

One Shining Moment: The American Role in the Expansion of Humanitarian Law after World War II

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A Shining Idea in a Sea of Fear. On January 6, 1941, President Franklin Delano Roosevelt faced a wary Congress and an anxious populace. The Great Depression still lingered in the heartland and in the pocketbooks and larders of the people. The war Great War that was overwhelming Europe seemed ready to break all bounds, uniting with the expanding Asian conflict and draw into itself an unprepared still threadbare nation. Seeking to prepare the country for the possibility of new and greater sacrifices, Roosevelt laid out a set of principles which, he maintained were so universal and so fundamental to democracy, that they were worth fighting for:

There is nothing mysterious about the foundations of a healthy and strong democracy.

The basic things expected by our people of their political and economic systems are simple. They are:

Equality of opportunity for youth and for others.

Jobs for those who can work.

Security for those who need it.

The ending of special privilege for the few.

The preservation of civil liberties for all.

The enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living (F D. Roosevelt, 1941).

Then, looking to the future after the struggle which he anticipated would soon arrive, he offered this hope:

In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms.

The first is freedom of speech and expression -- everywhere in the world.

The second is freedom of every person to worship God in his own way -- everywhere in the world.

The third is freedom from want, which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants -- everywhere in the world.

The fourth is freedom from fear, which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor -- anywhere in the world. (.Roosevelt, 1941)

The Four Freedoms through World War II and the Founding of the United Nations. The Four Freedoms, or at least most of them, found their way into the Atlantic Charter, the agreement between the United States and Great Britain signed on the USS Augusta and the HMS Prince of Wales on August 12, 1941, just a few short months before the attack on Pearl Harbor precipitated the United States' formal entry into World War II. (Roosevelt, F., and Churchill, W., 1941)

The war certainly took its toll on these aspirations, but not on Roosevelt's commitment to them or on the power to inspire that they generated throughout what is now called the developing world (Glendon, 2001; Donovan, 1966)

By early 1945, Roosevelt was in precarious health, attempting to negotiate with the other allies, whose interests increasingly diverged from each other and to broker the metamorphosis of the United Nations from a wartime alliance (with no member to negotiate a separate peace) to an international body with some capability to hold back the cycles of war, oppression and want which had plagued the first half of the 20th century (Glendon, 2001; Donovan, 1966). Other than the insistence that some reference to human rights be included in the purposes for which the United Nations was formed, he could not secure a more prominent place for a rights basis incorporated into the charter.

After Roosevelt's death, the four freedoms acquired new advocates at the table, such as Carlos Romulo of the Philippines (Glendon, 2001), representatives of a number of NGOs in the United States and many politically less powerful nations in Latin America and non-Western regions. Through a series of astute maneuvers and serendipitous circumstances which will not be catalogued here (see Glendon, 2001 and Donovan, 1966), the essential tenets of Roosevelt's four freedoms speech regarding the human rights and economic opportunity underpinnings of democracy did find their way into the United Nations Charter, with particular mention in the Preamble, Article 1 and Article 56 of the Charter (United Nation General Assembly, 1945).

Just as important, the UN Charter called for the creation of a "commission for the promotion of human rights" within the UN's Economic and Social Council, the only separate commission established in the charter itself. (United Nations General Assembly, 1945) It was this Commission on Human Rights which developed and proposed to the UN General Assembly the Universal Declaration of Human Rights. Chairing the Commission, as will be discussed later in this paper, was the American envoy and widow of President Roosevelt, Eleanor Roosevelt. What is important at this juncture is to note that President Roosevelt's Four Freedoms are enshrined in the Universal Declaration of Human Rights, both in the Preamble and in the various Articles which follow.(United Nations General Assembly, 1948; Glendon, 2001).

Law and Humanity at Nuremberg. The shining moment of human rights and humanitarian law was to arise again in the evolving American position about what to do with the Nazi high command after the end of World War II. Even the American position here was initially conflicted, with some in Roosevelt's government favoring Winston Churchill's proposal for summary execution and the return of Germany to an agrarian state which could never form the industrial base to wage war again (Bass, 2001). Roosevelt himself appears to have been initially favorable to this solution, while his Secretary of War, Henry Stimson was deeply opposed to it. At the heart of Stimson's opposition was a belief in American "legalism," that is the notion that even the most despicable perpetrators of crimes of war had the right to be told the charges against them, to confront the evidence and to be aided by counsel. Without such guarantees, Stimson argued, the cycle of war and revenge would go on unchecked (Bass, 2001). Due to a "strategic" leak to the press of the harsher plan for dealing with the Nazi leadership, President Roosevelt eventually came around to support Stimson's proposal for war crimes trials.

The important part of the story of Nuremberg for this study, however, is not the political positioning which led to President Roosevelt's adoption and President Truman's implementation of the plan for a tribunal to try the Nazis accused of war crimes, but the establishment of the tribunal and the rules under which it would operate. This is a story of Robert Jackson, the United States Supreme Court justice who, at the request of President Truman, took a leave of his duties at the court to represent the United States in setting up the tribunal and to act as chief prosecutor in the trials. Jackson's efforts were heroic in their humanness.

Beset by criticism, especially from some other members of the Supreme Court (Hockett, 1990), Jackson charted new territory in international jurisprudence. Crimes of war there might be, but these crimes were different. Some of the worst atrocities were done against Germany's own people, should they be Jewish or from some other disfavored group. The rules for conducting trials for both domestic and international atrocities did not exist. Yet, the alternatives all were unacceptable. Summary execution

defied fundamental concepts of due process. Returning the perpetrators to the jurisdictions of their crimes when Europe was still in uproar and the rule of law not yet fully reestablished risked either avoidance of justice or imposition of vengeance.

Jackson used American principles of fairness, due process, and trial on the evidence to craft procedures and conduct a prosecution which brought before the world the “crimes against humanity” which the defendants had committed. In the process, the Tribunal established that there is such a thing as a “crime against humanity,” an act so heinous that the entire world community stands in opposition to it and that every government bears part of the responsibility to bring its perpetrators to justice (Ferencz, 2004).

In his opening statement, Jackson pointed out how much was at stake for the future conduct of every nation:

We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice (Jackson, R. H., 1945).

In words prophetic of the current state of domestic and world affairs, politically, militarily and economically, Jackson warned:

The American dream of a peace-and-plenty economy, as well as the hopes of other nations, can never be fulfilled if those nations are involved in a war every generation so vast and devastating as to crush the generation that fights and burden the generation that follows (Jackson, 1945). ...

Applying the American legal principle that all persons are equal before the law, Jackson argued:

The ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law. This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world's peace and to commit aggressions against the rights of their neighbors.

...It is not necessary among the ruins of this ancient and beautiful city with untold members of its civilian inhabitants still buried in its rubble, to argue the proposition that to start or wage an aggressive war has the moral qualities of the worst of crimes. The refuge of the defendants can be only their hope that international law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law (Jackson, 1945).

In his closing argument, Jackson insisted that a milestone in the rule of law was being established by the principles contained in the Nuremberg Charter and their application to the Nazi defendants:

The defendants complain that our pace is too fast. In drawing the Charter of this Tribunal, we thought we were recording an accomplished advance in international law. But they say we have outrun our times, that we have anticipated an advance that should be, but has not yet been made. The Agreement of London, whether it originates or merely records, at all events marks a transition in international law which roughly corresponds to that in the evolution of local law when men ceased to punish crime by "hue and cry" and began to let reason and inquiry govern punishment. The society of nations has emerged from the primitive "hue and cry," the law of "catch and kill." It

seeks to apply sanctions to enforce international law, but to guide their application by evidence, law, and reason instead of outcry (Jackson, R. H., 1946;).

In a tribute to Robert Jackson, Benjamin Ferencz, a prosecutor under Jackson at Nuremberg credits Jackson and his leadership both in negotiating the terms of the Charter that guided the Nuremberg proceedings and in his emphasis in the prosecution with clarifying the scope of Crimes Against Humanity and outlawing the crime of aggression. According to Ferencz, "Jackson's primary goal was to mobilize the force of law on the side of peace." (Ferencz, B., 2004). The principles which Jackson played such a leading role in establishing for the Nuremberg trials (See the Charter of the International Military Tribunal at Nuremberg, 1945 and Jackson's opening and closing statements, *infra*.) became institutionalized into the fabric of international jurisprudence when they were affirmed by the General Assembly of the United Nations (United Nations General Assembly, 1946).

A World Speaking as One on the Universality of Human Rights. Shortly after assuming the Presidency, Harry Truman requested Eleanor Roosevelt to be a member of the United States delegation to the United Nations at the inaugural meeting of the General Assembly which met in London in January of 1946. It has been suggested (Glendon, 2001) that Truman wanted to demonstrate a continuity of his administration with that of the late, much admired FDR. Mrs. Roosevelt was hesitant at first, since her political experience, while considerable, was more that of the supporter and/or gadfly rather than the official representative of government. Other members of the delegation, on both the left (Fulbright) and the right (Dulles) were likewise wary of her presence.

Mrs. Roosevelt was assigned to work with the UN committee dealing with Social, Humanitarian and Cultural Affairs. While suspecting that this was considered a comparatively "safe" place to shuffle her, Roosevelt soon found herself in the center of one of the most highly contested arenas of the entire session. The skill with which she addressed the issues and handled herself impressed her own delegation and the representatives from other nations as well. In short order (much of the story is abbreviated here). Eleanor Roosevelt was unanimously elected chairman of the UN Commission on Human Rights (Glendon, 2001; E. Roosevelt II, 2004).

Mary Ann Glendon (2001) has written an eloquent and exquisitely well researched account of Eleanor Roosevelt's skill and tenacity as chair of the UN Human Rights Commission during the tumultuous process through which the Commission developed the Universal Declaration of Human Rights and presented it to the United Nations for ratification (See also E. Roosevelt II, 2004). An invitation to tea at Mrs. Roosevelt's apartment in New York was a sure sign that arms would be twisted and language negotiated.

Roosevelt was working against the ticking clock of the emerging cold war. Not only were the Soviet Union and its tutelary nations becoming increasingly resistant to agreements of general applicability but her own government was becoming increasingly resistant to the notion of enforceable claims grounded in human rights. The last colonies were resisting their continued colonization and each side of the Cold War struggle sought to gain advantage in a world where the Great War did not seem to have brought the much hoped for Great Peace.

The scope of the term "human right" was the subject of considerable contestation. The United States and its allies generally defined the phrase in terms of individual civil liberties, such as freedom of speech and the right to a fair trial. Many non-western nations and the nations of the Soviet block included economic and social "rights," such as the right to adequate food, education health care and work in the human rights which should be guaranteed. The Soviet representatives maintained that the state could represent the people in the assertion of these rights. The United States maintained that the individual must be able to assert human rights against the state. Through it all, Roosevelt sought to negotiate through to a finished product which would receive overwhelming support in the General Assembly and which would not lose the support of her own government, particularly its Senate.

That the draft of the Universal Declaration of Human Rights to be presented to the General Assembly was finally brought to conclusion at all and that it retained the continued support of the United States government was a tremendous accomplishment, due to the efforts of many committed representatives from around the world. Nonetheless, the role of Eleanor Roosevelt's leadership in the maintaining the

momentum and in securing the continued support (with some backsliding) of the American government for the Declaration itself at least through the adoption of the document, was significant. The result, although certainly imperfect and incomplete, was and is the first truly global statement on the rights of “everyone” in every nation to be able to rely upon certain fundamental human rights.

Eleanor Roosevelt worked with incredible energy, kept her cool, maintained her dignity and demonstrated nerves of steel. The Declaration was adopted by the UN General Assembly at UN Headquarters in New York on December 10, 1948. The Commission concluded its work on the document, however, earlier that month in Geneva, Switzerland. Roosevelt’s niece, Eleanor II recounts:

On the day in December when the commission finally finished its work and voted the declaration ready to be brought before the General Assembly, Aunt Eleanor gave a small reception for her colleagues at the Palais de Nations in Geneva. She wrote to me that after all the guests had left and she was walking through the empty hall with her advisor, she came upon a better way to celebrate than with a glass of champagne at a party. The marble floors were polished to a shine of black ice. My aunt’s feet were long and narrow and her low-heeled shoes had leather soles. She ran, gathered momentum, and then slid down the hall, her arms outstretched in triumph. It was so much fun that she did it again. (E. Roosevelt II, 2004, p. 78)

Humanitarian Law in the Face of Nightmare. The cold war curtain of fear and militarized stand-off had not yet completely fallen over the world still recovering from the horrors of World War II, although time was running out. In 1949, Jean Pictet, Director of the International Committee of the Red Cross, convened a Diplomatic Conference at Geneva, Switzerland to review the existing Geneva Conventions (the 1st, 2nd and 3rd), to make any changes to them which seemed appropriate in the aftermath of World War II and to determine what additional conventions or new language might be advisable to adopt in light of the tremendous loss of life and abuse of persons which had accompanied the War.

The 1949 Diplomatic Conference at Geneva was not convened by the United States. However, the United States was well represented at the Conference. The United States delegation was headed by Leland Harrison, former U.S. Minister to Switzerland. He was joined, and even superseded, in regard to the 4th Convention by the current Minister to Switzerland, John Vincent. The deputy Head of the delegation was Raymond Yingling, an Assistant Legal Advisor to the U.S. State Department (Diplomatic Conference of Geneva of 1949 2004), .

To this point, the American delegation might not seem too impressive or its role particularly central to the proceedings at Geneva. However, the fairly pedestrian official delegation was accompanied by a very impressive group of advisors: the Air Provost Marshall of the Department of the Air Force, the Provost Marshal General of the Department of the Army, the Head of the International Law Branch of the Judge Advocate General of the Department of the Navy, a Special Assistant to the Attorney General, a Special Assistant to the Chief of Protective Services of the Department of State, an Associate Counsellor of the American Red Cross and another career diplomat currently assigned to the U.S. embassy Lisbon. (Diplomatic Conference of Geneva of 1949 (2004), Vol.1) Most significant among these advisors, in terms of the high level of American input, is the high level of legal expertise from the three branches of the U.S. military. These officers, with expertise in every aspect of the laws of warfare, the laws regarding treatment of prisoners, noncombatants, etc. sat on every small committee that met to iron out particularly thorny issues, such as penal and disciplinary sanctions against prisoners of war who commit offenses while in captivity, the handling of financial accounts of prisoners of war.

The Diplomatic Conference proposed substantial amendments to the first three Geneva Conventions, the first addressing sick and wounded on the battlefield, the second addressing those wounded on the high seas and the third dealing with prisoners of war. However, the delegates had learned from the extreme harm visited on civilian populations in World War II that more was needed. They drafted a 4th Geneva Convention to deal specifically with treatment of civilian populations in war zones and in occupied areas. This 4th convention, particularly since it was new, occasioned considerable discussion, disagreement, and revisions to language. In one instance of particular note, the Soviet delegation had proposed certain revisions to the language of an article prohibiting torture, maiming, murder, involuntary medical

experiments, etc. The American delegation expressed concern that the Soviet language might not be inclusive enough in its prohibitions. The parties were challenged by the fact that so many languages were involved (with French and English being the two official languages) and that so many delegates were operating in translation.

At last, the American delegation, under ambassador Clattenburg, proposed specific language regarding abuse of “protected persons” in the power of an occupying civilian or military authority:

The contracting parties specifically agree that each of them is prohibited from taking any measure which has as an object the physical suffering or extermination of protected persons in its power. The prohibition of this Article extends not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not related to the necessary medical treatment of the protected person, but also to any other measures of brutality whether applied by civilian or military administrators.” (Diplomatic Conference of Geneva of 1949 (2004), Vol. II, p. 647)

In the end, the delegations approved the four conventions, subject to ratification by their home governments. In several cases, delegates made reservations on behalf of their government. In the case of the United States, the Minister to Switzerland expressed on behalf of his government a reservation to language in the 4th Geneva Convention which might be interpreted to mean that the United States as an occupying power might not be able to impose the death penalty in a case in which the death penalty could be imposed under the laws of the United States but not under the laws of the country occupied. (Diplomatic Conference of Geneva of 1949 (2004), Vol 1).

In the case of the Soviet Union and its member soviet republics, there was a different area of reservation. The Soviet delegation had sought specific language in the 4th Geneva Convention treating as a “serious crime” “all means of exterminating the civilian population.” (Diplomatic Conference of Geneva of 1949(2004), Vol. 11, p.716.). The United States delegation objected to the proposed amendment on the grounds that it might prohibit means of warfare that had long been allowed by international law. The United States was willing to consider a more limited provision prohibiting extermination of civilian populations in occupied countries. Coincidentally, the language favored by the Soviets would most certainly have prohibited any further use of nuclear weapons since, of their essence, these weapons involve the “extermination of the civilian population” of at least a significant part of the country attacked. In any case, the American delegation argued that the Hague conventions were the proper venue to address this issue.

The American position on including specific language prohibiting weapons that exterminate civilian populations prevailed at the Conference and the 4th Convention does not include any specific language addressing this issue. While they signed the 4th Convention, a number of soviet nation states made clear in their statement of reservations that they did not consider the language protecting civilian populations to be sufficient in the absence of a general, protection of civilian populations even in countries not occupied by the enemy, a reference to the failed argument to include a general prohibition against extermination of civilian populations.

This reservation to the failure to prohibit all means of exterminating civilian populations is found in the signing statement of the Byelorussian Soviet Socialist Republic, the Rumanian People’s Republic, the Ukranian Soviet Socialist Republic, and the Union of Soviet Socialist Republics (Diplomatic Conference of Geneva of 1949 (2004), Vol 1). It may or may not be coincidental that the Final Conventions were signed by the heads of delegation of the various nation states, subject, of course, to the ratification process of their home governments on August 12, 1949. The Soviet Union tested its first nuclear weapon on August 29th, 1949. Was this test an inevitability regardless of the outcome of the Soviet effort to include a veiled prohibition against the use of nuclear weapons in the 4th Geneva Convention, or was an opportunity to head off the start of the nuclear arms race missed?

The One Article in the 4th Convention that Everybody Forgets. There is one provision in the 4th Geneva Convention that is probably more forgotten than any other:

Article 144:

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population. (*para. 1*)

Does the “entire population” of the United States know about the 4th Geneva Convention? About the prohibition against torture and abuse of protected persons? About the applicability of the different conventions? Does the civilian population of the United States know how central a role their own diplomats and military leaders played in negotiating the language of these agreements? Probably not, any more than they know that President’s Roosevelt’s Four Freedoms became part of the United Nations Charter, or that the promise of a fair and public trial in the American legalist tradition was maintained in the extreme circumstances of Nuremberg because Justice Robert Jackson took such leadership in the process or that so many conflicting notions of what constitutes a human right were debated and refined and a final consensus reached due to the persuasive and organizational skills of Eleanor Roosevelt.

The testing of the first nuclear weapon by the Soviet Union essentially shut the door on American willingness to work with the Soviet Union or its allies on anything. The outbreak of war in Korea further divided the world into “them” and “us.” When the iron curtain fell, it fell not only around the subject nations around the periphery of the Soviet Union, but also around a rich period in American history when the United States was a creative and energetic proponent of international standards of human rights and humanitarian law and when United States leaders insisted that these standards are as applicable to actions by the United States as actions by anyone else in the world.

This paper has been mostly devoted to an overview of the period between the end of World War II and the start of the Cold War to demonstrate that there is a great deal of history in this period, and that a common theme of human rights and adherence to humanitarian law runs through the many strands of that history. The post-war period of enthusiastic American engagement with the expansion of the world’s human rights consciousness was scarcely long enough to make its way into the history books. Furthermore, the lessons of this period were already being rewritten by cold warriors by the time this story should have been told. But this is a new millennium and a new century and a new day. Maybe it is finally time to rediscover the American history of universal human rights and international humanitarian law and tell the story.

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