taken to be ground zero of the modern international system of human rights, a number of competing narratives challenge the notion that the Declaration represents the true point of origin of the modern system of international human rights.<sup>12</sup> There are, for example, stories that trace the origins of human rights back to antiquity, thereby placing the UDHR within a much longer historical trajectory of moral progress and the realization of abiding truths. Other stories that suggest that the birth of human rights can be traced to revolutions and the creation of republics tend toward a notion of human rights rooted in liberal concerns about using law to restrain the state power.<sup>13</sup> A newer crop of narratives suggest that human rights as we know them today are a much more recent invention that actually postdates the creation of the UDHR, thereby offering a conception of human rights as contingent, mutable, and politically constructed.<sup>14</sup> Even the commonly invoked ideas of “first generation” civil and political rights and “second generation” socioeconomic rights imply a very specific history of concept formation. In this understanding of human rights and history, the two categories of rights have not always been conjoined and of equal importance, but chronologically distinct historical events.<sup>15</sup> Importantly, within each of these rival stories, the rights concept assumes a distinctive character.

The many competing narratives of origins also reveal that in addition to the historical events that so readily shape the nature of the concept, it is also a matter of *who* takes part in those events that has a profound effect on the development of the concept. There are historical critiques,

*Vision for Human Rights* (Cambridge: Harvard University Press, 2005); Johannes Morsink, *The Universal Declaration of Human Rights* (Philadelphia: University of Pennsylvania Press, 1999); Susan Waltz (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; David P. Forsythe (1985), “The United Nations and Human Rights, 1945–1985,” *Political Science Quarterly* 100(2):249–69; Stefan-Ludwig Hoffman, *Human Rights in the Twentieth Century*, ed. Stefan-Ludwig Hoffman (Cambridge: Cambridge University Press, 2011); Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004); Roger Normand and Sarah Zaidi, *Human Rights at the UN: the Political History of Universal Justice* (Bloomington: Indiana University Press, 2008).

<sup>12</sup> For an excellent discussion of the scholarship surrounding the history of human rights, see Philip Alston (2013), “Does the Past Matter?” *Harvard Law Review* 126(7):2043–81; Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (New York: Oxford University Press, 2012).

<sup>13</sup> For example, Lynn Hunt, *Inventing Human Rights* (New York: W. W. Norton, 2007).

<sup>14</sup> For example, Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2012).

<sup>15</sup> Karel Vasak (1977), “Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights,” *UNESCO Courier* 30(11):28–29, 32.

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for instance, that question the universality of human rights through suggestions that human rights emerge from a Western, colonial framework and therefore do not truly represent the rights of non-Western societies. On the other hand, counter-narratives identify a more inclusive and universal process in which smaller and non-Western nations, for instance, had a significant part in the creation of the Universal Declaration.<sup>16</sup> The substance of these stories of origins is inseparable from the conceptual nature of the human rights at the heart of the narrative. The founding stories are, themselves, vessels that transfer a particular idea of what human rights are.

HUMAN RIGHTS ARE WITHOUT QUESTION a central organizing principle within the modern world – the contemporary epoch has been called the “age of rights.”<sup>17</sup> But when it was in fact inaugurated with respect to human rights remains unclear. The competing stories provide less definite answers about the origins of rights, what they are, or who is responsible for their creation than they add to the existing ambiguities. As shown in this book, these ongoing, contemporary disputes over the origins of human rights are just as much a part of the story of origins as the events that occurred within the Palais more than a half-century ago. In fact, it is impossible to understand the origins of human rights without incorporating into the story the ongoing conceptual conflicts within the contemporary study of rights.

## IV

AS SCHOLARS PEER INTO THE PAST to recount the human events surrounding the development of the modern human rights concept, it is common to approach rights as a subject of politics, law, or ideas.<sup>18</sup> Although these three conceptual entry points into the subject have yielded a wealth of knowledge about the development of the modern

<sup>16</sup> Waltz, “Universalizing Human Rights,” 44–72; Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002); Rowland Burke, *Decolonization and the Evolution of International Human Rights* (Philadelphia: University of Pennsylvania, 2010); Glenn Mitoma, *Human Rights and the Negotiation of American Power* (Philadelphia: University of Pennsylvania Press, 2013).

<sup>17</sup> Norberto Bobbio, *The Age of Rights* (Cambridge: Polity Press, 1996).

<sup>18</sup> Because the particular understanding of human rights adopted within this book applies equally to the basic “rights” concept, throughout this book the terms rights and human rights will be used interchangeably. Tony Evans, *US Hegemony and the Project of Universal Human Rights* (London: Palgrave Macmillan, 1996), 4; Susan Waltz (2002), “Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights,” *Third World Quarterly* 23(3):437–48.



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international human rights system, they also throw open a series of longstanding disagreements concerning the fundamental nature of rights in general. For decades, these first-order ontological questions have seized the attention of rights scholars within the fields of law, philosophy, and political science, for example. Given the contemporary ubiquity and importance of human rights, in recent years similar debates now ensnare scholars representing a much broader range of disciplinary perspectives – anthropology, sociology, history, economics, and policy, to name just a few.

The way the human rights concept is defined at the outset of a study leads to a distinct engagement with the historical record. By identifying the nature of the object of study, any particular conception of human rights determines the nature of the facts and human events that are permitted into the story. If, for instance, human rights are assumed at the outset to be political expressions of state interests, the resulting story might focus more on the accrual and preservation of state power, or international politics. If, on the other hand, it is assumed that human rights are codified positive law, or perhaps basic moral ideas, different classes of legal facts and philosophical ideas will likely gain prominence within the resulting story. In the study of human rights, concepts act as gatekeepers; from different conceptual entry points there emerges a significantly different historical focus.

Defining what human rights are – even if only implicitly – establishes the rudiments of an analytic framework that simultaneously reveals *where* within the historical record to look for evidence of human rights formation, as well as *how* to investigate the history of origins. A rigorous methodological approach therefore necessitates an *explicit* statement about the operative human rights concept being employed and a precise acknowledgment about the work it is doing to produce the story. But herein lies a significant dilemma: the eternal disagreements about their foundational nature throw into doubt all of the derivative facts, history, and normative conclusions that rest upon it. Although there certainly is agreement about the nature of rights within particular epistemic communities, between such spheres of consensus – when considering whether human rights are to be studied as forms of law, politics, or ideas, for instance – disagreement reigns.<sup>19</sup>

<sup>19</sup> Peter Haas (1992), “Introduction: Epistemic Communities and International Policy Coordination,” *International Organization* 46(1):1–35.



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As scholars debate the nature of human rights, where they come from, and how to study them, the derivative questions that emerge bear costs far beyond historiography and philosophy. Indeed, the most significant questions in the human rights literature are the same ones that inform the actual policy decisions of presidents and dictators alike. Are human rights universal entities or fundamentally Western creations? Do certain human rights categories have priority over others (e.g., civil and political rights vs. social and economic rights)? Are human rights more utopian myths than they are prizes?<sup>20</sup> Are human rights simply state politics by another name? The divisions, paradoxes, and uncertainties that permeate virtually all aspects of human rights today have made it nearly impossible to define an agreed on framework for studying the concept of human rights and its related phenomena. Given the enormity of the human consequences, in many respects it has been more productive to skirt these issues and avoid the potential infighting and intellectual stalemates surrounding these questions by locating a departure point from the higher ground of widely agreed upon unassailable, normative foundations.

## V

THE IDEA OF HUMAN RIGHTS has been lauded a new secular religion.<sup>21</sup> The intangible and abstract notions of dignity, universality, and humanity are today the defining features of human rights. Faith in these abstract, unassailable ideas exerts a powerful force over the doubts and uncertainties. These foundational ideas have become an accepted core of today's common language of human rights – a *lingua franca* that provides the strength to resist the chronic indeterminacy of meaning while concealing the intellectual sectarianism that divides the study of human rights.<sup>22</sup>

Upon these foundations, there has emerged a glorious, triumphalist history of human rights. A founding narrative of postwar consensus billows up with confidence and certainty even as a host of challengers gnaw at the presumed age and origins of concept and practice. And this now-familiar founding story sustains our belief that human rights are good, obvious, and natural and that all humans possess them by virtue of their humanity, even in the face of ongoing and horrific

<sup>20</sup> Hathaway, "Do Human Rights Treaties Make a Difference?"; Hafner-Burton and Tsutsui, "Human Rights in a Globalizing World"; Koh, "Why Do Nations Obey International Law?"

<sup>21</sup> <http://www.pbs.org/eliawiesel/resources/millennium.html> (Accessed December 12, 2013).

<sup>22</sup> Michael Ignatieff ed., *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005).

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violations that seem to suggest that human rights might be nothing more than window dressing, empty promises, or utopian dreams.<sup>23</sup>

In practice, the efficacy of human rights depends on its perceived legitimacy and the normative strength of the idea. But though such a normative foundation is crucial for its success, an unwavering faith in its power and being is a poor foundational departure point for rigorous *empirical* inquiry. Faith is a bulwark against all challengers. Within the historical study of human rights, its tendency is to shield from view that which does not agree.

As JOHN HUMPHREY, the initial drafter of the UDHR and the UN's Human Rights Director, watched what he called the "final act of the play," the events unfolding before him appeared, from his seat within the Great Hall of the Palais de Chaillot, much different than those within the founding story now emblazoned in the contemporary human rights historiography.<sup>24</sup> He depicted in his diary an altogether different story. The plenary meetings did not possess for him the now-familiar ring of triumph and success. The speeches, which he referred to in his private diary as "long but uninspired," fell flat and failed to hold his attention.<sup>25</sup> Even his own nation of Canada, he wrote, delivered "a niggardly acceptance of the Declaration" which in his opinion was "one of the worst contributions" of the entire performance.<sup>26</sup>

Humphrey was, of course, not a neutral observer; he had an enormous professional and personal stake in the success of the project. Nevertheless, his words provide a partial glimpse of a crucial piece of the story that today is generally overlooked or assumed away: beneath high principle and resplendent phrase, by December 10, 1948 there had already propagated a series of terminal objections. Within this moment of triumph, consensus and success, dissent, conflict, and denial also reverberated within the Palais and radiated outwards in all directions. It seems that the many paradoxical faces of human rights were present from the start.

## VI

IRONICALLY, the inescapable contradictions, the internal conflicts, and all of the seemingly irreconcilable antinomies concerning what human

<sup>23</sup> For example, Hafner-Burton and Tsutsui, "Human Rights in a Globalizing World."

<sup>24</sup> Humphrey, *On the Edge of Greatness*, 90.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.