

Britain and the European Convention

A. W. Brian Simpson

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Britain and the European Convention†

A.W. Brian Simpson*

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Introduction

I have just completed a book on the genesis of the European Convention on Human Rights, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*.¹ The book is concerned primarily with the

† Professor Simpson delivered this paper as the first Carlos Caceres Memorial Lecture. Caceres, ‘91, died in 2000 while working for the United Nations in Indonesia, and so gave to the world all at his command.

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1. A.W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* (2001). This paper is a byproduct of that book, which has now been published by the Oxford University Press. It is based on the published material and on various collections of archives: British archives, mainly those of the Cabinet Office, the Colonial Office and the Foreign Office, U.S. National Archives, 34 CORNELL INT’L L.J. 523 (2001)

period 1945-1966, it being in 1966 that the British government accepted the jurisdiction of the European Court of Human Rights and the right of individual petition, both of which were optional under the convention as signed in 1950. The negotiation of such a convention is primarily an aspect of the conduct of foreign policy, hence the negotiations need to be located in the general history of British foreign policy of the postwar period. Britain was, at this time, a major colonial power, and the negotiations were also much affected by this fact and by the climate of anticolonialism which found a platform in the United Nations. Indeed, the convention first began to have practical significance in relation to British colonies and their government when Greece began proceedings against the U.K. over the insurrection in Cyprus and the measures taken by the U.K. to suppress it.

The ratification of an international human rights instrument capable of having domestic effect, either at home or in dependencies, is bound to cause difficulties and embarrassment to government. The whole purpose of human rights law is to restrict the powers of government over its own citizens or subjects. At the conclusion of the Second World War there were three major powers, the U.S.S.R., the U.S.A., and the U.K., which all actively participated in the human rights movement, initially solely in the United Nations. In the period between the end of the war and the collapse of the Soviet *bloc* only the U.K. ended up as a party to a general human rights convention capable of having significant domestic effects—the European Convention. How and why did the U.K. come to negotiate and ratify this convention and, after long delay, accept the jurisdiction of the court and the right of individual petition? More generally, why did other European powers, some with much reluctance, do the same? More radically, why did the idea of the general international protection of human rights evolve during the Second World War, and what is the relationship between the human rights movement's first major expression, the Universal Declaration of 1948, and the European Convention? These are the questions I hope to raise for discussion.

I. The Three Major Powers

The movement for the international protection of human rights, though it has pre-war antecedents, is a product of the Second World War. When the war ended there were three major world powers: the U.S.A., the U.S.S.R., and the U.K. The scheme embodied in the UN Charter assumed that they, together with China (which was not a world power, but which was included on the insistence of President Roosevelt), would cooperate and exercise a leadership role in the brave new world. This system has been labeled "Four Power Management."

the records of the European Movement, the records of the United Nations, and various other collections of papers. The book provides fuller documentation than is possible in this paper.

Of the three states, the U.S.A. was far and away the most powerful. The U.S.S.R. had been devastated by war, but retained an extremely powerful military. The U.K. was nearly bankrupt and had commitments out of proportion to its resources, although it was not until sometime after the war that the extent of its disastrous consequences on the U.K. became apparent. So there were, in 1945, three super powers.

The U.S.A. and the U.K. were liberal democracies, but the U.K. differed radically from the U.S.A. in being, straightforwardly, a colonial power. Nearly all of its colonial dependencies enjoyed some measure of domestic self-government, but in general had made very limited progress towards eventual independence as democratic self-governing states. The dismantling of the British colonial empire, to be largely complete by 1966, had, in 1945, not yet begun. The first major step in the process of decolonization was Indian independence in 1947. For some other territories, for example Burma and Ceylon, independence came at about the same time. For others, such as Nigeria, independence was, in 1945, thought to lie far in the future.

The U.S.A. did not, in 1945, possess a significant colonial empire. Like the U.S.S.R. it sought to establish satellite states and areas of the world in which it exercised predominant influence, for example the Pacific, with power bolstered by the acquisition of overseas bases. Both the U.S.A. and the U.S.S.R. had, within their borders, minority groups of peoples who were in one way or another treated as outsiders. For example African and Native Americans in the U.S.A. and the Crimean Tatars in the U.S.S.R. The official U.S. position was that there were no minorities in the U.S.A.; the U.S.S.R. was proud of its minority policy, described by an unsympathetic British Foreign Office official as "folk-dancing punctuated by deportations." All three superpowers had human rights skeletons in their cupboards, but those in the cupboard of the U.S.S.R. were far and away the most grisly.

In the period immediately after the establishment of the UN in 1945 all three powers participated actively in the human rights movement at the United Nations, through the Human Rights Commission (HRC), the Economic and Social Council (ECOSOC), and the General Assembly and its Third Committee. All claimed to be enthusiastic champions of human rights. Somewhat inconsistently, they exhibited considerable nervousness over the possibility that some scheme of human rights, supported by some institutionalized system for investigating and taking action over alleged violations, should apply to themselves. They subscribed, to varying degrees, to the notion that human rights protection is primarily an aspect of the export trade, designed to bring "lesser breeds without the law" up to civilized standards. States are not, of course, monolithic, and there were clashes of view, for example, within the U.S. State Department. Some actors favored strong protection, even if this applied domestically, whilst others did not.

II. Going Their Separate Ways

The policy of the three superpowers in relation to human rights protection developed along different lines.

A. The U.S.S.R.

After some initial fumbling, the U.S.S.R. took the line firstly, that civil and political rights, the darlings of the West, were not of primary importance and secondly, that any form of international supervision of what went on in the U.S.S.R. was both unnecessary and improper. It represented an illegitimate interference in matters of purely domestic concern. Quite recently Russian policy has changed, and the Russian Federation has now signed up to the European Convention on Human Rights. But strong resistance to interference with domestic matters under the banner of human rights long continued to be the message from Moscow. The Soviets, however, were quite ready to employ appeals to human rights in critical attacks on the conduct of other States. The essentially negative Soviet attitude is strikingly illustrated by the failure of the Soviet *bloc* to vote for the Universal Declaration of Human Rights in December 1948. There were eight abstentions: the U.S.S.R., Byelorussia, Czechoslovakia, Poland, Saudi Arabia, Ukraine, South Africa, and Yugoslavia. The Declaration was generally then thought to impose no international obligations, and it established no form of institutionalized international supervision. Yet the Soviets would not vote for it.

However, the U.S.S.R., in spite of its negative attitude, continued to be involved in the tedious negotiations that eventually, in 1966, produced texts of the two basic UN human rights covenants. It also sought to exercise a leadership role in the anti-colonial movement. Opposition to colonial rule, though in reality having little to do with the idea that government should be limited by individual rights, could be expressed in terms of the denial of the right of self-determination.

B. The U.S.A.

The U.S.A., by contrast, adopted under the Truman administration a very positive attitude. Eleanor Roosevelt took the chair at the meetings of the Human Rights Commission, which was engaged from 1947 onwards in drafting an International Bill of Rights. As we shall see, it was not initially settled what form this would take. Her appointment by President Truman as U.S. Representative to the General Assembly and to the Commission of Human Rights signaled a serious commitment by the U.S. administration to the work of the new organization generally, and to its human rights work in particular. She enjoyed what Humphrey, head of the human rights secretariat, described as "enormous" prestige with the Russians, and indeed with many Europeans. Within the U.S.A. she was highly regarded by those of a liberal or mildly left wing persuasion. To those of the right she was viewed with intense hostility as little better than a communist.

She was a government nominee, not an independent expert, and this, together with her lack of technical expertise, inevitably meant that she was very much under the influence of her advisers from the State Department. Considerable friction was caused by the fact that she relied on the advice of the State Department officials, rather than the advice provided by the UN Secretariat, in the conduct of business. Material now available from the State Department Records in the U.S. National Archives makes it clear that she was expected to act on instructions produced by the State Department, and that she played little part in settling these instructions. Her dual role as both Chair of the Human Rights Commission and delegate of the most powerful state involved caused considerable difficulty. The problematic aspects of her chairmanship were offset by the warmth of her personality, her friendliness to her colleagues outside the meetings, and her unbounded enthusiasm for getting the job done quickly.

With respect to the Universal Declaration was concerned, she succeeded in that a text was accepted in 1948 (though not in 1947, her original aim). Her contribution to the UDHR in its final form has been overplayed. Much of the credit, so far as chairmanship is concerned, is due to Charles Malik, who represented Lebanon at San Francisco and who chaired the critical meetings of the Third Committee of the Assembly. He contrived to so control this unruly body as to produce a reasonably well-drafted text; loquacious members were controlled by stopwatch. Much credit must also go to the officials of the State Department, of the Foreign Office (FO), and of India—and, in particular, Mrs. Hansa Mehta—whose collaboration made Malik's task possible. Mrs. Roosevelt appears to have played no part at all in the actual work of drafting. She enjoyed no success with drafting the Covenants and by 1951 had no desire to continue to chair the HRC. Long before this she had become disillusioned; a memorandum she wrote in 1950 set out her views:

My own feeling is that the Near East, India, and many of the Asiatic peoples have a profound distrust of white people. This is understandable since the white people they have known intimately in the past have been the colonial nations and, in the case of the United States, our business people. Their areas of the world have been largely visited for purposes of exploitation.²

She also drew attention to the race problem in the U.S.A., and to the suspicions of Latin American countries. The consequence was that in the Third Committee of the General Assembly:

there has been a constant attitude among a great bloc of these countries to oppose everything the United States suggested. The mere fact that we spoke for something would be enough to make them suspicious. . . . They are joined by the whole Soviet bloc and while I am not sure they are fooled by the Soviets, they are glad to have their votes.³

2. NA, Dep't of State RG 59 340.1 AG 4-350 Box 1327. Letter of 14.12.50 E. Roosevelt to Secretary of State.

3. *Id.*

So it was that she came to think of the U.S.A. as beleaguered by an unholy alliance between the anti-colonial group and the Soviets, much indeed as did the British at this period. During the period when she chaired the HRC she appears to have come to the view that it was supremely important, if a covenant was ever produced, that it would be one acceptable to the U.S. Congress.

The U.S.A., with its long tradition of individual rights protection under the Constitution, was certainly well placed to exercise leadership in the human rights movement. But there developed considerable domestic opposition to involvement in the human rights movement, opposition in part connected with the nature of U.S. federalism. When the Eisenhower administration assumed power U.S. policy changed. It was made clear that the U.S.A. was not going to sign up to any international human rights covenant produced by the UN. The U.S.A., like the U.S.S.R., nevertheless continued to be involved in the negotiations.

Since then U.S. policy has changed. The position now is the U.S.A. is only prepared to become a party to international human rights covenants subject to a set of reservations and interpretative understandings that ensure that the covenant has, for all practical purposes, no domestic effect. The explanations for this change in policy and the history of the matter are complicated, and I only briefly mention some aspects in what follows. The policy is that human rights are for export. The change of policy by the Eisenhower administration inevitably damaged the U.S. position as a principal champion of the international protection of human rights. This continues to be the situation.

C. The U.K.

The history of U.K. involvement in the human rights movement is strikingly different from that of either Russia (until very recent times) or the U.S.A. Like the U.S.A., it participated enthusiastically in the UN negotiations from 1947 onwards, and continued, in a somewhat grudging way after 1951, to involve itself in the negotiation of the two covenants, which it eventually signed. Its potential role as a principal protagonist of human rights in the UN was severely weakened by its position as a colonial power. As the anti-colonial movement gathered strength it became increasingly beleaguered in the General Assembly and other organs of the UN. Furthermore, and quite independently of the colonial issue, British diplomats and politicians became deeply disillusioned with the UN. The assumptions on which this world organization had been based—in particular continued cooperation between the wartime allies—had proved to be false. Even cooperation between the U.K. and the U.S.A. faltered, and by late 1947 all hope of getting along with the Russians had been abandoned.

Britain's assumed role as a champion of human rights came to be chiefly exercised at a regional level. The most important step the U.K. took was to sign and ratify the European Convention (ECHR) in 1950 and 1951 (and later its first protocol). These were produced by the Council of Europe, established in 1949. This was sixteen years before the UN settled

texts of the two covenants. Under the ECHR states could make complaints of violations by other states that were parties. These went to a Commission, which was there to act as a filter and weed out baseless complaints, investigate the facts, try to secure a friendly settlement, and if this failed express an opinion as to whether there had been a violation. Some states had accepted the optional jurisdiction of a European Court of Human Rights (the Strasbourg court), to which the case might then go for a legal judgment. The U.K. initially did not consent to the idea of a Court, preferring the report of the Commission to go to the Committee of Ministers of the Council of Europe, a political body.

What about the colonies? The convention allowed colonial powers to extend the Convention to their colonies under a colonial applications clause. In 1953 the U.K. extended the Convention to virtually all its dependencies. This all sounds as if the U.K. adopted an import view of human rights. In fact, there was considerable nervousness about the Convention in some circles in Britain. But the prevailing view was that the Convention would have no significant domestic effects. One reason was that domestic British law and practice was thought to conform to the Convention, which had largely been drafted by the British. Another reason was that at this time only states could lodge complaints against the U.K., for a right of individual petition was optional and had not been accepted by the U.K. Britain's European allies in the Council of Europe were hardly likely to do so. In the colonies there were, it was known, some skeletons, but given the absence of any right of individual petition the extension of the Convention in 1953 was unlikely to make much difference to life. Although the Convention applied, for example, to Malaya, where a major colonial insurrection was, at this time, being crushed through the use of draconian legal powers, no European State was interested in complaining about this. So the Convention caused no problems there.

It was not until 1966 that the U.K. accepted both individual petition and the Court. By this date the troublesome colonial empire had been largely dismantled. Again, the belief was that since British law and practice respected human rights this was unlikely to cause any serious domestic problems.

III. Consternation in Whitehall

The belief that ratifying the Convention and extending it to the colonial empire would make no great difference proved to have been a mistake.

Between 1955 and 1959 a dispute arose over the colony of Cyprus, in which both Greece (which wanted to annex Cyprus) and Turkey (which strongly objected) were involved. Both were members of the Council of Europe and parties to the European Convention. They were also Britain's allies in NATO. In 1956 and 1957, in the context of this dispute, the first interstate cases were brought by Greece against the U.K. alleging extensive violation of the Convention. Cyprus was then a British colony in the grip of a major insurrection. Britain reacted by attempts to crush this insurrec-

tion by military force under an elaborate code of emergency powers. Once the cases were brought the U.K. had little choice but to respond to the allegations and go along with the Convention institutions, though this was not at first fully accepted. With the acceptance of a right of individual petition in 1966 the practical consequences became much more pervasive.

As a simple example of the current difference between the situation in the U.K. in relation to the international protection of human rights, and the position in the U.S.A., suppose the authorities do something very nasty to you. For example, you are subjected to extremely unpleasant methods of interrogation (such as the techniques employed in Northern Ireland at one time, including hooding, wall standing, subjection to continuous loud noise, etc.), or you are subjected to some brutal method of control in a prison (such as the use of stun belts in some prisons in the U.S.A.). In both the U.K. and the U.S.A. you may seek redress through your domestic law and domestic courts. In the U.S.A. if this fails that is the end of legal mechanisms at your disposal. Not so in the U.K.; if dissatisfied, you may then go to Strasbourg. This happened over the methods of interrogation, and Britain lost. Stun belts would have not the least chance of escaping an adverse finding by the Strasbourg court, as their use would violate Article 3 of the Convention.

The Convention institutions have recently been rejigged, and the two-tier system of Commission and Court is gone, leaving just the Court. Since the system took off in the 1970s the U.K. has been taken to the Court on many occasions, and has lost a considerable number of cases. Some of these cases have been extremely troubling to the British Governmental machine. Indeed, when the first proceedings against the U.K. began in 1956—that is when an import trade in human rights protection effectively began—there was horror in Whitehall. At once there were discussions in official circles of how, if at all, the U.K. could extricate itself from the mess it had gotten into by ratifying the wretched thing in the first place, and then by extending it to Cyprus.

The second case, started in 1957, accused the U.K. authorities of complicity in the widespread use of torture. No government welcomes investigation of such allegations by an international body, operating through essentially legal procedures. The U.K. government did co-operate with these procedures, but there was considerable opposition to this in official circles. The investigation was overtaken by independent events (the Cyprus dispute was ended by a political settlement in 1959 and the proceedings dropped). Although it is likely that this cooperation would have continued, it is by no means clear that this is the case.

IV. A Problem of Explanation

Why, alone of the three major powers which existed back in the immediate post war period, did the U.K. subject itself to international supervision in this way? I do not propose to say anything very much about why the U.S.S.R. and the U.S.A. did not. But I must emphasize that in comparing

the U.K. and the U.S.A. I am not in the business of simply differentiating “goodies” from “baddies.” Indeed, even a comparison including the U.S.S.R. would be too simple. Both in the U.K. and its dependencies, and in the U.S.A., there were in this period serious violations of even minimum standards of human rights. There were also persons involved in public life who really believed in human rights. As it turned out only the U.K. signed up to an obtrusive system of international human rights protection. The explanation lies in the political and diplomatic history of the period. The story of how this came about begins with the initiatives undertaken in the UN.

V. Human Rights in the United Nations

The negotiations that led to the establishment of the United Nations were dominated by the U.S.A., the U.S.S.R., and the U.K.; China played a trivial part. During the war Western public opinion came to accept that the protection of Human Rights and Fundamental Freedoms (HRFF) constituted a war aim. This perception owed much to President Roosevelt’s speech of 6 January 1941, in which he linked the idea of future security to the protection of four essential human freedoms: freedom of speech and expression, freedom of worship, freedom from want, and freedom from fear. In reality, the participation of the U.K. in the war, and that of the U.S.A. and U.S.S.R. (and of China) had not been triggered by concern over HRFF. But the reasons why countries become involved in wars, the reasons they give for fighting, and the advantages they hope to achieve if they win, commonly differ. By the end of the war it was generally accepted that the desired outcome of the fighting was not just a secure world order, but a just one in which rights would be respected. Largely in response to U.S. pressure, public statements to this effect were made during the war. The most notable was the “Atlantic Charter”—not a treaty, but in origin a press release of 14 August 1941, issued after a meeting between Roosevelt and Churchill.

The Dumbarton Oaks Conference (August–October 1944) established a set of proposals and developed a scheme for a future world organization. The emphasis of the proposals was primarily on making the world safe from war, not on producing a just world based on freedoms. However, the U.S.A. proposed that the General Assembly of the future organization should be concerned with making recommendations about the protection of human rights. After some difficulty with the U.S.S.R. the promotion of respect for human rights was featured in the Dumbarton Oaks proposals as an aspect of the future arrangements for international economic and social cooperation. But the proposals did not place a high emphasis on HRFF.

The proposals went to the San Francisco Conference, which produced the Charter of the UN (June 1945). This gave considerable prominence to the promotion of HRFF as a task for UNO. The pressure for this change in emphasis came largely from non-governmental organizations (NGOs) in the U.S.A., which were critical of the lack of emphasis on HRFF in the Dumbarton Oaks proposals. Both in continental Europe and in the U.K.

there had also been much advocacy for the promotion of HRFF by private individuals and NGOs, though not on the scale of such activity in the U.S.A. For example, it was very difficult for those in the European resistance to meet, though, a conference did take place in Switzerland during the war. It was also difficult for European NGOs to attend the conference.

All this private activity produced a number of draft international bills of rights, including one by the American Law Institute and another by the British international lawyer Hersch Lauterpacht. There were indeed suggestions, which were not pursued, to incorporate a statement of HRFF in the UN Charter as a ticket of entry into the UN. The Charter contains a number of references to HRFF. Promoting and encouraging respect for them was declared to be one of the purposes of the organization. The Charter, however, neither enumerates nor defines HRFF, nor does it say how this purpose was to be achieved.

Under the Charter the Economic and Social Council of the UN (ECOSOC) held its first sessions in 1946, when it established the Commission on Human Rights (HRC). The Commission, with eighteen members, was chaired by Eleanor Roosevelt, and held its first session in January and February 1947. It was charged with producing proposals for an international bill of rights and suggestions for "means of implementation." The HRC received many complaints of violations of HRFF from groups and individuals, but in 1947 it decided, amid some controversy, that it had no power to do anything about them. It became, therefore, a body engaged in drafting work.

The U.K., working through the FO, which of course consulted with other departments, took an active part in the work of the HRC. The U.K. government had publicly committed itself to the notion that the UN should further HRFF, and numerous ministerial statements had expressed this policy. The official committee, that is one that no Ministers attended, was the Steering Committee on International Organizations (SCIO), which established a Working Party on Human Rights (WPHR) in 1947. The chairman of the WPHR was normally Sir Eric Beckett, FO Legal Adviser, and something of an enthusiast for HRFF. The other departments chiefly involved were the Home Office (HO) and the Colonial Office (CO). At this time the U.K. was responsible for a vast and somewhat ramshackle colonial empire, with various sorts of colonies, protectorates, protected states, and *condominia*. The U.K. also administered some territories, for example Palestine, under League of Nations Mandates. It was all very complicated, and in some instances it was obscure what the status of a dependency was. Some dependencies were virtually self-governing internally, and others had no local legislatures at all. The CO was normally the department concerned, but some territories, for example the Anglo-Egyptian Sudan, were the concern of the FO.

There was little conflict between the FO and HO over international negotiations concerning HRFF. The HO viewed the U.K. as the home of HRFF with nothing to fear. There was, however, considerable conflict between the FO and CO, whose officials viewed each other with considera-

ble suspicion. The FO was not, of course, involved in governing (as was the CO) and its officials therefore were not so inclined to view HRFF as a potential nuisance or even menace.

The FO produced an incomplete draft International Bill of Human Rights, which was published on 6 June 1947. It was submitted to the Secretariat of the HRC. The initial work on this draft was undertaken by Geoffrey M. Wilson, a barrister who joined the Cabinet Office as a temporary assistant secretary in 1947. He was used because the FO did not regard the work as of high priority at this time, and its senior officials were heavily committed to other matters. Also, they had come of age long before HRFF were a matter of concern. Beckett worked on the draft. This Bill was not intended to commit the U.K. government. Since producing the UN Bill of Rights would involve prolonged negotiations, it would have been inappropriate to commit the U.K. to a text in advance of negotiations, which would necessarily involve give and take.

VI. Why Become Involved?

FO and U.K. involvement was motivated by a number of factors, of which the following are the more important:

- a) Ministerial statements supporting the idea that HRFF required international protection, both for simple humanitarian reasons and because their violation could threaten peace;
- b) simple humanitarian enthusiasm amongst officials, encouraged by the horrors of the recent past;
- c) the desire to exercise international leadership over the protection of HRFF and enhance British prestige;
- d) the desire to provide a model, based upon British traditions, which other countries might be encouraged to follow;
- e) the desire to use a UN Bill of Rights as a weapon in the ideological struggle against totalitarianism, and increasingly against the Soviet *bloc*.

One might now imagine that the European Holocaust, would, as such, feature prominently in the documents. In fact, this is not so. It was a factor, but a less prominent factor than one would expect. The immediate post-war response to the Holocaust was the Genocide Convention of 1948, not the Universal Declaration.

It was never supposed by the FO or HO that an international Bill of HRFF would make any practical difference within the U.K. The underlying assumption was that HRFF were adequately protected both in the U.K., and in all Western democracies, including the U.S.A. There was some unease over certain laws and practices in some British colonies (for example restrictions on internal freedom of movement, and the use of punitive bombing to control inter-tribal violence in the Southern Arabian Emirates), even if some could be justified by local conditions. There was also some concern over the discriminatory laws and practices of some of the states of the U.S.A.

In the period immediately after the war there was considerable optimism over the UN and its future activities. The scheme established under the Charter was based upon the assumption that wartime collaboration between the U.S.A., the U.S.S.R., and the U.K. would continue. Late in the war, and immediately after it, the U.S.A. took the line that it could get along with the Soviets, it was the U.K. and its colonies which was the problem. This perception changed in 1946 and thereafter, and the British Commonwealth came to be viewed as a valuable bastion against communism.

VII. The Negotiations at the HRC

British amateurism, and the idea that intelligent people (in effect, Oxbridge graduates from leading British private schools) could turn to any subject, characterized the negotiations. The representative at the HRC was Charles Dukes (became in 1947 Lord Dukeston), a trade unionist with no expertise in HRFF. He was assisted by Wilson. Beckett wanted a distinguished jurist, but was overruled; Foreign Secretary Ernest Bevin did not like intellectuals. Dukeston was expected to act under instructions prepared in the FO and approved by the WPHR and SCIO. The basic starting assumption made by the U.K. (and by the U.S.A. and U.S.S.R.) was that disputes concerning HRFF were matters of domestic jurisdiction, except perhaps when a real threat to the peace was involved, and therefore outside the competence of the UN. If a threat to the peace arose, that was a matter for the Security Council, not for the HRC. However states could, by treaty, voluntarily undertake obligations, or even submit themselves to some form of international supervision. What the UN could do through the HRC, ECOSOC, and the General Assembly was to promote their protection only by means that did not involve interference in matters of domestic jurisdiction. It could, for example, draft a HRFF convention and recommend states adopt it, but no more. Or it could draft and commend a statement of HRFF, or set up educational programs about HRFF.

The policies agreed and adopted by the WPHR were that:

(a) The U.K. should work for the production of a draft international convention, that is a treaty, which would, on ratification, impose international legal obligations on those states that participated, rather than a draft declaration of rights which, even if adopted by a resolution of the General Assembly, would not be legally binding on anyone.

(b) The U.K. should ensure that the rights were clearly defined, together with the limitations upon them.

(c) The U.K. should ensure that social, economic, and cultural rights were not included. There was some disagreement over political rights, which were favored by Dukeston and the junior FO Minister, Hector McNeil, but viewed nervously by the CO; the U.K. Bill did not include them. However it was thought that it might be difficult to exclude political rights at the HRC.

(d) The U.K. should ensure that practical means of enforcement were included, though initially it was not very clear what they might be. The FO

was inclined to favor a procedure modeled on that evolved before the war under the post war Minorities Treaties and the League of Nations. There was opposition in the FO, particularly by Beckett to the idea of allowing individuals or groups to present their complaints formally to some organ of the UN, such as the HRC—a right of individual petition. The CO consistently opposed such a right. The FO officials postponed taking a decision by making the line that, until the protected HRFF were clearly defined, it was premature to settle questions of implementation.

(e) Whatever was done about enforcement, there should be no right to take a complaint to an international court, as advocated by Australia. The U.K., U.S.S.R., and U.S.A., in an unholy alliance, were consistently opposed to such a court. It was not until 1966 that the U.K. view changed.

Underlying the approach of the FO was the idea that the Covenant would, in effect, codify the existing practice in the U.K., serving as a model for other countries, and as a weapon to curb excesses in totalitarian states. The Home Office (HO) went along with this; the Colonial Office (CO) and Commonwealth Relations Office, which handled relations with self-governing dominions were a trifle nervous. The Lord Chancellor's Office and Law Officers' Department were not initially represented in the official committees. Since they neither handled international affairs nor were directly involved in governing there was no reason why they should have been.

VIII. A Declaration and a Covenant

During 1947 the UN institutions came around to the idea of producing *both* a Declaration *and* a Covenant, which together would form the Bill of Rights. The former would constitute a statement of ideals to which, it was hoped, all states would ultimately conform. The Declaration would not itself impose any international legal obligations. The Covenant would be quite different in its legal effect; it would be a multilateral treaty that would impose international legal obligations only on countries that adhered to it. The "means of implementation" (i.e., means of enforcement) might form part of the Covenant, or might appear in some other way, for example, as the terms of reference for the HRC. The U.K. went along with this, provided that both Declaration and Covenant were produced at the same time. The FO view was that there was no harm in having a Declaration, but the Covenant must be regarded as the core of the operation. A Declaration was no substitute for an effective Covenant. The State Department appears to have thought that a Declaration was all that was needed, at least for the moment, and Eleanor Roosevelt, no doubt acting on instructions, came to be suspected by the U.K. and others of trying to sabotage the idea of drafting a covenant.

The Declaration was developed out of a shopping list draft produced by the Secretariat, derived from the numerous drafts on offer at the time (for example, those produced by the American Law Institute and Hersch Lauterpacht) and from provisions found in national constitutions, virtually all of which embodied statements of rights. It became the Universal Decla-

ration of Human Rights (UDHR), adopted by the General Assembly in December 1948. In the course of the negotiations the FO changed its policy and reluctantly agreed to the adoption of a Declaration before an agreed text of the Covenant had been produced. It continued, however, to press for a Covenant.

The main U.K. effort, however, went into the drafting of the Covenant, and the FO International Bill of Human Rights became the basic working document for the HRC. An HRC Working Group on the Convention, appointed in late 1947, was chaired by Lord Dukeston, reflecting the importance of the U.K. contribution. Neither the U.S.A. nor the U.S.S.R. had put forward any rival comprehensive draft. A draft UN Covenant was indeed produced in late 1947, but little further progress was made on it in 1948, since the preoccupation was with the UDHR. Lord Dukeston died in 1948, and was temporarily replaced by Geoffrey Wilson. His long-term replacement was Miss Marguerite Bowie, one of the first women barristers in England. She was not an international lawyer, and she had never practiced as a lawyer, though she had practiced as an insurance broker. Miss Bowie was assisted by Wilson and later by Martin Le Quesne, a junior FO official of considerable ability but little legal knowledge. He had studied law in Oxford for one year, and previously worked in the Embassy in Baghdad. Again, it may seem curious that the negotiations were not handled by a senior FO official. Although the operation was taken seriously in the FO, under the influence of Beckett, it was not initially treated as being of the highest importance. Some officials in the FO indeed regarded the UDHR as little more than pious hot air. Hersch Lauterpacht, perhaps the leading scholar of human rights of the period, viewed it with something approaching contempt.

IX. Conflicts and Problems at the UN

In 1949 work on the Covenant resumed and by now serious problems began to arise. Some were internal. In 1948 a division of opinion had developed within the U.K. government machine. The FO, joined in due course, though with a little unease, by the HO, came around to thinking it would be impossible to resist the acceptance of a right of individual (and group) petition. Public statements by Dukeston and others, public opinion in the U.K., and international opinion, tended to favor such a right, and there was a consensus that in principle it was hardly possible to resist the idea if HRFF were to be taken seriously. The CO, beleaguered by the extremely vocal anti-colonial movement, became increasingly opposed to conceding the right except as a final resort, and only if accompanied by elaborate safeguards. Arguments were made that it would confuse the loyalty of colonial subjects, be exploited by agitators and communists, and clog the machinery with huge numbers of petitions. The U.K. delegation to the HRC contrived to avoid taking up a firm position one way or the other on the matter; there was a feeling that in the end other states would be unlikely to accept such a right.

The CO was also aware that the laws and practices of some colonies might be difficult to reconcile with a Covenant, and that some might not agree to the extension of the Covenant to them. It was not at this time the practice to extend international agreements of the character of the proposed Covenant to colonies without securing the consent of the colonial government. Although most such governments, if not all, could be coerced, this was not the practice followed. There were various disagreements between the FO and the CO over how the problem posed by the colonies should be handled. For example, the CO at one point argued for a scheme under which the Covenant could be extended to colonies with reservations. The FO thought this would simply provide ammunition to the Soviets and the anti-colonialists and was a worse option than not extending it at all. The CO did not want to facilitate criticism from the anti-colonial lobby by conceding that HRFF posed problems in the Colonies. At the same time, it wanted to be a little selective in extending any Covenant to them. Some Colonial Governments were horrified by the UDHR and refused to publish it locally. The CO in London tended to be more liberal than some of the local colonial governments, especially those dominated by settlers.

Acceptance of a right of individual petition did not necessarily entail establishing a Court—such petitions might go, for example, to the HRC. It was also possible to have a machinery for dealing with communications from individuals, treating them as a source of information, without adopting the notion that an individual had legal power to initiate proceedings of a legal character; this had been the League of Nations system for minorities.

At the international level there were also problems which became acute in 1949. In particular the U.K. had serious disagreements with the U.S.A. The officials began to suspect that all the U.S.A. wanted was a Covenant which was sufficiently vacuous to be acceptable to Congress, the underlying reason for this being the notorious institutionalized discrimination in the southern states. Trouble centered on the U.S.A.'s pressure for a "general limitations clause" spelling out in vague language the permissible limitations of the HRFF, and for a "federal applications clause" enabling the U.S.A. to sign up whilst the laws of some of its constituent states violated HRFF.

The U.S.A. in turn opposed the U.K. demand for a "Colonial Applications" clause which would enable the U.K. to sign up without the Covenant automatically applying forthwith to its colonial dependencies. The Commonwealth country that took the most active role was Australia, which advocated a Court of Human Rights, and was thus also at odds with the FO, the U.S.A., and the U.S.S.R.

Matters grew worse, from the FO point of view, when the General Assembly in 1950 passed resolutions to the effect that the Covenant should embrace economic, social and cultural rights, and possibly a right of national self-determination, which alarmed the CO. There was also growing displeasure at the UN as a forum for anti-colonial pressure, and genu-

ine disillusion at the hypocrisy of the behavior of some governments there. The reality of the matter was perhaps that the approach of even the better governments to HRFF always involved some degree of hypocrisy.

Initially the U.S.S.R. representative on the HRC did not squabble with the U.K. or U.S.A., but by 1948 Soviet *bloc* representatives devoted much time to violent attacks on them. There were also real ideological differences—the Soviet representatives thought that social and economic rights, rather than political freedoms, were of primary importance. They also took a strong position on non-interference in matters of domestic jurisdiction.

X. The Growing Disillusion

The initial enthusiasm over the UN became impossible to maintain in the climate of the Cold War.

To sum up a complex story, it was thought that the U.K. was unlikely to secure from the UN the sort of Covenant it wanted, that agreement was unlikely ever to be reached, and that if a Covenant was drafted many states might never sign up to it. It came to be suggested as desirable for the U.K. to withdraw entirely from the UN HRFF exercise—a possibility which was to be very seriously considered in 1951, and one which had been mooted in 1948 and 1949. The deteriorating international situation aggravated the problems, and by about 1950 the FO believed the chief obstacle to progress was the Soviet *bloc* and the anti-colonial powers, rather than the U.S.A. Indeed, the U.K. began to wonder whether it had been rather a mistake to become so locked into disagreements with the U.S.A. over, for example, the federal applications problem. Was it not better to make concessions to such friends as you had?

In 1951 it became U.K. policy to delay, so far as possible, the production of a draft Covenant without actually withdrawing from the exercise. This decision does not seem to have made a great deal of difference to U.K. participation.

British disillusion was matched by developments in the U.S.A.

The decision at the UN to include social and economic rights presented special difficulties for the U.S. and was bound to generate strong opposition in the Senate. President Truman still wished to support the Convention in an election year; problems over economic and social rights might be solved by having a separate covenant (the solution eventually adopted) or by some system of reservations. In 1951, however, Charles Malik had succeeded Eleanor Roosevelt as Chairman of the HRC, a move welcomed by Humphrey of the Secretariat, who now described her Chairmanship as “incredibly bad,” adding that “as spokesman for the State Department, she had also become one of the most reactionary forces.”⁴ He welcomed the change as ending the influence of her State Department

4. II J.P. HUMPHREY, ON THE EDGE OF GREATNESS: THE DIARIES OF JOHN HUMPHREY, FIRST DIRECTOR OF THE UNITED NATIONS DIVISION OF HUMAN RIGHTS 193 (A.J. Hobbins ed., 1996).

adviser, James Simsarian, for Malik refused to become the mouthpiece of the State Department.

In 1951 Senator John Bricker of Ohio proposed to the Senate that the U.S. should take no further part in negotiating the covenant. Between 1952 and 1957 his name was associated with a succession of attempts to amend the U.S. Constitution. The intention was to ensure that ratification of a treaty would not confer on the Congress a power to legislate to implement the treaty unless Congress would have possessed the relevant legislative power without a treaty. It was essential to this scheme to provide that treaties were not self-executing, so that legislation was necessary if they were to have domestic effect. The aim was to reverse *Missouri v. Holland*,⁵ to protect "states rights" from being whittled away through the use of the treaty making power and, more mysteriously, to protect the U.S.A. from the loss of sovereignty caused by ratifying international instruments which impinged on domestic affairs. Viewed more broadly, the Bricker amendments (for there were a number of versions of the proposal) attempted to resist the relentless expansion of the frontiers of international law. International human rights conventions were viewed as the chief menace. The movement was encouraged by the decision of the California District Court of Appeal in *Sei Fujii v. State*,⁶ which invalidated the discriminatory *Alien Land Law* as contrary to the UDHR. The decision was reversed on appeal, but only on the ground that the Declaration was not a self-executing treaty.⁷

The Constitution was not amended, and it has been argued that even if it had been this might not have restricted the progressive enlargement of Congressional power. But politically Bricker won the battle. Once the Republican administration of President Eisenhower took over in 1953 Eleanor Roosevelt, who was strongly disliked by the new President, was somewhat curtly told that she would not in future be representing her country at the United Nations. Within the State Department in February 1953 the arguments for and against a change in policy were analyzed in a long memorandum by Simsarian: "A change in position would be difficult to explain To withdraw support . . . would be interpreted by at least some other countries as a step backward in the world effort to promote universal observance of human rights."⁸ The memorandum, which echoes ideas under consideration in Britain at the time, went on to make suggestions as to how the new policy might be implemented. The possibilities included, for example, complete withdrawal from the negotiations, or continued participation coupled with obstruction.

John Foster Dulles was fearful that the Bricker Amendment would gravely restrict the ability of the executive to conduct foreign affairs. He decided to sacrifice human rights to protect that ability. So on 6 April, 1953, he gave an assurance to the Senate Judiciary Committee that no

5. 252 U.S. 416 (1920).

6. 217 P.2d 481 (Cal. App. 1950).

7. 242 P.2d 617 (1952).

8. NA, Dep't of State RG 59 Lot File 62D 205.

human rights convention would be submitted to it and, in particular, that the U.S. did not propose to sign the Convention on the Political Rights of Women. A State Department Circular stated that “[t]reaties are not to be used as a device for the purpose of effecting internal social changes, or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.”⁹

In a deeply unattractive letter to Mrs. Oswald B. Lloyd, now the U.S. member of the Commission, which it is difficult to believe he personally drafted, Dulles expressed his government’s deep commitment to the advancement of human rights and the work of the United Nations, and went on to set out the new policy: “the United States Government has reached the conclusion that we should not at this time become a party to any multilateral treaty such as those contemplated in the draft Covenants on Human Rights, and that we now work towards the objectives of the Declaration by other means.”¹⁰ As to the other means the letter was not very specific, but proposed “other suggestions of method, based on American experience, for developing throughout the world a human rights conscience which will bring nearer the goals stated in the Charter.”¹¹ In his statement to the Senate Judiciary Committee he mentioned persuasion, education, and example. The basic reasons given for the change were that the covenants were unlikely to be effective because of the widespread lack of respect for human rights and were unlikely to be widely ratified. Subsequently new mechanisms were evolved whereby the U.S.A. has contrived to ensure that international human rights conventions, even if ratified, are deprived of all domestic significance. Thus did the U.S.A. forfeit its position as the most powerful protagonist of the human rights movement.

And so did the honeymoon with the UN and HRF end. In the end the UN Covenant became two Covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These covenants were not opened to signature until 1966, and they first came into force in 1976.

XI. A Regional European Covenant

It was in part because of the growing disillusion with the UN that the idea of attempting to negotiate a Western European regional covenant on Human Rights was considered in U.K. official circles. Throughout the history of the UN there had always been those who had little confidence in the idea of a world organization and who favored a regional approach. The first appearance of the idea of a regional covenant is a minute by Beckett of the FO in June 1948. He was sympathetic to the idea that the U.K. might try to negotiate a Human Rights Covenant with the Brussels powers—the five countries which had entered into the Brussels Treaty of 17 March 1948: the U.K., France, Belgium, the Netherlands, and Luxembourg. At

9. II FAM 700, 796, State Dep’t Circular no. 175.

10. NA, Dep’t of State RG 59 340.1 AG 4-350 Box 1327.

11. *Id.*

this date the Council of Europe had not yet been established. One of the ideas behind this was that amongst Western European countries there might not be the sources of disagreement that had bedeviled the UN negotiations.

The main impetus, however, came from two other factors. One was a radical change in British foreign policy, made public by Foreign Secretary Ernest Bevin in a speech to the Commons on 22 January 1948. The other was the pressure exerted by unofficial bodies seeking the integration and eventual federation of Western Europe. Underlying both was the traditional European fear of the destruction of Western European culture by "the barbarians at the gates"—once the Goths and Vandals and Huns—now represented by the increasingly demonised Soviet *bloc*.

XII. The Change in British Foreign Policy

There had long existed apprehension over Russian expansionism, and a school of thought that favored the creation of some form of Western European *bloc* to protect the security and civilization of Western Europe. Perhaps in addition such a *bloc*, together with its colonies, could act as a counterbalance to the power of the U.S.A., a third world force based on social democracy rather than on free market capitalism or communism. But U.K. foreign policy from 1945 resisted openly promoting this idea, in part in the hope of achieving security through the world organization of the UN, and also to avoid antagonizing the Soviets, with whom the U.K. continued to try to get along. There was also fear that formation of such a *bloc* would encourage U.S. isolationism; the U.K. wanted the U.S.A. to be involved in European defence. The only action which involved a formal link between the U.K. and a Western European power, and which might seem an exception to this policy, was the largely symbolic Anglo-French Treaty of Dunkirk of March 1947, explicitly directed only against possible German aggression. This did not create a Western *bloc*, and the Treaty did not establish any permanent institutional structure for co-operation.

The condition of Western Europe after the war was very bad indeed. Germany was devastated and incapable of feeding its population; formerly occupied countries had collapsed economies; there was serious fear of a communist take over of both Italy and of France, which were both politically extremely unstable. Alone of the Western democracies the U.K., though economically in a parlous condition, still possessed significant military power, but power quite inadequate to its commitments. The general deterioration of relations with the Soviet *bloc* in 1946 and 1947, the Soviet takeover of power in Eastern Europe, and in particular the wholly hostile Soviet attitude to the Marshall plan, whereby the U.S.A. offered economic aid to Europe (including Eastern Europe), led to a change in British policy initiated by the submission of a number of papers to the Cabinet in late 1947 and 1948, one being titled "The Extinction of Human Rights in Eastern Europe." This was the first British Cabinet paper explicitly concerned with human rights.

On 22 January, in his speech to the Commons, Bevin came out openly in favor of Western Union; what precisely he had in mind is not entirely clear, but he spoke of the need for "a spiritual union" and said that "the union must primarily be a fusion derived from the basic freedoms and ethical principles for which we all stand."¹² The background to Bevin's speech was the idea that Western Europe must counter the Soviet threat not only by some form of military alliance, which had to include the U.S.A. because of European weakness, but also by offering some alternative vision to Russian communism, and by tackling the economic conditions which encouraged its spread. It needed also to win the propaganda battle. In 1948 there was real fear in the minds of some European statesmen that the Russians might be at the Pyrenees in a matter of weeks.

Whether the U.S.S.R. really did threaten world domination or not is disputed. It is perhaps worth noting that the diplomats whose communications from Moscow signaled the start of the Cold War—George Kennan (U.S.A.) and Frank Roberts (U.K.)—never took such an alarmist view as later became current. The U.K. Field Marshal Montgomery, who visited Russia in 1947, regarded Russia as constituting no military threat whatever to Western Europe at this time, not because of the military strength of the West, but because of Soviet reluctance to subject itself to a new war. From the other side the Russian Ambassador in Washington, Nikolai Novikoff, sent alarming communications to Moscow on U.S. plans for world domination, made clear by U.S. enthusiasm for the acquisition of a world wide chain of military bases, many very far away from the U.S.A. What else were they for?

Whatever the rights and wrongs, in the period 1946-1949 there was very considerable anxiety in Western Europe over the future. In 1948 the only European power capable of exercising significant leadership was, for better or worse, the U.K.

The first practical outcome of Bevin's new policy was the Brussels Treaty of 17 March 1948, whose preamble, drafted by Beckett of the FO, included this passage:

Resolved. To reaffirm their faith in fundamental human rights, in the dignity and worth of the human person and in the other ideal proclaimed in the Charter of the United Nations;

To fortify and preserve the principles of democracy, personal freedom and political liberty, the constitutional traditions and the rule of law, which are their common heritage¹³

Bevin's proposed "Western Union" had sounded like a proposal for a single Western European organization; whether he intended this or not is problematic, but, to anticipate, the actual outcome was three different bodies—the Brussels Treaty organization (1948), the Council of Europe (1949), and the North Atlantic Treaty Organization (1949). This becomes

12. 446 PARL. DEB., H.C. (5th ser.) (1948) 407.

13. Treaty for Collaboration in Economic, Social and Cultural Matters and for Collective Self-Defence, Mar. 17, 1948, 19 U.N.T.S. 51, 53.

four if you add the Organization for European Economic Co-operation (OEEC), set up before his speech was delivered in response to the Marshall plan.

XIII. The European Movement

Another factor was the Continental European pressure for federation. A number of unofficial Western European organizations, many of whose members favored the formation of a federated Europe, had combined in 1947 to form the United Europe Movement. This was dominated by the experience of continental Europeans of the wartime period, and in particular of occupation; only federation could protect against the excesses of nation states that had produced this horror. The movement was organized by the British former Minister Duncan Sandys. Winston Churchill, then in opposition after his fall from power in 1945, placed himself at the head of this movement. It is unlikely that he ever favored a federation that included the U.K. British leadership of the movement and involved dominance by those who, never having experienced occupation, seem never to have fully understood the motivation of European federalists.

In May 1948 the movement held a highly publicized Congress at the Hague, attended by a remarkable number of significant European politicians. Sir David Maxwell-Fyfe, a Conservative M.P., who had been a U.K. prosecutor at Nuremberg, was associated with this movement, which was regarded with some hostility by the U.K. Labour government. One of the two principal resolutions passed at this Congress called for the establishment of a European Parliamentary Assembly. The other called for a European Charter of Human Rights, together with a Court to which citizens would have access.

The aim was not revolutionary but conservative: to protect the freedom that currently existed in Western Europe.

Before the Hague Congress met a committee associated with it had produced a *Rapport* and a *Projet de Déclaration des Droits*. The *rapporteur* was one Alexandre Marc, a prominent federalist, and the committee included some distinguished international lawyers, including Charles De Visscher. The Congress proposed a Declaration of Rights—that is, an enumeration of them—and a Convention to confer on the rights “an obligatory juridical character.” This was to be achieved in part by establishment of the right of individual petition and a court of human rights. There were to be barriers (*barrages*) between complainant and court to decide on admissibility of complaints, seek to secure conciliation, ensure that domestic remedies be first exhausted, weed out frivolous or malicious complaints and so forth. This is the germ of the idea of the European Commission of Human Rights.

The Hague Congress established a Commission under the Belgian Jean Drapier to draft the Charter. Little progress was achieved until 1949, when the British section of the European Movement took the initiative, with Drapier’s agreement. By the time any progress was made the negotiations

to establish the Council of Europe were nearing completion. The Treaty was signed in May 1949.

In September 1948 the European Parliamentary Union, an organization of members of parliaments that had supported the Hague Congress, met and agreed to a Declaration of Human Rights of ten articles, drafted in very general terms. This was a copy of a concise form of UDHR, which the U.S.A. had promoted at the UN in 1947-48 without success. The Union also favored creating a Supreme Court of Europe with jurisdiction both over the constitution of a federal Europe and over Human Rights.

Thus European enthusiasm for a Charter of Human Rights was closely linked to federalist plans. The model was the U.S.A.

XIV. Enlarging "Western Union"

The idea of producing a regional Charter was taken up by Francis Rundall, another FO official, in late 1948. One of the arguments he used was that it was desirable for governments to regain the initiative from private hands, that is from the European Movement and associated organizations. His other argument was that a European Charter produced by the five Brussels powers would be useful to provide a ticket of entry to an enlarged group of Western powers, formed around the nucleus of the Brussels Treaty. It had always been envisaged that the five original Brussels powers might be joined by other respectable European States, for example, the Scandinavian countries, to form a larger *bloc*. In the long term it was desirable to reintegrate Germany into Europe; since it was now divided because of the failure to reach agreement with the U.S.S.R. this would involve West Germany only.

In early in 1949 Rundall's proposal was dropped because it was thought that it would not be possible for the U.K. to secure control over the negotiations. It was feared that France would be represented by René Cassin, and Belgium by Fernand Dehousse, both viewed by the FO as loose cannons. Luxembourg would always vote with France. Hence the U.K. would be outvoted.

As it turned out the Brussels powers were not joined by others through accession to the Brussels Treaty. For reasons I pass by negotiations were opened in the summer of 1948 through the Consultative Council of the Brussels Powers over possible further European integration through a new treaty. These negotiations were divisive, the British being blamed for obstructing ambitious plans for European integration. In due course the negotiations led to the formation of the Council of Europe in May of 1949. Five new States (Ireland, Italy, Denmark, Norway, and Sweden) joined the five Brussels powers to form a new organization. The Statute (i.e., Treaty) of the Council of Europe was an uneasy compromise between the European federalist movement, which hoped to establish something in the nature of a United States of Europe, with a European parliament vested with real powers, and the British desire to limit the conception of a "Western Union" to an informal system of co-operation between the governments of Western

states. This was to involve no surrender of sovereignty, and was not to duplicate the activities of other organizations, including the OEEC and NATO. The outcome was deeply disappointing to enthusiasts for greater European integration, and the U.K. was strongly criticized for adopting a negative attitude. In fact the U.K. was not alone, but it did dominate the negotiations.

The basic structure involved a Committee of Ministers, whose powers could only be exercised by unanimity, and a Consultative Assembly, which lacked any executive or legislative powers and had severely restricted competence. For example, the Assembly could not discuss defence. The Assembly was not directly elected, and each country could choose who attended as it wished. Once the Consultative Assembly met the two component parts of the Council fell to quarrelling. What was never controversial, however, was the idea that the members of the Council were committed to the protection of HRFF. The Statute referred to this, though without explicitly requiring a Charter of Human Rights. Judging from the papers, the Statute was drafted by Beckett in the FO. The Statute was signed on 5 May 1949.

XV. The European Movement's Scheme

In late 1948 and early 1949 the European Movement began work on its scheme for human rights protection; Maxwell-Fyfe was the most prominent person involved, but an obscure barrister, John Harcourt Barrington, was paid to do most of the work. Professors Arthur Goodhart (an American residing in the U.K.) and Hersch Lauterpacht were involved, although details are obscure. They adopted a plan in January. There was to be a list of rights and municipal courts would primarily be responsible for enforcement. But there would also be a European Court, which would not, however, function as a supreme court of appeal. Individuals and states could petition, and their petitions would go in the first instance to an intermediate body (called a Council) that would police access to the Court, and investigate complaints. This is basically the scheme envisaged in the *Marc Rapport*.

The International Council of the European Movement met in February 1949 during the negotiations for the Council of Europe. From the U.K., Maxwell-Fyfe, Goodhart, and Lauterpacht attended. There had been prior consultations with the French Professors M.C. Chaumont, Joliot de la Morandière (Dean of the Paris Law Faculty), Georges Scelle, and René Cassin. In early March a proposal for a European Court of Human Rights was sent to the FO with a view to influencing the negotiations. A concise list of "those individual, family and social rights of an economic, political, religious or other nature which it is necessary and practical to protect by judicial process"¹⁴ was compiled. It was recommended that rights should be judicially protected, ultimately by a Court, which might issue a judgment requiring State implementation, and award reparation. However, petitions

14. U.K. PRO FO 371/117924/Z2144.

would only be admissible if domestic remedies had been exhausted, and they would first go to a Commission, which would investigate and seek conciliation, and control access to the Court.

To carry the plan further a Juridical Section of the European Movement was established, and Pierre-Henri Teitgen (former French Minister and resistance organizer) became its Chairman, Jean Drapier (Belgian) its Vice-Chairman, and Maxwell-Fyfe and Professor Fernand Dehousse (Belgian) its *co-rapporteurs*. Various other jurists were consulted.

The Statute of the Council of Europe was signed in May 1949, and a modified proposal was approved and submitted to the Committee of Ministers on 12 July. This embodied a list enumerating the rights to be protected, included an undertaking by states to respect democracy, allow political opposition and hold regular elections with universal suffrage and free elections, and contained a general limitations clause. It was envisaged that fuller definitions of rights might later be produced. The scheme for enforcement followed the earlier model. Ultimately if member State failed to implement an order from the Court the Committee of Ministers would have to decide what action to take.

XVI. The FO Reaction to the European Movement's Scheme

These proposals were basically anathema to the FO—no clear definitions, and a Court, and what one civil servant called “a meddling Commission.” However, the FO was not anxious to appear negative to the protection of HRFF, having just led the negotiations that produced a Council of Europe, built explicitly around the need for their protection as an aspect of the Cold War with the Soviet *bloc*.

Relations with the Soviets had continued to deteriorate since Bevin's speech in January 1948, for example, through the Prague coup of February 1948 and the blockade of Berlin in the summer. This produced in official circles a fear of imminent war, and gave urgency to the idea of producing an ideological statement of the principles of liberal democracy as an alternative to the rival communist ideology, whose extension over Western Europe was so feared.

The Consultative Assembly was to meet in August 1949. Its agenda was controlled by the Ministers, which was a bone of contention. The U.K. proposed that the definition, maintenance and further realization of HRFF should be on the agenda, thereby reviving in a slightly different form Beckett and Rundall's proposal. Behind this lay the FO's desires to find something useful and harmless for the Assembly (dominated by federalists) to work on and to not appear negative towards the Council. The U.K. was at first unable to secure consensus for this, in effect being outvoted. After protests from Churchill on behalf of the Assembly the item was, however, restored. The FO line was that the Assembly should be encouraged to seek to produce a clear definition of rights before considering their enforcement, in accordance with established FO policy: definition first, implementation later.

So the Assembly debated the matter, the chief speakers being Teitgen and Maxwell-Fyfe. The former suggested a Convention that would at once provide a collective guarantee of HRFF as at present defined by the domestic law of member states, and establish a Commission and Court, as the European Movement had proposed. Later a full code might be produced, but immediate action was needed. This plan got around the difficulty of agreeing on a regional set of definitions. It only makes sense if one remembers the very grave fears of the period and the experience of those whose countries had been occupied. Maxwell-Fyfe put forward the European Movement's proposals, which did not involve precise definitions of rights, but was merely a list and a statement of the essentials of democracy. The matter was then referred to the Committee on Legal and Administrative Questions, whose Chairman was Maxwell-Fyfe, with Teitgen as *Rapporteur*.

This committee, which was not unanimous, came back to the Assembly with a proposal for a Convention that merely provided general definitions of the principal HRFF in the UDHR. Member states would have wide discretion as to precisely how these would be guaranteed in their law in accordance with what is now called the "principle of subsidiarity" and the "doctrine of the margin of appreciation." There would also be a general limitations clause. The Committee adopted the basic scheme for enforcement proposed by the European Movement. With some disagreement and controversy, in particular over the right of individual petition, the Assembly adopted the committee's proposals, which it communicated, with a draft, to the Committee of Ministers.

XVII. Reestablishing Governmental Control

The outcome of the proceedings now appeared to be likely to lead to the production of a Convention of a type wholly at odds with FO thinking—no clear definitions, a general limitations clause, a right of individual petition, a meddling Commission, and a Court of Human Rights.

The Ministers decided to refer the whole question to a committee of expert jurists. This conformed to the idea that Human Rights had an objective existence and that what was needed was to consult those who were expert in the subject, rather than to constitute Human Rights by negotiation between Government representatives acting under instructions. The FO also supported this procedure as a technique for taking the matter out of the control of the Assembly and the European Movement, and back to governmental control. Most, but not all, states appointed persons who counted as jurists, and who acted simply as individuals. The U.K. appointed Sir Oscar Dowson, who had been legal adviser to the HO. He was not a good negotiator, and was by now beginning to lose his eyesight so that he could not manage his papers.

The FO took the line that the Assembly draft was quite unsuitable as the basis for a binding Convention, and set out to try to ensure that its ideas as to the form of a Convention (based upon its 1947 International Bill of Human Rights, to some degree as modified in the course of the UN

negotiations on the Covenant) should form the basis of the European Convention. So Dowson was instructed to follow the established FO line. In effect his brief was to get the experts to accept the proposals that the U.K. had been advancing in the UN HRC, with the addition of some rights not in the U.K. proposal (dealing with torture, fair trials, presumption of innocence, and right to marry) to which no objection was made. But since the U.K. had not advocated the inclusion of a protected right of property (which was in the European Movement proposal) he was to oppose its inclusion, and, for the same reason, oppose any provision safeguarding political freedom or democracy.

The experts held two sets of meetings, and were chaired by the Belgian, Étienne de la Vallée Poussin, an enthusiastic federalist. France was represented by Chaumont. It was with difficulty that Dowson persuaded the committee to consider anything except the European Movement's scheme. For the second round of meetings Dowson was assisted by Le Quesne and was more effective. Eventually the committee failed to achieve a consensus. So the experts produced two drafts of the substantive rights, one based on the European Movement's scheme, the other on the U.K. scheme. On enforcement there was general support for the idea of a Commission, but a majority was opposed to establishing a court, with France, Italy, Belgium, and Ireland being in favor. No firm decisions were taken.

XVIII. The Conference of High Officials

The use of the experts had failed to achieve the U.K. objective of regaining governmental control and rejecting the European Movement's proposals. When the Committee of Ministers met to consider the report of the experts the U.K. proposed that the report should now be considered by a conference of government appointed high officials, who would be under instructions, but would not be plenipotentiaries with power to bind them. They would be instructed, whatever disagreements arose, to produce one single coherent draft Convention. This was agreed, and the U.K., for the first time, appointed a really senior and effective civil servant as its representative—Samuel Hoare of the HO. Hoare was instructed that: "we attach great importance to the text based on our proposals being eventually accepted as the basis of the Convention."¹⁵ The central points in his brief were that he was to persuade the Conference: "(a) to define the rights . . . and the limitations with the greatest possible precision, preferably on the basis of the draft which we had previously submitted, (b) to restrict to States the right to petition . . . (c) to abandon as inappropriate the original proposal . . . that a European Court of Human Rights be established . . ."¹⁶ There was continuing disagreement as to how far Hoare ought to go by way of concession to the Assembly. The FO, but not the CO, was prepared if necessary to concede a right of individual petition.

15. U.K. PRO CAB 134/403 (IOC(50)41).

16. *Id.*

By now both the U.K. and the other member states were anxious to produce some sort of acceptable Convention. If the Council of Europe, built around the idea of protecting democracy and human rights, proved to be incapable of producing a Human Rights Convention, which the Assembly (with only one dissenting vote) had called for, then the very institution might well collapse entirely, and the Ministers, in particular the British Minister, would be blamed for the disaster. Hence the Ministers were inclined to agree to more or less anything that would produce consensus, and avoid a veto, and at the same time the FO was inclined to try to be as conciliatory as possible.

The officials were unable to reach a consensus on any of the disputed matters, but this did not prevent them from producing a single draft, based, of necessity, upon what the majority supported. It amounted to a compromise. Over the definition of rights it followed the British model. A provision on the protection of democratic institutions was not included, nor was there any provision dealing with the right of property or the right of parents to choose the kind of education provided for their children, or indeed to the right to education at all. These exclusions conformed to the FO view. Again, in accordance with the FO view, there was nothing on minorities. On enforcement it followed the European Movement's model with a Commission and a Court. The jurisdiction of the Court was, however, to be optional. This was a compromise proposed by Sweden. The Commission would meet in camera, which tended to make its activities less problematic. The draft also provided for a right of individual petition, which was opposed only by Britain and Greece. It deferred to British wishes by including an article permitting derogation in time of war or emergency, and provided two versions of a colonial applications clause. The process of weakening the Convention was carried still further, for there was unanimous agreement not to include the requirement of a formal declaration at the time of accession (earlier insisted upon by Britain) that the domestic legislation of member countries gave full effect to the Convention: "Indeed, it considered it was necessary for the Convention to include a clause allowing the High Contracting Parties to make reservations with respect to the maintenance of certain existing laws which might not be in accordance with a particular provision of the Convention."¹⁷ This process of weakening the Convention made it increasingly acceptable.

In effect, the reference to "high officials" had enabled the FO to secure a considerable degree of control over the negotiations.

The report of the Conference was made available to Maxwell-Fyfe and his Committee on Legal and Administrative Questions, which accepted the compromise on the definition of rights (that is, the U.K. view) and the optional jurisdiction of the Court. Its main criticism was the omission of any provision safeguarding democracy, and of the right to property, and to

17. IV COUNCIL OF EUROPE, COLLECTED EDITION OF THE TRAVAUX PRÉPARATOIRES 216-17 (Martinus Nijhoff ed., 1977).

education. Over the Colonial Clause it favored the more liberal of the two alternatives proposed.

XIX. The British Cabinet Explosion of 1 August

The Committee of Ministers was to meet on 3 August, and since agreement on a text now seemed likely the matter was raised in the British Cabinet on 1 August. A general paper submitted by the FO Minister of State, Kenneth Younger, urged acceptance of the Covenant in the form that had emerged from the Conference of Officials. The text was appended. It pointed out that its provisions, in the main, followed "almost word for word the actual texts proposed by the United Kingdom representatives."¹⁸ The Colonial Secretary drafted a paper urging that the U.K. should, as far as possible, continue to press for the exclusion of the right of individual petition completely, and expressing unease over the repercussions of accepting the Convention on the colonies. The Foreign Secretary, Ernest Bevin, was already in Strasbourg and did not attend this meeting.

The general desirability of a European Convention was never previously fully considered by the Cabinet. The matter had been handled by officials on the basis that no new general issue of policy was involved and departments had agreed on all basic issues. There was an explosion from the Lord Chancellor, William Jowitt, and from Stafford Cripps, the Chancellor of the Exchequer. Jowitt thought the Convention was "meaningless and dangerous," being too loosely drafted and alien to the whole tradition of the common law. The outcome of this was a decision that Bevin should be instructed to try to secure that the Committee of Ministers remitted the draft for further consideration by Governments, and did not submit it for consideration during the current session of the Consultative Assembly. After FO attempts to discover what, precisely, the objections of the Cabinet were it transpired that Cripps was objecting to the draft Article 8 as incompatible with economic planning. The other objection was to draft Article 23, which provided for the right of individual petition. Hence at the meeting of the Committee of Ministers on 3 August Bevin indicated that he would urge the reconsideration of draft Article 23. He declined to object to Article 8 on the ground that it had no relevance to economic planning and he did not wish to seem foolish.

He also simply refused to urge delay, aware of the odium this would bring on the U.K. in Europe. It remains rather obscure what the explosion was really all about, and the entire event may have been, in reality, an expression of irritation with Bevin as Foreign Secretary, unconnected with HR.

After this meeting a subcommittee of government-appointed officials set about revising the draft produced by the high officials in the light of proposals from governments. This provided a further opportunity for the U.K. to secure modifications, and proposals were made (1) to permit trials

18. U.K. PRO CAB 129/41 CP(50) 179.

in camera, long possible in the U.K., (2) to make the acceptance of the right of individual petition optional, and (3) to make provision for the denunciation of the Convention. The U.K. also made it clear that the Colonial Applications Clause must be modified so as to make it possible for a State which had extended the Convention to its colonies to withdraw that extension. Where agreement was possible an agreed draft was produced. Where this was not possible, as in relation to the Colonial Clause and the right of individual petition, alternatives were produced.

The Committee of Ministers met again on 7 August and adopted the British proposal over the Colonial Applications Clause, and a compromise, acceptable to the U.K., on the right of individual petition. The right became optional, and could be accepted for a limited period. Only Ireland, which found the progressive weakening of the Convention in response to pressure led by the U.K. objectionable, abstained. The Ministers had now accepted a complete draft, and there was, in practical terms, no way that it could be substantially altered unless a new full round of negotiations was to begin. Bevin in effect agreed to the draft, and could not at this late stage go back on his word. However the Convention was not at this stage signed (signature has the effect of fixing the text of a treaty, which still has to be ratified).

XX. The Assembly Seeks to Modify the Text

In order to keep the peace with the Assembly the draft was now submitted to Maxwell-Fyfe's Committee and to the Assembly. Bevin here did not conform to the Cabinet decision, which was to the contrary. The Assembly made a number of very significant proposals for amendment and voted to delete the Colonial Clause entirely. Apart from a proposal for a Preamble these changes were quite unacceptable to the U.K., and there was no chance of securing immediate agreement to them even if the U.K. had not objected.

Back in the U.K. the rearguard action by Jowitt against the Convention was maintained. He was, to some degree, now joined by the Attorney General, Sir Hartley Shawcross. The details have been fully explored in an article by Geoffrey Marston,¹⁹ but the basic reality is that there was never the least hope of Jowitt, a political lightweight, securing a volte face by Ernest Bevin and the FO. Bevin was, for all practical purposes, in complete control of British foreign policy, though he was careful to take steps to carry the Prime Minister Attlee and the Cabinet along with him. Bevin and the FO had already committed the U.K.

By the time Jowitt submitted a Cabinet paper he had conceded that the U.K. was bound to sign the Convention. Arrangements were made to enable him to save face, and the FO replied to his criticisms in a wholly unrepentant Cabinet Paper. In effect, this paper was the reply of the officials to the suggestion that they had in some way behaved improperly in

19. Geoffrey Marston, *The United Kingdom's Part in the Preparation of the European Convention on Human Rights 1950*, 42 INT'L & COMP. L.Q. 796 (1993).

the SCIO and WPHR, a suggestion which they resented. The matter came before the Cabinet again on 24 October, Bevin having explained that the U.K. must sign the Convention, which Jowitt now conceded. Hence adherence to the Convention was now the agreed policy of the Attlee government.

Officials representing the Ministers met on 2 November and agreed to prepare a text for signature by the Ministers, incorporating minor drafting changes and attempts to ensure that the English and French texts coincided. Ernest Davies signed the text of the Convention on behalf of the U.K. on 4 November in Rome. Bevin did not attend, probably to avoid having to attend an audience with the Pope, as all other delegates did, for Bevin could not bear to be in the same room as a Catholic priest. There was never any suggestion that it should not be ratified, and Bevin signed the instrument on 22 February 1951. The officials had previously agreed that no further reference to the Cabinet was needed.

Of the States involved in the negotiations Belgium ratified in 1955, Denmark in 1953, West Germany in 1952, Greece in 1953, Iceland in 1953, Ireland in 1953, Italy in 1955, Luxembourg in 1953, the Netherlands in 1954, Norway in 1952, Sweden in 1952, and Turkey in 1954. The ratification by West Germany, as an associate member of the Council of Europe, was a significant event in the re-integration of Germany into Europe. France was the chief laggard, not ratifying until 1974. The right of individual petition was first accepted by Denmark (1953), Germany (1955), Iceland (1955), Ireland (1953), and Sweden (1952). The U.K. first accepted it in January 1966 under the then Labour Government. Under the Colonial Applications Clause the U.K. extended the Convention to forty-five territories in 1953. The significant exceptions were Hong Kong, the Sultanate of Brunei (included 1967), the Kingdom of Tonga (included 1964), Zimbabwe, and the South Arabian Emirates. Hong Kong was initially excluded because the Governor's legal staff was too small to check the compatibility of local laws. It did not get a Bill of Rights until shortly before the return to China. Southern Rhodesia (now Zimbabwe) was effectively self-governing and its government was hostile and under settler influence. Some of its laws were incompatible. Conditions in the Southern Arabian Emirates were thought too primitive, some of the provisions (for example, freedom of religion) would not have been acceptable, and in any event the area was only weakly controlled, at times by punitive bombing. Brunei and Tonga were administrative errors.

XXI. The First Protocol

The refusal of the Committee of Ministers to accept the changes recommended by the Consultative Assembly provided yet another bone of contention between the Ministers and the Assembly. The Ministers, anxious to improve relations, agreed to consider further the possibility of a Protocol incorporating the rights to property and education, and the guarantee of democratic institutions. Jowitt and Shawcross now transferred their atten-

tions to raising problems over the negotiations, which eventually led to the signature by the incoming Conservative Government of the First Protocol on 20 March 1952, the day it was opened for signature. The negotiation of the First Protocol, which was very tedious because of the need to placate Jowitt and acute difficulties in settling the precise text, is another story.

XXII. Final Comments

During the negotiation of the ECHR the U.K. was, far and away, the most powerful Western European state, and it still possessed considerable prestige as the home of Human Rights and the savior of European liberty. Although the Council of Europe formally operated by unanimity, through the Committee of Ministers, in reality member States were inclined to go along with the majority and there was reluctance to antagonize the U.K. The U.K. was in turn anxious not to appear negative in its dealings with the Council of Europe. The U.K. and France had been largely responsible for its invention. It was the only Western organization with which West Germany was associated. Bevin did not want to destroy what he had created, and sought to find something for it to do which would deflect enthusiastic Europeans from pursuing what he viewed as wild schemes for federation.

Other members of the Council knew that no Convention was possible unless the U.K. agreed to its terms. When Dowson represented the U.K. the mice could play, but Hoare was an entirely different proposition. The French government, though anxious to appease French federalists, was not in reality very keen on a Convention that would raise problems for France. Some of the other governments were nervous about an effective Convention, and much of the pressure for one came from non-governmental sources. In the event the U.K. entirely dominated the negotiations. The ECHR (though not the first Protocol) was, for all practical purposes, just what the FO wanted and represented a compromise accepted reluctantly by the CO. Provisions unacceptable to the FO became optional (the court and right of individual petition). Its substantive provision followed U.K. views. The basic scheme of the arrangements set up the implementation of the ECHR—state and individual petition, Commission to investigate, screen, attempt conciliation, and monitor in part access to the Court. This scheme was eventually accepted by the U.K. and was devised by the European Movement. Acceptance was motivated by political considerations, the U.K. being unwilling to become the whipping boy of European integrationists.

The ECHR was conceived as an ideological response to the threat of Soviet communism, a basic statement of the liberty enjoyed in the free West. Given the political situation in Europe at the time, it was thought to be in accordance with British interests to negotiate and ratify the Convention. It was a purely conservative document, and it was never anticipated that over the course of the next fifty years its institutions would adopt a theory of evolutive interpretation that led to the creation of an elaborate jurisprudence of human rights. The negotiation of the ECHR was conceived to be an aspect of foreign, not domestic, policy. It was not until the

two Cyprus cases of 1956 and 1957 that it was understood in official circles that the U.K. had committed itself to an institutional scheme of human rights protection from which it was politically impossible to disengage, and that this scheme could have serious effects on the activities of government. The U.K., more or less, won the first of these two cases, subject to powerful dissent and at the price of abandoning the use of certain emergency powers. It would probably have substantially won the second torture case, but perhaps with some egg on its shirt. Life, for the authorities, was never going to be quite the same again.