

## ARTICLE

### PREAMBULAR HISTORY: THE VIEW OF THE PAST IN KEY HUMAN RIGHTS INSTRUMENTS

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#### ABSTRACT

This article claims that the preambles of foundational human rights instruments, taken together, articulate a consistent view of the past. This view is firmly rooted in historical processes, embedded in metaphysical truths, and enacted in service of the future. Part 1 assesses the strengths and weaknesses of the “preambular approach to history” and selects four instruments from a group of twenty-two: the United Nations Charter, the Universal Declaration of Human Rights, the Genocide Convention, and the International Criminal Court Statute. Part 2 reconstructs the discussions during which the historical recitals in the preambles of these instruments emerged. Part 3 analyzes these findings. In writing the historical recitals, the drafters of these key instruments opted for either the approach of the contemporary historian (the “recent history approach”) or the approach of the philosopher of history (“the holistic approach”). Both approaches are explained and compared. The conclusion contains a thought experiment in which the human rights view of the past embedded in these historical recitals is articulated.

*Keywords:* Genocide Convention, holistic approach to the past, human conscience, human rights view of the past, International Court of Justice, International Criminal Court Statute, metaphysics, natural law, recent history approach to the past, United Nations Charter, Universal Declaration of Human Rights

If the world could speak with one voice, what would it say about the past? If the world had a memory, how would it remember previous generations? If the world had a conscience, how would it pass judgment on history? These are metaphysical questions that historians or philosophers no longer pose; they are remnants of a speculative approach that has seemingly lost its attractiveness as a result of the disenchantment of the world that has emerged in the past century. Yet, in recent decades, these questions have received responses—not by historians or philosophers but by diplomats and legal scholars. And not only that, these responses can be read in easily accessible texts of supreme authority: the preambles to foundational international human rights instruments. This article claims that

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these preambles, taken together, articulate a consistent human rights view of the past.

In order to prove this thesis, part 1 assesses the strengths and weaknesses of what can be called the “preambular approach to history” and, from twenty-two foundational human rights instruments concluded since the First World War, it selects four that have the strongest genealogical primacy: the Charter of the United Nations (UN) (1945), the Universal Declaration of Human Rights (1948), the Convention on the Prevention and Punishment of the Crime of Genocide (1948), and the Rome Statute of the International Criminal Court (1998). Part 2 reconstructs the discussions during which the historical recitals in the preambles of these four instruments were written. Part 3 shows that, in emphasizing events of the last century, the drafters of the UN Charter and the Rome Statute chose to follow a recent history approach to the past and that, in looking back at the whole of history, the drafters of the Universal Declaration and the Genocide Convention opted for a holistic approach to the past. The conclusion offers a thought experiment that attempts to envision the drafters’ responses to the metaphysical questions outlined at the outset of this article. It claims that they articulate a consistent human rights view of the past. This view is firmly rooted in historical processes, embedded in metaphysical truths, and enacted in service of the future.

#### I. THE PREAMBULAR APPROACH TO THE PAST

The gulf between a preambular approach to history and the historian’s approach cannot be wider. The preambular approach has a different length and language, and it applies a different method, theory, and philosophy. In general, declarations and treaties—even those concluded after periods of war or dictatorship when people are most inclined to look back—refer to the past sparingly.<sup>2</sup> If they do, they usually dedicate only a few lines of the preamble to the historical events that prompted them. For example, the English text of the Universal Declaration of Human Rights consists of 1,779 words, 320 of which comprise the seven recitals of the preamble. Only two of these (a mere 88 words) are dedicated to history. Drafters have repeatedly insisted that preambles must be brief and simple statements so as to appeal not only to the minds of the people but also to their hearts.<sup>3</sup> That brevity is not conducive to the explication of full-fledged historical views, to say the least.

2. Treaties referring to the past include the Treaties of Westphalia (1648) and Versailles (1919), the Potsdam Agreement (1945), and the Taif Accords (1989). The Constitute project’s website (<https://constituteproject.org>) lists 232 constitutions, of which 193 were in force as of 2 April 2025. Of these 193 constitutions, 157 have preambles, 141 refer to the motives behind writing the constitution, 77 refer to the country’s history, 30 refer to historical figures, 17 refer to crimes of the previous regimes, and 7 refer to truth commissions.

3. See, for example, UN Econ. & Soc. Council, Human Rights Commission, 1st Sess., 1st mtg., UN Doc. E/CN.4/SR.1 (27 January 1947). The vast majority of sources with the “UN Doc.” notation can be located, using the provided symbols, in the UN Official Document System (<https://documents.un.org/>). Many sources specifically for the Universal Declaration are also available at its Drafting History page, <https://research.un.org/en/undhr>.

Moreover, preambles are cast in solemn language that is sometimes reminiscent of the incantatory tone of holy books.<sup>4</sup> For example, the basic document of the League of Nations and the treaties emanating from the Universal Declaration are baptized “covenants” rather than “conventions”—a term echoing the Ark of the Covenant.<sup>5</sup> And on 9 December 1948, Eleanor Roosevelt, chair of the UN Human Rights Commission and widow of former President Franklin D. Roosevelt, told the UN General Assembly that the Universal Declaration “might well become the Magna Carta of all mankind,”<sup>6</sup> comparing it to the Great Charter of medieval England. Her phrase resonated like an oracle and became iconic. These formulas stand in stark opposition to the critical, and often ironic, tone of professional historical works.<sup>7</sup>

Method is another point of contrast. Historical works are the result of the systematic testing of theories against sources and the pitiless refutation or corroboration of arguments to obtain plausible interpretations. Treaty texts, as the result of collective authorship, are subjected to a completely different, though no less rigorous, procedure: drafting them occurs by committee and is the result of lengthy negotiations, compromise, and consensus building or voting among delegates of participating States.<sup>8</sup>

Another striking characteristic of the recitals is that some are cast in the vocabulary of natural law—and carry with them the tenets of that theory. Whatever its merits and weaknesses, natural law theory tends to express itself in universal and absolute truths, whereas science accepts only preliminary truths.<sup>9</sup> In the Universal Declaration, for example, the vocabulary of natural law can be traced in the first

4. See, for example, the references to the Ten Commandments in UN GA, 3rd Comm., 3rd Sess., 91st mtg., UN Doc. A/C.3/SR.91 (2 October 1948), and UN GA, 3rd Comm., 3rd Sess., 98th mtg., UN Doc. A/C.3/SR.98 (9 October 1948).

5. The term *Covenant* (*Pacte* in French) was proposed by Belgian delegate Fernand Dehousse (UN Econ. & Soc. Council, Commission on Human Rights, 2nd Sess., 42nd mtg., UN Doc. E/CN.4/SR.42 [16 December 1947]).

6. UN GA, 3rd Sess., 180th plen. mtg., UN Doc. A/PV.180 (9 December 1948).

7. Useful remarks on the “formulaic articulation” of moral principles can be found in Jeremy Waldron, “Nonsense upon Stilts?—A Reply,” in *Nonsense upon Stilts: Bentham, Burke, and Marx on the Rights of Man*, ed. Jeremy Waldron (Methuen, 1987), 177–81.

8. For a discussion of the literary style employed in the UN Charter, see Coordination Committee, 35th mtg., Doc. WD 435 CO/199 (20 June 1945), in *Documents of the United Nations Conference on International Organization, San Francisco, 1945* (United Nations, 1945–1955), 17:276–89. The *Documents* source, hereafter cited as *UNCIO*, can be accessed through the UN Digital Library (<https://digitallibrary.un.org/record/1300969?ln=en>).

9. Martti Koskeniemi, “The Preamble of the United Nations Declaration of Human Rights,” in *The Universal Declaration of Human Rights: A Common Standard of Achievement*, ed. Gudmundur Alfredsson and Asbjørn Eide (Martinus Nijhoff, 1999), 30–33; Johannes Morsink, *The Universal Declaration of Human Rights: Origin, Drafting, and Intent* (University of Pennsylvania Press, 1999), 281–302; Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (University of Pennsylvania Press, 2009), 17–111; James Chappel, “The Mythical Connection Between Natural Law and the Universal Declaration of Human Rights,” in *The Cambridge Handbook of Natural Law and Human Rights*, ed. Tom Angier, Iain T. Benson, and Mark D. Retter (Cambridge University Press, 2023), 88–99; Paul Yowell, “Natural Law and the Universal Declaration of Human Rights,” in Angier, Benson, and Retter, *The Cambridge Handbook of Natural Law and Human Rights*, 100–15; Antoon De Baets, “The Impact of the *Universal Declaration of Human Rights* on the Study of History,” *History and Theory* 48, no. 1 (2009): 20–43.

word of its title, “universal,” which replaced the original term, “international.”<sup>10</sup> This adjective made the Declaration applicable to all countries on earth, including those that abstained during the vote on 10 December 1948 and those that were not currently UN members. The influence of natural law can also be seen in the use of the words “inherent” and “inalienable” in the first recital.<sup>11</sup> The impact of natural law language on the historical recitals specifically, however, is limited to the phrases “conscience of mankind”<sup>12</sup> and “conscience of humanity”<sup>13</sup> in the preambles of the Universal Declaration and the Rome Statute, respectively. The term “conscience” goes back at least to the so-called Martens Clause in the preamble to 1899 Hague Convention II on the Laws and Customs of War on Land. It contained the principle that all acts in armed conflict not regulated by that convention were nevertheless subject to “the usages established between civilized nations, . . . the laws of humanity, and the requirements of the public conscience.”<sup>14</sup> These phrases have been reproduced in many human rights and humanitarian instruments.

Finally, the philosophical content of treaty preambles is also problematic. Philosophy has never been particularly loved among preamble drafters. An early contribution of the American Association of Anthropologists to the debate on human rights, which was published in the autumn of 1947 and which was critical of the notion of universal human rights and emphasized cultural diversity, went almost unnoticed by the drafters of the Universal Declaration.<sup>15</sup> And when, in December 1947, these same drafters learned about a UNESCO initiative that presented the findings of an international survey among intellectuals on the metaphysical and philosophical problems raised by the concept of human rights, their reaction was indifferent, if not dismissive.<sup>16</sup> Most UNESCO respondents felt that practical, but not theoretical, agreement on a Universal Declaration could be reached.

10. This was a late French proposal. See UN GA, 3rd Comm., 3rd Sess., Draft International Declaration of Human Rights—France: Amendments, UN Doc. A/C.3/339 (15 November 1948) and UN GA, 3rd Comm., 3rd Sess., 167th mtg., UN Doc. A/C.3/SR.167 (30 November 1948).

11. GA Res. 217 (III) A, Universal Declaration of Human Rights (10 December 1948): “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

12. *Ibid.*: “Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.”

13. UN Diplomatic Conference of Plenipotentiaries, Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (17 July 1998): “*Mindful* that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.”

14. Convention (II) with Respect to the Laws and Customs of War on Land, preamble recital 9, The Hague, 29 July 1899, 32 Stat. 1803, 1 Bevans 247.

15. Executive Board of the American Anthropological Association, “Statement on Human Rights,” *American Anthropologist*, n.s., 49, no. 4 (1947): 539–43.

16. The UNESCO Committee on the Theoretical Bases of Human Rights (chaired by historian Edward Carr) presented its report on 31 July 1947. Its reception by the UN Commission on Human Rights can be found in UN Econ. & Soc. Council, Commission on Human Rights, 2nd Sess., 26th mtg., UN Doc. E/CN.4/SR.26 (3 December 1947). UNESCO’s response can be found in UN Econ. & Soc. Council, Commission on Human Rights, 2nd Sess., UN Doc. E/CN.4/78 (16 December 1947). The survey was published as UNESCO, ed., *Human Rights: Comments and Interpretations* (UNESCO, 1948). The story surrounding this exchange can be found in Mark Goodale, “The Myth of Universality: The UNESCO ‘Philosophers’ Committee’ and the Making of Human Rights,” *Law and Social Inquiry* 43, no. 3 (2018): 596–617.

In his introduction to the survey, French philosopher Jacques Maritain recalled how delegates of opposing ideologies, when preparing the Universal Declaration, had exclaimed: “Yes, . . . we agree about the rights *but on condition that no one asks us why*.”<sup>17</sup> Ironically, with their cool reception of the UNESCO survey, the drafters unwittingly proved that philosophical consensus on human rights was indeed not possible and that, if such consensus could ever be achieved, it did not matter for the pragmatic issue of whether or not a concrete list of rights could be agreed upon.

In short, the approach of the drafters of treaties and declarations was legal, moral, political, and practical. With few exceptions, it was anything but historical or philosophical. No wonder many drafters were utterly skeptical of preambles. These critics repeatedly argued that preambles contained only empty phrases that lacked practical utility, were too short or too long, did not captivate the minds (as was their stated intention), and, above all, had no legal force. They also contended that debates about what to include in them could obstruct otherwise fruitful cooperation and sap energies from the “real” task and that it was possible to reach majorities over treaty provisions without necessarily agreeing on the motives that inspired them. The drafters agreed to disagree.

All of these aspects of preambles may disappoint when compared to the breadth, academic freedom, and scientific method of the philosopher and the historian, but preambles compensate for their deficiencies in unexpected ways—in particular, by demonstrating the acute historical awareness of their drafters and through the interpretation, origins, and authority of their historical recitals.

In the first place, many drafters of human rights instruments were used to thinking long-term. During the concluding debate on the Universal Declaration, Icelandic delegate Thor Thors told the UN General Assembly that his country regarded the Universal Declaration “as a preamble to a future world constitution.”<sup>18</sup> His words echoed the legal tradition of having a list of rights prefixed or annexed to constitutions, a tradition that was inaugurated in France and the United States in the eighteenth century. In footage of the same debate, Lebanese delegate Charles Habib Malik told the UN General Assembly: “While history alone can determine the historic significance of an event, it is safe to say that the declaration before us may be destined to occupy an honourable place in the procession of positive landmarks in human history.”<sup>19</sup> Most delegates were well aware that their texts could have lasting impact, moving many to appeal to “history” and some to propose historical recitals. Furthermore, over the years, treaty provisions, including their preambles, are reproduced and quoted in many languages, eventually enabling them to reach vast audiences. The result of severe selection and compromise, their content represents a majoritarian view of the past among participating States (varying from 50 approving the UN Charter in 1945 to 120 approving the Rome Statute in 1998).

17. Quoted in Jacques Maritain, introduction to UNESCO, *Human Rights*, i.

18. UN GA, 3rd Sess., 181st plen. mtg., UN Doc. A/PV.181 (10 December 1948).

19. Charles Habib Malik, “UDHR @ 70: The History,” UN Human Rights, YouTube video, 1:41, <https://www.youtube.com/watch?v=uA1IZkWycMk&t=2s>.

In the second place, according to the Vienna Convention on the Law of Treaties (which is itself *the* treaty providing guidelines on how to interpret treaties), the preamble is an integral part of “the context for the purpose of the interpretation of a treaty.”<sup>20</sup> The International Court of Justice (also called the World Court) has explained that, although they do not in themselves amount to rules of law, preambles may “constitute the moral and political basis for the specific legal provisions thereafter set out.”<sup>21</sup> As Makane Moïse Mbengue observed, “the preamble may . . . incorporate the parties’ motivations for concluding the treaty by describing the foundation of their past, present, and future relations”; “preambles . . . are concerned with explaining the policy rationale . . . , including the historical . . . considerations.”<sup>22</sup> In most court cases about treaty breaches, however, preambles do not play a role.<sup>23</sup> And yet they are sometimes surprisingly important.<sup>24</sup> As early as 1951, for example, the International Court of Justice affirmed that the scope of the Genocide Convention was universal because its preamble explained that its purpose was “to liberate *mankind* from such an odious scourge.”<sup>25</sup>

In the third place, the Vienna Convention also refers to the circumstances in which treaties came into existence. It stipulates that, when the meaning of a treaty is unclear, the preparatory work of the treaty and the circumstances of its conclusion serve as supplementary means of interpretation.<sup>26</sup> Indeed, all major declarations and treaties are preceded by lengthy preliminary meetings, the records of which are known as *travaux préparatoires*. Sections of these *travaux* are dedicated

20. See Article 31.2 of the Vienna Convention on the Law of Treaties (23 May 1969; entered into force on 27 January 1980), in United Nations, *Treaty Series*, vol. 1155 (United Nations, 1987), 340, <https://treaties.un.org/doc/publication/unts/volume%201155/v1155.pdf>.

21. *South West Africa (Liberia v. South Africa)*, 2nd Phase, Judgment, 1966 ICJ Rep. 6, ¶ 50 (18 July), <https://www.icj-cij.org/case/47/judgments>.

22. *Max Planck Encyclopedia of Public International Law*, s.v. “Preamble,” by Makane Moïse Mbengue, last modified September 2006, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1456?prd=EPIL>. See also Jan Klabbers, “Treaties and Their Preambles,” in *Conceptual and Contextual Perspectives on the Modern Law of Treaties*, ed. Michael J. Bowman and Dino Kritsiotis (Cambridge University Press, 2018), 172–200.

23. On the use of preambles in court cases, see Mbengue, “Preamble” and Klabbers, “Treaties and Their Preambles,” 183–89, 194–95.

24. The European Court of Human Rights has consistently used the preamble to the 1950 European Convention on Human Rights as a criterion to judge Holocaust denial cases. Applications of Holocaust deniers before the Court have invariably been rejected on the grounds that Holocaust denial violated the Convention’s “underlying values” as expressed in its preamble—namely, justice and peace—thus triggering Article 17 of the Convention, the abuse clause. Cases involving atrocity crimes that preceded the adoption of the Convention are also systematically adjudicated with reference to its preamble.

25. Preamble to the Genocide Convention, quoted in Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ Rep. 23 (28 May), <https://www.icj-cij.org/case/12/advisory-opinions> (emphasis added). This point is reiterated in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Preliminary Objections, Judgment, 1996 ICJ Rep. 595, ¶ 31 (11 July), <https://www.icj-cij.org/case/91/preliminary-objections>. Additionally, UN GA Res. 260 (III) A, Adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, and Text of the Convention, art. 12 (9 December 1948) recommended extending the Convention to non-self-governing territories. See also UN GA Res. 260 (III) C, Application with Respect to Dependent Territories, of the Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948). All of the UN General Assembly resolutions in this article can be found on the Network of Concerned Historians website (<https://www.concernedhistorians.org/re>).

26. See Article 32 of the Vienna Convention on the Law of Treaties, 340.

to discussions of preambles. Many of these *travaux préparatoires* have been published or made available on the internet in whole or in part, and legal experts have written extensive commentaries on them. Even if the idea for historical recitals has typically come early in the drafting process, final decisions on them are usually repeatedly postponed: a solid preamble can be written only after a clear impression of the complete instrument (including its title, promulgating authority, core ideas, fine-tuning with the first article, and occasional reshuffling of operative and preambular parts) has been gained. Not infrequently, time pressure and the question of whether and where to exclude or include repetition have affected the outcomes. The reconstruction of debates across the many stages between initial drafts in preparatory committees and higher-level meetings can be arduous, and arguments rejected in the beginning can always be reintroduced later. All of this has often enabled the identification (by name) of those who launched the idea for a historical recital and those who discussed, amended, and opposed it. These discussions have shed light on power relations, enabled us to assess the proposals that did not appear in the final versions, and, sometimes, offered us opportunities to learn about why certain proposals were rejected.

Finally, some drafters have argued that human rights instruments can somehow be regarded as the so-called voice of the peoples of the world and even as an “expression of the human conscience.” Ecuadorian delegate Jorge Carrera Andrade, for example, told the drafters of the Universal Declaration that “the international declaration of human rights was the most important document of the century, and, indeed, was a major expression of the human conscience.”<sup>27</sup> And during the concluding debate on the Genocide Convention before the UN General Assembly, French delegate Alexandre Parodi observed that, “in spite of its imperfections[,] the convention . . . expressed the feelings of the conscience of mankind, aroused by the indignation caused by the odious crimes committed . . . a few years ago.”<sup>28</sup> Are the instruments studied here indeed “expression[s] of the human conscience”? A first argument is that they were all produced under the aegis or inspiration of the UN General Assembly, which, among all international bodies, is undoubtedly the most authoritative forum for interpreting world opinion. Second, despite their very imperfect approximation of world public opinion, let alone of “the human conscience,” and despite the almost insurmountable difficulties of guessing at the bundled intentions of the multiple authors involved in composing these preambles, stronger collective expressions than the ones traced in these instruments are difficult to find. Third, odd as it may sound, the concise historical recitals under scrutiny here are often more compelling than the most inspiring history books, precisely because they represent and condense a huge multitude of voices and address worldwide audiences. Without a trace of exaggeration, they can be counted among the deepest-felt expressions about the fate of humanity ever written. Taken together, these three arguments are not implausible and support a humble version of the human conscience thesis.

27. UN GA, 3rd Comm., 3rd Sess., 90th mtg., UN Doc. A/C.3/SR.90 (1 October 1948).

28. UN GA, 3rd Sess., 178th plen. mtg., UN Doc. A/PV.178 (9 December 1948).

On balance, the preamble is a literary and legal genre with its own rules, and the historical recital is a special historiographical genre. Millions have read them, but never from a comparative perspective and never to inspect the coherence of the combined views expressed in them. The following is an attempt to do this.

From the human rights declarations and treaties of global scope promulgated in the century after World War I (1918–2025), the twenty-two most important were collected. Of these, four were ultimately selected.<sup>29</sup> The eighteen other treaties consisted of three groups: treaties without a (substantial) preamble (group 1);<sup>30</sup> treaties with a preamble that did not, or did not explicitly and substantially, refer to the past (group 2);<sup>31</sup> and treaties that referred to one of the four selected instruments as their predecessor and inspiration, thus emphasizing path dependence (group 3).<sup>32</sup> Suffice it to say here that, when drafters decided not to insert preambles (group 1) or historical recitals (group 2) into their treaties, the reason was unrelated to history. The historical recitals of the selected instruments are quoted in Table 1.

Some further observations about the four instruments are in order. The fact that the Universal Declaration is not a treaty does not matter for our purposes. The Universal Declaration is the flagship of human rights. It has inspired all other human rights instruments and is now considered part of customary international law.<sup>39</sup> Likewise, the fact that the Vienna Convention on the Law of Treaties, with

29. All *travaux préparatoires* of the nonselected instruments were consulted.

30. These include nine instruments: Statute of the Permanent Court of International Justice (1920); Statute of the International Court of Justice (1945); Geneva Conventions (two in 1929, four in 1949); and Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).

31. These include six instruments: Covenant of the League of Nations (1919); London Agreement and Charter of the International Military Tribunal in Nuremberg (1945); Charter of the International Military Tribunal for the Far East in Tokyo (1946); Convention on Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968); and Protocols Additional to the Geneva Conventions (two in 1977).

32. These include three instruments: International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); and Draft Articles on Crimes Against Humanity (2019).

33. UN Charter, preamble, <https://www.un.org/en/about-us/un-charter>.

34. Plenary, 9th Sess., Doc. 1210 P/20 (25 June 1945), in *UNCIO*, 1:612–32.

35. GA Res. 217 (III) A, Universal Declaration of Human Rights (10 December 1948).

36. GA Res. 260 (III) A, Adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948).

37. Rome Statute of the International Criminal Court (International Criminal Court, 2021), <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>; this version of the Rome Statute is “an informal consolidated version incorporating all amendments adopted by the Assembly of States Parties.” See also UN Diplomatic Conference of Plenipotentiaries, Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (17 July 1998).

38. UN Diplomatic Conference of Plenipotentiaries, 9th plen. mtg., UN Doc. A/CONF.183/SR.9 (17 July 1998); GA Res. 53/105, Establishment of an International Criminal Court (26 January 1999).

39. Discussion of the Universal Declaration’s legal status can be found in the Separate Opinion of International Court of Justice Vice-President Ammoun, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep. 67, ¶ 6 (21 June), <https://www.icj-cij.org/case/53/advisory-opinions>. See also Jaime Oraá Oraá, “The Universal Declaration of Human Rights,” in *International Protection of Human Rights: Achievements and Challenges*,

Table 1. The Historical Recitals of Key Human Rights Instruments

<i>Charter of the United Nations</i> (UN Charter)	WE THE PEOPLES OF THE UNITED NATIONS DETERMINED [Recital 1] to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . . <sup>33</sup>	The preamble was adopted by Commission I (42–0) and the Charter was adopted (50–0) at the UN Conference on International Organization in San Francisco on 14 June 1945 and 25 June 1945, respectively. <sup>34</sup> As of 2 April 2025, the UN had 193 Member States (States that ratified the UN Charter).
<i>Universal Declaration of Human Rights</i> (Universal Declaration)	[Recital 2] <i>Whereas</i> disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people, [Recital 3] <i>Whereas</i> it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law . . . <i>Now, therefore, The General Assembly, Proclaims</i> this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations . . . <sup>35</sup>	The recitals were adopted (56–0) and the Universal Declaration as a whole was adopted (48–0–8) by the UN General Assembly in Paris on 10 December 1948.
<i>Convention on the Prevention and Punishment of the Crime of Genocide</i> (Genocide Convention)	<i>The Contracting Parties, . . .</i> [Recital 2] <i>Recognizing</i> that at all periods of history genocide has inflicted great losses on humanity . . . <sup>36</sup>	The Genocide Convention was adopted by the UN General Assembly (56–0) in Paris on 9 December 1948. As of 2 April 2025, it had been ratified by 153 States Parties.

(Continued)

Table 1. (Continued)

<i>Rome Statute of the International Criminal Court</i> (Rome Statute)	<i>The States Parties to this Statute</i> , [Recital 1] <i>Conscious</i> that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time, [Recital 2] <i>Mindful</i> that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity . . . <sup>37</sup>	The Preamble (no vote) and the Rome Statute (120–7–21) were adopted at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome on 16 July 1998 and 17 July 1998, respectively. <sup>38</sup> As of 2 April 2025, the Rome Statute had been ratified by 125 States Parties.
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its interpretation rules, is limited to interstate treaties concluded after it entered into force in 1980 is no obstacle: the International Court of Justice itself has applied the Vienna Convention interpretation rules to treaties of the past—including one from 1890—on the grounds that these rules also reflect customary international law.<sup>40</sup>

The four selected instruments are also related. Some of the drafters of the UN Charter wanted to insert a human rights bill directly into it, but this plan failed.<sup>41</sup> Instead, they agreed to limit the references to human rights in the Charter and to draft a supplementary human rights bill later. As the *travaux préparatoires* for this International Bill of Human Rights developed, it was eventually divided into three parts: the Universal Declaration and the two Covenants derived from it. As an instrument of criminal law, the Genocide Convention has strong affinities with the Rome Statute but precedes it by five decades, making their relationship less straightforward. Whereas the Genocide Convention focuses solely on genocide, the International Criminal Court has jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression.

ed. Felipe Gómez Isa and Koen De Feyter (University of Deusto, 2006), 117–32, and William A. Schabas, “Introductory Essay: The Drafting and Significance of the Universal Declaration of Human Rights,” in *The Universal Declaration of Human Rights: The Travaux Préparatoires*, ed. William A. Schabas (Cambridge University Press, 2013), cxix–cxxiii.

40. Kasikili/Sedudu Island (Botswana/Namibia), Judgment, 1999 ICJ Rep. 1045, ¶ 18 (13 December), <https://www.icj-cij.org/case/98/judgments>.

41. Additional Amendments Proposed by the Delegation of the Republic of Panama Concerning the Proposals for the Maintenance of Peace and Security Agreed Upon at the Conference of Dumbarton Oaks, Doc. 2 G/7 (g) (2) (5 May 1945), in *UNCIO*, 3:265–71.

## II. WRITING THE HISTORICAL RECITALS

The idea for a preamble to the UN Charter sprang from a call by South African Prime Minister Jan Smuts at the UN founding conference, the UN Conference on International Organization (UNCIO), which gathered in San Francisco in 1945. The then seventy-five-year-old Smuts emerges from the *travaux préparatoires* as an elder statesman and a figure of authority and continuity among the delegates because he was the only person to sign both the League of Nations Covenant in 1919 and the UN Charter in 1945.<sup>42</sup> On the second day of the conference, 26 April, he presented the first draft of a preamble, including the following historical recital: “Determined to prevent a recurrence of the fratricidal strife which has twice in our generation brought untold sorrows and losses on mankind.”<sup>43</sup> On 1 May, he defended his idea for the preamble before the Plenary Session, arguing that “the Charter should contain at its very outset . . . a declaration of human rights and of the common faith which has sustained the Allied peoples in their bitter and prolonged struggle.”<sup>44</sup> UNCIO Commission I adopted Smuts’s preamble as a basis for discussion by acclamation.<sup>45</sup> On 31 May, Subcommittee I/1/A in charge of the preamble rephrased Smuts’s idea: “determined to save succeeding generations from the scourge of the war, which twice in our lifetime has brought untold sorrow to mankind.”<sup>46</sup> On 5 June, Syrian delegate Farid Zeineddine, rapporteur of Subcommittee I/1/A, again changed the text: “determined . . . ‘to save future generations . . . . . sorrow to mankind.’”<sup>47</sup> Zeineddine commented, “the magnitude of the two world wars called for a special reference to them.”<sup>48</sup> His version was adopted (25–2).<sup>49</sup> On 9 June, the rapporteur of Committee 1 (Zeineddine again) reported to Commission I. When he dealt with the historical recital, he explained: “It is war as such, the scourge of humanity, that we want . . . to bar. The magnitude of the two World Wars, the fact that other wars have been a prelude to these two, the lesson of experience that small wars lead to universal struggle, made us make

42. A complex man, Smuts was also a politician who thought in imperial and racist terms. For more on him, see Christof Heyns, “The Preamble of the United Nations Charter: The Contribution of Jan Smuts,” *African Journal of International and Comparative Law* 7, no. 2 (1995): 329–48.

43. Delegation of the Union of South Africa, Draft “Preamble to the Charter of the United Nations,” Doc. 2 G/14 (d) (26 April 1945), in *UNCIO*, 3:474–75. See also the verbatim records of the 6th plen. sess., Doc. 55 P/13 (1 May 1945), in *UNCIO*, 1:416–55. The text varied slightly because UNCIO Commission I President Henri Rolin, among others, edited it; see Preamble: Text of the South African Delegation as Amended by Mr. Rolin, Doc. 337 I/1/A/2, annex 2 (16 May 1945), in *UNCIO*, 6:648.

44. Jan Smuts, verbatim records of the 6th plen. sess., Doc. 55 P/13 (1 May 1945), in *UNCIO*, 1:425.

45. Committee I/1, 2nd mtg., Doc. 133 [I/1/7] (7 May 1945), in *UNCIO*, 6:277. Later, Rolin added the adjective “irreparable” before “losses.” See Preamble: Text of the South African Delegation as Amended by Mr. Rolin, Doc. 337 I/1/A/2, annex 2 (16 May 1945), in *UNCIO*, 6:648.

46. Subcommittee I/1/A, Draft Preamble (as Approved by Committee I/1/A), Doc. WD 62 [I/1/A/18] (31 May 1945), in *UNCIO*, 6:694.

47. Report of Rapporteur of Subcommittee I/1/A (Farid Zeineddine, Syria), section 3, to Committee I/1, Doc. 785 [I/1/28] (5 June 1945), in *UNCIO*, 6:359.

48. *Ibid.*

49. Committee I/1, 13th mtg., Doc. 817 I/1/31 (5 June 1945), in *UNCIO*, 6:366.

a special reference to the two World Wars.”<sup>50</sup> On 14 June, the president of Commission I, Belgian diplomat Henri Rolin, put Zeineddine’s text to a vote after he had replaced the phrase “future generations” with the earlier and broader phrase “succeeding generations,” a notion including future as well as past generations. It was unanimously adopted and became the final version.<sup>51</sup>

The discussions on the historical recitals in the Universal Declaration were far more elaborate. On 12 November 1945, the UN decided to ask its Commission on Human Rights to prepare an “international bill of rights” to supplement the Charter.<sup>52</sup> Early in this process, on 31 January 1947, Chinese delegate Peng-chun Chang pointed out that such a bill needed a preamble in which the history of human rights was recalled.<sup>53</sup> However, the first draft, a 4 June 1947 outline prepared by the head of the Human Rights Division of the UN Secretariat, the Canadian John Humphrey,<sup>54</sup> contained only brief suggestions for a preamble—in particular, a reference to the Four Freedoms (freedom of speech, freedom of worship, freedom from fear, and freedom from want) formulated by President Franklin D. Roosevelt in 1941.<sup>55</sup> On 13 June 1947, the Commission’s Drafting Committee decided to split the bill into a manifesto or declaration and a convention and to work on both simultaneously.<sup>56</sup> On the basis of that decision, a Working Group of the Drafting Committee consisting of three delegates was entrusted with preparing a draft for the declaration. After some discussion, the Working Group invited French delegate René Cassin to formulate it. On 16 June, Cassin presented his draft declaration. It contained a preamble “to express the general principles”<sup>57</sup> and began as follows: “We, the Peoples of the United Nations, *Considering* 1. that ignorance and contempt of human rights have been among the principal causes of the sufferings of humanity and of the massacres and barbarities which outraged the conscience of mankind before and especially during the last world war; and . . . 3. that it has been proclaimed as the supreme aim of the recent strife that human beings shall be free in speech and in worship and free from fear and want.”<sup>58</sup>

50. Report of Rapporteur of Committee 1 to Commission I, Doc. 885 I/1/34 (9 June 1945), in *UNCIO*, 6:391.

51. Commission I, 1st mtg., Doc. 1006 I/6 (14 June 1945), in *UNCIO*, 6:12–34, esp. 12–14, 16–17, 19–20. For the unanimous adoption—probably by forty-two commission members—see *ibid.*, 20.

52. Executive Committee, Report to the Preparatory Commission of the United Nations, UN Doc. PC/EX/113/REV.1 (12 November 1945).

53. UN Econ. & Soc. Council, Commission on Human Rights, 1st Sess., 7th mtg., UN Doc. E/CN.4/SR.7 (31 January 1947).

54. UN Econ. & Soc. Council, Commission on Human Rights, Drafting Committee, Draft Outline of International Bill of Rights, UN Doc. E/CN.4/AC.1/3 (4 June 1947).

55. *Ibid.*

56. UN Econ. & Soc. Council, Commission on Human Rights, Drafting Committee, 1st Sess., 6th mtg., UN Doc. E/CN.4/AC.1/SR.6 (13 June 1947). In 1952, the UN General Assembly split the Covenant project into two; see GA Res. 543 (VI) (5 February 1952). Both Covenants were adopted in 1966.

57. UN Econ. & Soc. Council, Commission on Human Rights, Drafting Committee, 1st Sess., 7th mtg., UN Doc. E/CN.4/AC.1/SR.7 (17 June 1947).

58. UN Econ. & Soc. Council, Commission on Human Rights, Drafting Committee, Draft International Declaration of Rights Submitted by Working Group of Drafting Committee (Preamble and Articles 1–6), UN Doc. E/CN.4/AC.1/W.1 (16 June 1947).

The first recital initially spoke of “two world wars” rather than “the last world war,”<sup>59</sup> but it is not clear why World War I was omitted—especially since Cassin had been seriously wounded while serving as a soldier in World War I and later chaired the French Federation of Disabled War Veterans (1918–1940). Cassin’s draft preamble was adopted by the Working Group and remained basically unchanged, but with minor variations, until 15 June 1948, when the Committee on the Preamble relocated it, in a slightly rephrased form, as the second recital.<sup>60</sup> The word “ignorance” was disputed, as it suggested that the Axis powers were excused for their atrocities because they supposedly did not know that they were violating human rights. It was replaced by “disregard” (which is “intentional ignorance”).<sup>61</sup>

Less than a month before the adoption of the Universal Declaration, several new preamble amendments were tabled. Some countries, including France and the USSR, proposed inserting a reference to the perpetrators of the massacres (“Nazism and Racialism”),<sup>62</sup> while others, including Australia, sought to delete indications of time and perpetrators.<sup>63</sup> On 30 November 1948, France and Australia proposed a compromise that virtually constituted the definitive text of the new second recital. This new recital also included Cassin’s third recital (about the Four Freedoms), which was widely seen as a tribute to President Franklin D. Roosevelt and was added as a contrast to the passage about barbarism.<sup>64</sup>

Unexpectedly, the most controversial idea of the entire Universal Declaration—the right to rebellion—survived every scrutiny and found its way into the preamble, where it became the new third recital. The idea of a right to rebel had a long prehistory. It flowed from the natural law theory that States were instituted with the primary purpose of protecting the rights of their citizens. It implied that governments not acting on complaints or tyrants usurping their power could be removed. Under different guises, the theory has always been the object of speculation. The conditions under which tyrannicide was justified has been a problem of political philosophy since antiquity. The United States’ 1776 Declaration of Independence and France’s 1789 Declaration of the Rights of Man and the Citizen mention the right to rebel—or the right to resistance—as a crucial provision in the contract between rulers and ruled. Critics such as Jeremy Bentham and Immanuel Kant, however, feared that a right to resistance would immediately be interpreted as a right to *armed* resistance and, for that reason, rejected it out of hand.

59. UN Econ. & Soc. Council, Commission on Human Rights, Drafting Committee on an International Bill of Human Rights, 1st Sess., Suggestions Submitted by the Representative of France, UN Doc. E/CN.4/21, annex D (1 July 1947).

60. UN Econ. & Soc. Council, Commission on Human Rights, 3rd Sess., UN Doc. E/CN.4/138 (15 June 1948).

61. UN Econ. & Soc. Council, Commission on Human Rights, 3rd Sess., 75th mtg., UN Doc. E/CN.4/SR.75 (16 June 1948).

62. UN GA, 3rd Comm., 3rd Sess., Draft International Declaration of Human Rights—France: Amendments, UN Doc. A/C.3/339 (15 November 1948).

63. UN GA, 3rd Comm., 3rd Sess., 164th mtg., UN Doc. A/C.3/SR.164 (29 November 1948); UN GA, 3rd Comm., 3rd Sess., 165th mtg., UN Doc. A/C.3/SR.165 (30 November 1948); UN GA, 3rd Comm., 3rd Sess., 166th mtg., UN Doc. A/C.3/SR.166 (30 November 1948).

64. UN GA, 3rd Comm., 3rd Sess., 167th mtg., UN Doc. A/C.3/SR.167 (30 November 1948).

The idea of resistance persisted, and it was initially incorporated into Humphrey's Secretariat draft as Article 29: "Everyone has the right, either individually or with others, to resist oppression and tyranny."<sup>65</sup> Cassin's draft mentioned it as Article 25 and qualified the text: "When a government seriously or systematically tramples the fundamental human rights and freedoms, individuals and peoples have the right to resist oppression and tyranny."<sup>66</sup> Cassin's version was briefly discussed on 17 June 1947, with Chilean delegate Hernán Santa Cruz observing that it was difficult to determine when exactly a regime had so systematically deprived its people of their rights as to activate a right to resistance.<sup>67</sup> On 1 July, many delegates expressed the wish to move the right to the preamble.<sup>68</sup> This eventually happened on 6 May 1948 with the following text: "*Whereas* it is essential, if mankind is not to be compelled, as a last resource, to revolt against tyranny and oppression, that human rights should be . . . guaranteed . . . by . . . law."<sup>69</sup> Opponents of the idea thought that it was sufficient to mention that human rights had to be protected by the rule of law<sup>70</sup> or believed that a reference to the rebellion idea was more appropriate in a separate UN General Assembly resolution.<sup>71</sup>

However, on 12 October 1948, the Cuban delegation planted a bomb under the discussions by questioning the relocation of the right to rebellion to the preamble and proposing to reinstate it as an article with the following wording: "Every person has the right to resist acts of oppression or tyranny."<sup>72</sup> On 18 November, Ecuador proposed to merge the two historical recitals into one: "*Whereas* disregard and contempt for human rights are the main cause of wars and insurrections, since the oppressed ever seek to revolt against tyranny."<sup>73</sup> Both proposals ignited a fierce debate on 29 November—barely eleven days before the Declaration was adopted.

Some spoke in favor of the Cuban proposal. Cassin recalled "the noble principles of 1789 and also . . . the situation created by recent events" but warned that

65. UN Econ. & Soc. Council, Commission on Human Rights, Drafting Committee, Draft Outline of International Bill of Rights, UN Doc. E/CN.4/AC.1/3 (4 June 1947).

66. UN Econ. & Soc. Council, Commission on Human Rights, Drafting Committee, International Bill of Rights, UN Doc. E/CN.4/AC.1/W.2/REV.1 (18 June 1947).

67. UN Econ. & Soc. Council, Commission on Human Rights, Drafting Committee, 1st Sess., 8th mtg., UN Doc. E/CN.4/AC.1/SR.8 (17 June 1947).

68. UN Econ. & Soc. Council, Commission on Human Rights, Drafting Committee on an International Bill of Human Rights, 1st Sess., UN Doc. E/CN.4/21 (1 July 1947).

69. UN Econ. & Soc. Council, Commission on Human Rights, 3rd Sess., Observations of Governments on the Draft International Declaration on Human Rights, the Draft International Covenant on Human Rights, and Methods of Application: Communication Received from the French Government, UN Doc. E/CN.4/82/ADD.8 (6 May 1948).

70. UN Econ. & Soc. Council, Commission on Human Rights, 3rd Sess., 75th mtg., UN Doc. E/CN.4/SR.75 (16 June 1948).

71. UN Econ. & Soc. Council Official Records, 3rd year, 7th Sess., 215th mtg., UN Doc. E/SR.215 (25 August 1948).

72. UN GA, 3rd Comm., 3rd Sess., Draft International Declaration of Human Rights—Cuba: Amendments to Articles 23 to 27, UN Doc. A/C.3/261 (12 October 1948), rephrased from UN Econ. & Soc. Council, Commission of Human Rights, Draft Declaration on Human Rights and Letter of Transmittal, UN Doc. E/HR/1 (12 February 1946).

73. UN GA, 3rd Comm., 3rd Sess., Draft International Declaration of Human Rights—Ecuador: Amendment to the Preamble, UN Doc A/C.3/351 (18 November 1948).

the right to rebel should only apply where tyranny was systematic and not function as a permission to disobey in single instances of abuse.<sup>74</sup> For Santa Cruz, the right to resist oppression was the very basis of existence of the democratic State.<sup>75</sup> Communist representatives were also in favor.<sup>76</sup>

Opposition against the proposal was fierce and echoed Bentham's and Kant's views. Argentinian delegate Enrique Corominas wanted to remove the rebellion clause altogether and submit it to further study. Other countries warned that individuals would interpret the right to rebel as a license to disobey authority arbitrarily. United States delegate Eleanor Roosevelt feared that the formula, if stated too explicitly, would be abused with the purpose of inciting disorder, subversion, and sedition against legitimate governments.<sup>77</sup> Still others observed that, by its very nature, rebellion could never be a right, as it was, by definition, illegal. British delegate Ernest Davies declared that rebellion was a last resource to be used "only when the legal regime came to the point of collapsing, as had been the case with many countries after the Nazi invasion; at such time, resistance was not only a necessity, it was a duty."<sup>78</sup> Like others, he pointed to the problem of determining when tyranny began and to the slippery slope from rebellion to anarchy.<sup>79</sup>

A compromise was eventually found. Three proponents of the idea—Cuba, Chile, and France—submitted an amendment on 30 November to the effect that rebellion would be mentioned in the preamble "as a last resort"; it was carried (25–1–11).<sup>80</sup> When, on 10 December, the recital was put to a vote in the UN General Assembly, it was adopted unanimously (56–0). Thus, the right to rebellion spectacularly survived, albeit in a mitigated form: it was moved from the operative paragraphs to the preamble, no longer called a right, and, although presented as a powerful incentive for adhering to the rule of law, seen as a mere remote possibility. A few years later, the rebellion clause was silently dropped during discussions about the two Covenants and replaced by less radical guarantees: the rights to an effective remedy and to petition—combined with protocols that imposed complaints procedures, inspection visits, and reporting obligations on Member States.<sup>81</sup>

The idea for a historical recital in the Genocide Convention came rather late. The early draft of the Secretary-General of 26 June 1947—written mainly by legal scholars Raphael Lemkin, Vespasian Pella, and Henri Donnedieu de

74. UN GA, 3rd Comm., 3rd Sess., 164th mtg., UN Doc. A/C.3/SR.164 (29 November 1948).

75. *Ibid.*; UN GA, 3rd Comm., 3rd Sess., 166th mtg., UN Doc. A/C.3/SR.166 (30 November 1948).

76. UN GA, 3rd Comm., 3rd Sess., 164th mtg., UN Doc. A/C.3/SR.164 (29 November 1948); UN GA, 3rd Comm., 3rd Sess., 165th mtg., UN Doc. A/C.3/SR.165 (30 November 1948).

77. *Ibid.*

78. UN GA, 3rd Comm., 3rd Sess., 164th mtg., UN Doc. A/C.3/SR.164 (29 November 1948). See also UN GA, 3rd Comm., 3rd Sess., 166th mtg., UN Doc. A/C.3/SR.166 (30 November 1948).

79. UN GA, 3rd Comm., 3rd Sess., 164th mtg., UN Doc. A/C.3/SR.164 (29 November 1948).

80. UN GA, 3rd Comm., 3rd Sess., Draft International Declaration of Human Rights—Cuba, Chile, France: Joint Amendment to the Preamble, UN Doc. A/C.3/382/REV.1 (30 November 1948). See also UN GA, 3rd Comm., 3rd Sess., 167th mtg., UN Doc. A/C.3/SR.167 (30 November 1948).

81. Antoon De Baets, "The United Nations Human Rights Committee's View of the Past," in *Law and Memory: Towards Legal Governance of History*, ed. Uladzislau Belavusau and Aleksandra Glišczyńska-Grabias (Cambridge University Press, 2017), 29–47.

Vabres—contained a preamble without historical recitals.<sup>82</sup> Almost a year later, on 8 April 1948, American delegate John Maktos reminded the Ad Hoc Committee on Genocide, which he chaired, that “the fact which initiated the [1946] General Assembly resolution had been the systematic massacre of Jews by the nazi [*sic*] authorities during the course of the last war.”<sup>83</sup> On 26 April, Soviet representative Platon Morozov argued in the Ad Hoc Committee that “the preamble . . . should emphasize that genocide . . . was bound up with the ‘superior-race’ theory,” while French delegate Pierre Ordonneau opined that “the preamble should contain historical considerations and the motives which led the High Contracting Parties to sign the Convention.”<sup>84</sup> The next day, Maktos suggested “insert[ing] in the proposed preamble some condemnatory phrases of a general character.”<sup>85</sup> Morozov then recommended introducing the phrase “that the crime of genocide is organically bound up with Fascism–Nazism and other similar race ‘theories’ which propagate racial and national hatred, the domination of the so-called ‘higher’ races and the extermination of the so-called ‘lower’ races.”<sup>86</sup> Many committee members, however, argued that the Convention was not only concerned with that specific historical precedent, to which Morozov responded that “the Committee should draft a convention which drew its strength from the lessons of history and took special notice of the lessons of the contemporary period.”<sup>87</sup> Although the Soviet amendment and similar proposals were rejected the same day,<sup>88</sup> the seed was planted to incorporate some reference to contemporary history into the Convention.

The same day that Morozov offered his suggestions, Chinese delegate Lin Mousheng proposed adding the phrase “the High Contracting Parties, having been profoundly shocked by many recent instances of genocide,”<sup>89</sup> which immediately provoked a discussion about whether this implied a reference to the Nuremberg trials (at which many Nazi war criminals were convicted in 1945 and 1946). Maktos then put a French proposal to a vote: “The High Contracting Parties, having

82. UN Econ. & Soc. Council, Draft Convention on the Crime of Genocide, UN Doc. E/447 (26 June 1947), an update of the unretrievable UN GA, Committee on the Progressive Development of International Law and Its Codification, Draft Convention for the Prevention and Punishment of Genocide, UN Doc. A/AC.10/42 (6 June 1947), which is, however, reproduced in full in *The Genocide Convention: The Travaux Préparatoires*, ed. Hiram Abtahi and Philippa Webb (Martinus Nijhoff, 2008), 1:115–23.

83. UN Econ. & Soc. Council, Ad Hoc Committee on Genocide, 5th mtg., UN Doc. E/AC.25/SR.5 (8 April 1948). Maktos referred to GA Res. 96 (I) (11 December 1946), which set in motion work on the Genocide Convention.

84. UN Econ. & Soc. Council, Ad Hoc Committee on Genocide, 20th mtg., UN Doc. E/AC.25/SR.20 (26 April 1948).

85. UN Econ. & Soc. Council, Ad Hoc Committee on Genocide, 21st mtg., UN Doc. E/AC.25/SR.21 (27 April 1948).

86. UN Econ. & Soc. Council, Ad Hoc Committee on Genocide, 22nd mtg., UN Doc. E/AC.25/SR.22 (27 April 1948).

87. *Ibid.*

88. UN Econ. & Soc. Council, Ad Hoc Committee on Genocide, Draft Report Submitted by Karim Azkoul (Rapporteur), UN Doc. E/AC.25/W.1/Add.3 (30 April 1948); UN Econ. & Soc. Council, Ad Hoc Committee on Genocide, UN Doc. E/AC.25/W.5 (4 May 1948).

89. UN Econ. & Soc. Council, Ad Hoc Committee on Genocide, 23rd mtg., UN Doc. E/AC.25/SR.23 (27 April 1948).

been profoundly shocked by many recent instances of genocide, and having taken note of the fact that the International Military Tribunal at Nuremberg . . . has punished certain persons who have committed analogous acts.”<sup>90</sup> The Ad Hoc Committee adopted this recital. Polish representative Aleksander Rudzinski abstained, insisting that the phrase “committed under the Nazi–Fascist regime” should be inserted, and so did Venezuelan representative Víctor Pérez Perozo, but for a different reason: he found the Nuremberg reference superfluous.<sup>91</sup> The discussion went back and forth until, on 26 August, Chinese delegate Hsiu Cha took issue with the Nuremberg passage, pointing to instances of genocide outside Europe and hinting at the work of the International Military Tribunal for the Far East in Tokyo that was still underway.<sup>92</sup>

On 13 November, less than a month before the Convention was adopted, Pérez Perozo submitted an amendment to the Sixth Committee of the UN General Assembly (where the draft was then being discussed) that would eventually shift the emphasis away from recent history. Part of his proposal read, “*Recognizing* that at all periods of history genocide has inflicted great losses on humanity.”<sup>93</sup> On 17 November, Pérez Perozo explained that he “believ[ed] that genocide could not be linked solely to the precedents set by fascist and nazi [*sic*] crimes, because genocide had been committed throughout history, long before the rise of fascism and nazism [*sic*].”<sup>94</sup> He also pleaded to delete the Nuremberg reference, arguing that the UN General Assembly had clearly separated genocide from crimes against humanity and that, therefore, Nuremberg (dealing with crimes against humanity) was not a good precedent for the Convention (dealing with genocide).<sup>95</sup> Others expressed fears that the Nuremberg tribunal had produced victors’ justice based on retroactive law—a debatable argument because the Nuremberg verdict had clearly stated that the Nazi crimes had breached customary international law as it was in vigor in 1939.<sup>96</sup> Finally, still others argued that the Nuremberg trials were limited to Europe, to wartime, and to perpetrators of the European Axis powers, whereas the Genocide Convention was universally applicable in times of peace and war and for an infinite period of time. Egyptian delegate Wahid Fikry Raafat then proposed a compromise: “Recognizing that at all periods of history genocide has inflicted great losses on humanity, and having been profoundly shocked by

90. Ibid. Maktos erroneously spoke of 1947 as the year of the Nuremberg judgment.

91. UN Econ. & Soc. Council, Ad Hoc Committee on Genocide, 24th mtg., UN Doc. E/AC.25/SR.24 (28 April 1948).

92. UN Econ. & Soc. Council Official Records, 3rd year, 7th Sess., 218th mtg., UN Doc. E/SR.218 (26 August 1948); UN GA, 6th Comm., 3rd Sess., 65th mtg., UN Doc. A/C.6/SR.65 (2 October 1948).

93. UN GA, 6th Comm., 3rd Sess., Genocide: Draft Convention and Report of the Economic and Social Council—Venezuela: Proposed Text for the Preamble, UN Doc. A/C.6/261 (13 November 1948).

94. UN GA, 6th Comm., 3rd Sess., 109th mtg., UN Doc. A/C.6/SR.109 (17 November 1948).

95. Ibid. “Genocide” was not mentioned in the charter or verdict of the International Military Tribunal at Nuremberg, and it was mentioned only once in its indictment. Conversely, nowhere did the Genocide Convention refer to “crimes against humanity.”

96. The Nuremberg nonretroactivity debate is discussed in Antoon De Baets, “The View of the Past in International Humanitarian Law (1860–2020),” *International Review of the Red Cross* 104, no. 920–921 (2022), 1590–93.

many recent instances of genocide.”<sup>97</sup> He intended this phrasing to explain why, if genocide was of all times, a convention was being concluded at this precise moment. The compromise was rejected, and despite Communist opposition, which preferred to refer to recent history, the Venezuelan amendment was carried in the Sixth Committee on 18 November (38–9–5).<sup>98</sup> It became the definitive text in the UN General Assembly three weeks later.

The historical recitals in the Rome Statute of the International Criminal Court were also late additions. The preambles to the first drafts, from July 1994 and from April 1998, respectively, did not contain any historical recitals.<sup>99</sup> Only at a very late stage, at the UN Diplomatic Conference of Plenipotentiaries, which met in Rome from 15 June to 17 July 1998, did the question first arise. On 26 June, Spanish delegate Luis Yáñez-Barnuevo García proposed a historical recital before the Committee of the Whole: “*Conscious* that during this century millions of persons have been victims of grave crimes affecting the international community as a whole.”<sup>100</sup> He pointed out that his proposal reflected the historical recital of the UN Charter preamble.<sup>101</sup> His proposal received mild backing here and there, including from Andorran delegate Juli Minoves i Triquell. On 30 June, also referring to the UN Charter preamble as his inspiration, the latter proposed: “*The States Parties to this Statute, Convinced* that all peoples are united by a common bond, and that our cultures are woven together in a shared history, a delicate tapestry that may at any moment be rent and torn asunder by unspeakable acts of brutality and ignorance . . . , We, at the turning of the new millennium, . . . renounce for all further generations those stains on the human spirit that have haunted us for centuries.”<sup>102</sup>

Surprisingly, neither Yáñez-Barnuevo García nor Minoves i Triquell invoked the Genocide Convention—a more obvious model for an instrument of criminal law. On 6 July, the Dominican Republic introduced an alternative: “*Considering* that the century now closing has witnessed crimes whose extreme gravity and scope deeply affect the conscience of mankind.”<sup>103</sup> On 10 and 11 July, then, the Coordinator for the Preamble, Tuiloma Neroni Slade from Samoa, collected these ideas and put the following version before the Committee of the Whole:

*Conscious* that all peoples are united by common bonds, and that their cultures are woven together in a shared heritage, a delicate tapestry that may at any time be rent asunder by unimaginable atrocities threatening the peace, security and well-being of our world,

97. UN GA, 6th Comm., 3rd Sess., 109th mtg., UN Doc. A/C.6/SR.109 (17 November 1948).

98. UN GA, 6th Comm., 3rd Sess., 110th mtg., UN Doc. A/C.6/SR.110 (18 November 1948).

99. UN GA Official Records, 49th Sess., Supp. No. 10, Report of the International Law Commission on the Work of its Forty-Sixth Session, ¶¶ 42–91, UN Doc. A/49/10 (2 May–22 July 1994) and UN Diplomatic Conference of Plenipotentiaries, Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/ADD.1 (14 April 1998).

100. UN Diplomatic Conference of Plenipotentiaries, Proposal Submitted by Spain: Preamble to the Statute, UN Doc. A/CONF.183/C.1/L.22 (26 June 1998).

101. UN Diplomatic Conference of Plenipotentiaries, 20th mtg., UN Doc. A/CONF.183/C.1/SR.20 (30 June 1998).

102. UN Diplomatic Conference of Plenipotentiaries, Proposal Submitted by Andorra: Preamble of the Statute, UN Doc. A/CONF.183/C.1/L.32 (30 June 1998).

103. UN Diplomatic Conference of Plenipotentiaries, Proposal Submitted by the Dominican Republic: Preamble, UN Doc. A/CONF.183/C.1/L.52 (6 July 1998).

*Mindful* that during this past century millions of children, women and men have been victims of grave crimes that deeply shock the conscience of humanity.<sup>104</sup>

Slade's recitals began with the words "*Conscious* that," appealing to historical consciousness, and "*Mindful* that," invoking collective memory. Only one passage elicited discussion. Some delegates felt that the expression "rent asunder" was difficult to translate and culturally inappropriate (it is not clear why),<sup>105</sup> and, therefore, Slade replaced "tapestry" with "mosaic" to express unity in diversity: "*Conscious* . . . that their cultures are pieced together in a shared heritage, a delicate mosaic that may at any time be pulled apart."<sup>106</sup> On 16 July, at the meeting of the Committee of the Whole, Chairman of the Drafting Committee Cherif Bassiouni presented the preamble in a slightly rephrased form.<sup>107</sup> It was adopted, and the text became part of the Rome Statute that was approved the next day.

Invariably, the initial versions of preambles were thoroughly redrafted. The principal authors of the definitive historical recitals came from South Africa and Syria (UN Charter), France, Australia, Cuba, and Chile (Universal Declaration), Venezuela (Genocide Convention), and Spain, Andorra, the Dominican Republic, and Samoa (Rome Statute), thus pointing to the decisive involvement of a wide variety of States and strongly arguing against the claim that they were created under Western dominance. If we see how many critical eyes have looked at these recitals, we may be surprised that they survived at all.

### III. TWO APPROACHES TO HISTORY

In formulating their historical recitals, the drafters of the four human rights instruments basically chose between two approaches: they opted for the role of the contemporary historian or the role of the philosopher of history. If they took the first path, they emphasized the events of recent history; if they picked the second, they mused about the events of the whole of history, both recent and remote. The difference lay in the cause that prompted their indignation: the contemporary historian perceived the recent human rights catastrophe as unprecedented; the philosopher of history saw a long chain of human rights catastrophes, of which the most recent one was, depending on the perspective, an especially cruel example or the straw that broke the camel's back.

The first approach, one of discontinuity, was taken in the UN Charter and Rome Statute. The UN Charter tells us about "the scourge of war, which *twice in our*

104. UN Diplomatic Conference of Plenipotentiaries, Coordinator's Rolling Text, UN Doc. A/CONF.183/C.1/L.54/REV.2 (10 July 1998). See also UN Diplomatic Conference of Plenipotentiaries, Recommendations of the Coordinator: Preamble and Final Clauses, UN Doc. A/CONF.183/C.1/L.61 (11 July 1998).

105. Tuiloma Neroni Slade and Roger S. Clark, "Preamble and Final Clauses," in *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results*, ed. Roy S. Lee (Kluwer, 1999), 421–29.

106. UN Diplomatic Conference of Plenipotentiaries, Recommendations of the Coordinator: Preamble, UN Doc. A/CONF.183/C.1/L.73 (14 July 1998).

107. UN Diplomatic Conference of Plenipotentiaries, 41st mtg., UN Doc. A/CONF.183/C.1/SR.41 (16 July 1998).

*lifetime* has brought untold sorrow”; the Rome Statute reminds us of the fact that “*during this century* millions . . . have been victims of unimaginable atrocities.” The second approach, one of continuity, was chosen in the Genocide Convention and Universal Declaration. The Genocide Convention recognizes that “*at all periods of history* genocide has inflicted great losses on humanity,” and the Universal Declaration deplors that “disregard and contempt for human rights *have resulted* in barbarous acts which *have outraged* the conscience of mankind.”

It cannot be ruled out that the preferred approach is the result of coincidence. Both approaches found proactive defenders during the *travaux préparatoires* of all four instruments and the balance could have tipped in the other direction more than it actually did. However, other reasons are worth exploring.

Let us therefore first take a detailed look at the *recent history approach*. The UN Charter was concluded under the vivid impression of a world war that was still ongoing during part of the UN founding conference in San Francisco (April to June 1945), thus forcing its threatening proximity upon all participants. As for the Rome Statute, the fact that the desire for an international criminal court had first emerged after World War I (although negotiations were only concluded at the end of the twentieth century and the turn of a new millennium) perhaps explains the inclination to perceive the twentieth century in one retrospective glance. Usually, proponents of the recent history approach made their case by presenting three types of arguments. They argued, first, that the recent past was unique in world history and thus without reliable precedent—an argument often stated without further explanation. Second, they claimed that the catastrophic events of the recent past prompted them to act with a fresh sense of urgency: these events were the crimes of the Axis powers in World War II (prompting the creation of the UN) and the wars in Yugoslavia from 1991 to 1995 and the Rwandan genocide in 1994 (prompting two ad hoc tribunals and, ultimately, the International Criminal Court). While the UN Charter drafters were perplexed by the repetition of world wars at a short interval of not even twenty-one years, the Rome Statute drafters were overwhelmed by the bloody chain of twentieth-century conflicts that gave no sign of abating and culminated in genocides in Rwanda and Srebrenica. Third, the emphasis on recent history offered an opportunity to blame specific perpetrators of crimes and their pernicious doctrines, potentially making the instrument stronger. Although, in 1998, there was no debate about naming names because too many atrocities had happened in the twentieth century, in 1945, that issue was fought with daggers on the table. Countries whose populations had suffered the most in World War II (such as France and the USSR) were in favor of naming names. Also, the USSR and Poland campaigned for mentioning fascism—a denominator under which they subsumed the Nazi and Fascist ideologies.<sup>108</sup> Both countries had been attacked by Nazism and lost millions of lives, leaving deep scars. The fact that Soviets and Nazis had signed a secret non-aggression pact (the Molotov–Ribbentrop Pact), which lasted from August 1939 until June 1941 (at the cost of Poland, among others), was conveniently glossed over.

108. UN GA, 3rd Sess., 182nd plen. mtg., UN Doc. A/PV.182 (10 December 1948).

These three arguments in favor of recent history were weighed against a pair of strong objections. One counterargument lay in the lack of a clear beginning: What did “recent” actually mean? Was it last year, 1940, 1914, or 1900? The UN Charter and the Rome Statute answered this objection by taking a broad view of “recent”: it was defined as “twice in our lifetime” (UN Charter), a reference including World War I, or “during this century” (Rome Statute), potentially reaching back to 1900. In any case, “recent” alluded to more than one generation, because the UN Charter referred to “succeeding generations,” thus including past, present, and future generations, and the Rome Statute mentioned “the sake of present and future generations” in its preamble’s ninth recital.<sup>109</sup> Actually, the drafters were also forced to take the longer view of “recent” because of an obvious cumulation of failures: the drafters of the UN Charter had to do so because the League of Nations had not prevented World War II, and the drafters of the Rome Statute had to do so because the UN had not averted new genocides after the Holocaust. These crimes had happened under their eyes, prompting outrage and determination to prevent future catastrophes once and for all.

A second objection to the recent history approach was that listing enemy regimes, perpetrators, and crimes did not fit the genre of the historical recital. First, it made the recital longer. Second, by singling out specific atrocities, those committed by other defeated enemies or by the victors themselves would shine by omission, thus grossly distorting history. Third, there was the risk that, once “reformed,” those named as enemies would refuse to join the UN or the International Criminal Court because of the eternal shame heaped on them by the moral condemnation of their erstwhile conduct in texts meant to stand the test of time.<sup>110</sup> After all, the UN was named after the victorious military alliance against Nazis and Fascists that had operated under an identical name since 1 January 1942.<sup>111</sup> These three risks deterred the strategy of naming names.

However, the recent history argument is stronger for the UN Charter than for the Rome Statute. The UN Charter took months to prepare; the Rome Statute took decades. The option of an international criminal court had been seriously discussed since 1919,<sup>112</sup> including in 1945 to 1948, when the International Military Tribunals were at work and the Universal Declaration and Genocide Convention were being prepared. The possibility of an “international penal tribunal” is even mentioned explicitly in the Genocide Convention.<sup>113</sup> A problem that may have

109. UN Diplomatic Conference of Plenipotentiaries, Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (17 July 1998).

110. UN GA, 3rd Sess., 179th plen. mtg., UN Doc. A/PV.179 (9 December 1948); Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens, 1951), 4.

111. The Declaration by United Nations, the first official use of the term “United Nations,” was signed on 1 January 1942; this document can be viewed on the UN’s “Preparatory Years: UN Charter History” webpage, <https://www.un.org/en/about-us/history-of-the-un/preparatory-years>. A discussion of the name can be found in Farid Zeineddine, Report of Rapporteur, Subcommittee I/1/A, Section 3, to Committee I/1, Doc. 785 [I/1/28] (5 June 1945), in *UNCIO*, 6:360, and Kelsen, *Law of the United Nations*, 3–4.

112. I exclude the failed 1872 proposal to establish an international criminal court by Red Cross cofounder Gustave Moynier.

113. See GA Res. 260 (III) A, Adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, art. 6 (9 December 1948): “Persons charged with genocide or any of the other acts

played a role during the protracted negotiations of the Rome Statute—but not for the relatively short negotiations of the UN Charter—was that references to recent history could sow confusion. On the one hand, mention of an event of recent history in the draft statute could quickly prove outdated because it was uncertain for decades when exactly the preparatory work for the International Criminal Court would be finished. On the other hand, the UN debates about impunity of perpetrators of crimes and reparations for their victims—in full swing in the 1980s and 1990s—made crime prevention a paramount purpose of the International Criminal Court (stated in the fifth preamble recital). Therefore, the safe time reference to “future generations” was a welcome addition to the reference to present generations.

The *holistic approach* was selected, though not without much hesitation about the rivaling approach, in the Genocide Convention and the Universal Declaration. Whereas the language of generations was prominent in the UN Charter and the Rome Statute in order to locate “recent history” in time, it was completely absent in the Convention and the Declaration. The Universal Declaration emphatically refers to the past (“Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind”), but it does not mention explicit time indicators. Rather, it subtly uses the present perfect (“have resulted,” “have outraged”), the tense used to speak about past events that are still relevant in the present or about events that began in the past and are still ongoing. As such, it is a powerful message addressing past and present alike.

Like the Universal Declaration, the Genocide Convention uses the present perfect (“Recognizing that at all periods of history genocide has inflicted great losses on humanity”), but in contrast to the Declaration, it makes an explicit reference to “at all periods of history.” As we saw, a reference to World War II was deleted less than a month before the Convention’s approval: at Pérez Perozo’s instigation, the phrase “profoundly shocked by many recent instances of genocide” was changed to “at all periods of history genocide has inflicted great losses on humanity.” The drafters noted that the genocide in World War II was not the first but rather the most recent in a long succession of genocides in world history. Delegates gave examples ranging from China to Inca Peru, from Genghis Khan and Tamerlane to the colonies,<sup>114</sup> emphasizing that atrocities comparable to the crimes in both world wars but committed in other times and places also deserved recognition. The principal argument given here was—again—that, although the drafters acted under the emotional impact of recent atrocities, the instruments they shaped were meant to last, which implied that specific time references would feel outdated and mobilize insufficiently after some decades had passed.

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enumerated in article III shall be tried . . . by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.” See also GA Res. 260 (III) B, Study by the International Law Commission of the Question of an International Criminal Jurisdiction (9 December 1948).

114. UN GA, 6th Comm., 3rd Sess., 81st mtg., at 175 (China), UN Doc. A/C.6/SR.81 (22 October 1948); UN Econ. & Soc. Council Official Records, 3rd year, 7th Sess., 218th mtg., at 708 (China), 718 (Inca Peru), UN Doc. E/SR.218 (26 August 1948); UN GA, 6th Comm., 3rd Sess., 109th mtg., at 492–93 (Genghis Khan and Tamerlane), UN Doc. A/C.6/SR.109 (17 November 1948); UN GA, 6th Comm., 3rd Sess., 179th plen. mtg., at 844 (colonies), UN Doc. A/PV.179 (9 December 1948).

The debates about the Genocide Convention and the Universal Declaration developed from 1946 to 1948 against a backdrop of turmoil and nascent Cold War, with civil wars in China and Greece, partitions in Palestine–Israel, Korea, and India–Pakistan, decolonization wars in Vietnam and Indonesia, and Communist interventions in Prague and Berlin. The Convention and the Declaration were approved with barely a day’s difference (9 and 10 December 1948). The effects of the World War still lingered, but, gradually, they had to compete with an awareness that the instruments being created were future-oriented and meant to transcend the last war.

The choice of a holistic approach was not predetermined. Following the template of the UN Charter, a late draft of the Declaration, from May 1948, still contained a reference to World War II. It has been suggested that the intention behind the decision to remove the reference to the war was to avoid mentioning the Holocaust, but there is no evidence for this.<sup>115</sup> Another explanation is far more plausible. The drafters’ increasing awareness that they were working on a document that had to stand the test of time forced them to confront its potentially historical impact (as Malik sensed), which in turn made them philosophical and inspired them to take the longer view and avoid text parts that would look out-of-date with the passage of time or, worse, would already be outdated at the moment of adoption. Singling out one atrocity, even one of seldom seen proportions, would open the door for enumerations, a format ill-suited to the genre of the historical recital.<sup>116</sup>

It is safe to say that, in condemning past atrocities in general, the Universal Declaration firmly rejected dictatorship as a viable political regime because, by mentioning “tyranny and oppression” in the same breath, it saw a causal link between the two. The logical consequence of such a theory would have been for the Declaration to express a bold preference for democracy. But this did not happen. An explicit reference to the principle of democracy had already been rejected during discussions about the UN Charter,<sup>117</sup> and therefore, the drafters of the Universal Declaration were cautious. They eventually adopted a general principle of political democracy in Article 21 (“The will of the people shall be the basis of the authority of government”<sup>118</sup>), but they did so without using the term “democracy.” Nevertheless, in Article 29.2, a cardinal article describing legitimate restrictions on human rights, they used the term “democratic society” to articulate the sole political system able to guarantee that these restrictions would themselves remain

115. Nathan A. Kurz, “‘Hide a Fact Rather than State it’: The Holocaust, the 1940s Human Rights Surge, and the Cosmopolitan Imperative of International Law,” *Journal of Genocide Research* 23, no. 1 (2021): 55.

116. There has been a broader debate about the role of the Holocaust in the drafting of the Universal Declaration and the Genocide Convention. Antoon De Baets, “The Debate About the Role of the Holocaust in the Post-War Human Rights Revival,” *Práticas da História* 13 (December 2021): 157–86, shows that the influence of the Holocaust was moderate but unambiguous for the Genocide Convention and more indirect for the Universal Declaration.

117. Committee I/1, 13th mtg., Doc 817 I/1/31 (5 June 1945), in *UNCIO*, 6:365–69.

118. GA Res. 217 (III) A, Universal Declaration of Human Rights, art. 21.3 (10 December 1948).

restricted.<sup>119</sup> In short, the Declaration shows a marked preference for democracy, indirectly in Article 21 and discreetly in Article 29, but not as an explicit, stand-alone principle.

Another argument remained implicit. The holistic approach made the methodological grasp of analyzing genocidal violence more solid: a view singling out only recent atrocities presented as unforeseen catastrophes was less amenable to causal analysis than a view locating these atrocities in a chain of similar events. In this way, some past genocides could be perceived as precedents—and this facilitated comparison, although not without the risk that a reflex of relativization would cause genocides to lose their uniqueness. By the same token, the comparability of genocides raised the problem of the retroactive applicability of modern concepts such as genocide onto past crimes. In 2015, the International Court of Justice stipulated that the Genocide Convention could not be applied retroactively.<sup>120</sup> Retroactive applicability should therefore be understood not legally but historically. The case for historical applicability looks as follows. The fact that Raphael Lemkin coined the concept of genocide in 1944 (“the context of discovery”) does not exclude its applicability to situations before 1944 (“the context of justification”). If that were true, much of the Holocaust would not be covered by the concept. More generally, much historical research would become altogether impossible. Indeed, historians apply contemporary concepts to past events all the time. Even though the label “crimes under international law” is relatively recent, the conduct covered by these crimes is not. In principle, each element from the genocide definition presented in the Convention—the acts that were performed, the degree of premeditation, and the intent to destroy, in whole or in part, a certain national, ethnical, racial, or religious group—can be assessed empirically against any given historical massacre. The outcome of such a test could well be that all the elements of the definition are satisfied. Therefore, historical applicability of the genocide concept—as suggested in the Genocide Convention preamble—is possible in principle and practice without running the risk of anachronism.

In all of the debates—about the UN Charter, the Universal Declaration, the Genocide Convention, and the Rome Statute—Communist States were prompted to insinuate an expanded meaning of the terms “fascism” and “racism” to also cover the structural excesses of capitalism and the crimes of colonialism. These terms became a hyperbole for the entire Western political system. During the concluding debate on the Genocide Convention, Polish delegate Juliusz Katz-Suchy observed, for example, that “genocide had often been committed in the colonies; the colonial peoples were always in danger from the metropolitan States in that respect, whether in the direct physical form or in the form of cultural genocide.”<sup>121</sup> During the debates about the Universal Declaration, Western delegates

119. The phrase “democratic State” was replaced with the phrase “democratic society.” For a summary of the debate, see Morsink, *The Universal Declaration of Human Rights*, 64, 245.

120. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, 2015 ICJ Rep. 3, ¶¶ 90–100 (3 February), <https://www.icj-cij.org/case/118/judgments>.

121. UN GA, 3rd Sess., 179th plen. mtg., UN Doc. A/PV.179 (9 December 1948). Similar remarks of delegates of Communist States can be found in UN GA, 3rd Sess., 180th plen. mtg., UN Doc.

exposed these semantic maneuvers—without, however, being able to refute some of the harsher truths in the Communist critique of colonialism.<sup>122</sup> Ecuadorian representative Jorge Carrera Andrade pointed out that a condemnation of Nazism and racialism alone glossed over other equally criminal systems, such as Italian Fascism and Japanese militarism. As any list of such systems was doomed to be incomplete from the start, it would be preferable, he thought, to abandon the idea altogether.<sup>123</sup> In the end, Communist proposals to name Fascism as the culprit in the preamble were defeated. This meant that the Universal Declaration preamble neither mentions the winning political doctrine (democracy) nor condemns the losing one (fascism). The outcome of this debate weighed heavily in the decision of six Communist States to abstain during the final vote on the Universal Declaration.

When the drafters opted to refer to the remote pre-twentieth-century past, they could mention specific periods, regimes, or events even less than if they had preferred the recent history approach. Rather, they subtly echoed well-known formulas that silently positioned them in a longer—and largely Western—tradition of legal thought. Cassin, as the prime drafter of the Universal Declaration, was acutely aware of the parallels between the preambles of the 1789 Declaration and the Universal Declaration.<sup>124</sup> The 1789 Declaration stipulated: “Considering that ignorance, forgetfulness, or contempt of the rights of man are the sole causes of public miseries and the corruption of governments.”<sup>125</sup> The second preamble recital of the Universal Declaration echoes this: “Whereas disregard and contempt for human rights have resulted in barbarous acts.” The concepts of liberty, equality, and brotherhood (*liberté, égalité, fraternité*), used as ideals during and after the French Revolution, pervade the Universal Declaration’s first preamble recital, although this is less discernible: “Whereas recognition of the inherent dignity and of the *equal* and inalienable rights of all members of the human *family* is the foundation of *freedom*, justice and peace in the world.”<sup>126</sup>

Some delegates felt that the choice, made in the Universal Declaration and the Genocide Convention, to refer to the whole of history lent more gravitas to these instruments. One of them, Lebanon’s representative Karim Azkoul, even built a theory of history on the structure of the first three recitals of the Universal Declaration. He thought that the first recital (about the tripartite motto) laid down the general principle, the second (about barbarism) told us how this principle was violated in history, and the third (about rebellion) indicated how humanity could

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A/PV.180 (9 December 1948); UN GA, 3rd Comm., 3rd Sess., 165th mtg., UN Doc. A/C.3/SR.165 (30 November 1948); UN GA, 3rd Sess., 182nd plen. mtg., UN Doc. A/PV.182 (10 December 1948).

122. See, for example, the remarks of Canadian delegate Lester Pearson in UN GA, 3rd Sess., 182nd plen. mtg., UN Doc. A/PV.182 (10 December 1948).

123. UN GA, 3rd Comm., 3rd Sess., 166th mtg., UN Doc. A/C.3/SR.166 (30 November 1948).

124. UN GA, 3rd Comm., 3rd Sess., 140th mtg., UN Doc. A/C.3/SR.140 (16 November 1948).

125. Déclaration des droits de l’homme et du citoyen (1789), <http://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789>: “Considérant que l’ignorance, l’oubli ou le mépris des droits de l’homme sont les seules causes des malheurs publics et de la corruption des gouvernements.”

126. GA Res. 217 (III) A, Universal Declaration of Human Rights (10 December 1948) (emphasis added). The gendered term “brotherhood” has been replaced here with the term “family.”

avert the dangers of such a violation in the future (through human rights protection by the rule of law).<sup>127</sup>

Finnish legal theorist Martti Koskenniemi had a similar idea. In 1999, he argued that the three recitals contained a narrative: from the initial truth (first recital) to setbacks and tragedies (the fall from truth, second recital), and from there to redemption (the reaffirmation of truth, third recital). The Universal Declaration, he wrote, saw “history . . . [as] the slow process of (political) truth being gradually revealed to human communities.”<sup>128</sup> This is a tempting observation, except that his terms “redemption” and “revelation” are speculative.<sup>129</sup> It is true that the holistic and abstract view of history worked well with the abstract vocabulary of natural law. The drafters of the Universal Declaration eagerly explored that Enlightenment vocabulary but, at the same time, adapted it firmly to the new circumstances by rejecting proposals from Brazil and the Netherlands to mention God and nature as the sources of human rights. That is why Koskenniemi’s terms “redemption” and “revelation” are not applicable.

Opponents of holistic and macrohistorical views such as Azkoul’s put forward a battery of arguments. Those who painted a picture of the whole of history, they feared, would conjure up everything and nothing, leaving merely a residue of confused impressions about the past. The high degree of abstraction would blur any specific assertion and make any enumeration of tragedies utterly impossible. In a certain sense, this is indeed what happened: the brevity of the recitals was so commanding that the references to the past tended to convey abstract views of the past. This objection, however, was also true for the recent history approach: the brevity of recitals severely limited the explication of whatever view of history, recent or not.

The language of the Universal Declaration is “holistic” and “abstract,” but this does not mean that it is “ahistorical” or “tranhistorical.” Koskenniemi’s claim that the Universal Declaration is ahistorical,<sup>130</sup> and Nathan A. Kurz’s contention that it is intentionally tranhistorical, are untenable.<sup>131</sup> In fact, the recitals of all four instruments are deeply historical. They have actors and narrators (the Peoples of the UN, the General Assembly, the Contracting Parties, and the States Parties, respectively) who tell a story of crimes (war, barbarous acts, tyranny, oppression, genocide, and atrocities, respectively) and their victims (succeeding generations, humanity, peoples, nations, the common people, and millions of children, women, and men, respectively) to an audience of States (who, in so doing, spur themselves to change) and—in the case of the Universal Declaration—of individuals, groups, and peoples. All action takes place in the midst of history—not outside of it or above it.

127. UN Econ. & Soc. Council, Commission on Human Rights, 3rd Sess., 75th mtg., UN Doc. E/CN.4/SR.75 (16 June 1948).

128. Koskenniemi, “The Preamble of the United Nations Declaration of Human Rights,” 33. See also *ibid.*, 38.

129. *Ibid.*, 33, 32.

130. *Ibid.*, 30, 31, 33, 38.

131. Kurz, ““Hide a Fact,”” 55.

## CONCLUSION

The preambular recitals scrutinized here outline a sketch of a consistent human rights view of the past, a view that is firmly rooted in historical processes, embedded in metaphysical truths, and enacted in service of the future. This can be demonstrated with a thought experiment: if the drafters of historical recitals (as we have come to know them) were confronted with the three metaphysical questions posed at the beginning of this article, what would they want the answers to be? The following is an attempt to consider this. Fitting the special genre of the preamble, it is an amalgam of fact and conjecture, of principle and wishful thinking.

*If the world could speak with one voice, what would the drafters want it to say about the past?* For both the drafter acting as a philosopher of history emphasizing the whole of history and the drafter acting as a contemporary historian emphasizing recent history, the world would tell abstract but deeply historical stories. These would be tales with narrators like the chorus in ancient Greek tragedies who recall crimes and their victims in the presence of an audience that listens with mixed feelings of guilt and hope. They would narrate about society in metaphors of family and mosaic to express the tension between unity and diversity. They would show that the deepest destiny of the State is to respect, protect, and promote—not violate—human rights and that government ought to use its vast powers primarily to fulfill these three obligations. The philosopher of history would tell stories about the basic conflict between freedom and tyranny and point to an epic and ancient struggle of claiming human rights through critical debate, political participation, legal remedy, solidarity, and, as a last resort in the face of unjust laws and widespread or systematic violations by tyrants, rebellion. The contemporary historian would emphasize that the rights of present and future generations—those generations whose fate is not yet entirely sealed, for they are still living or have not yet been born—are at the core of the world's destiny. Inevitably, both would also observe, tongue in cheek, that if the world could speak with one voice, it would prefer mild polyphony.

*If the world had a memory, how would the drafters want it to remember previous generations?* For both the philosopher of history and the contemporary historian, the world would shoulder the painful responsibility to remember and reconcile itself with the Tolstoyan principle that each unhappy family remembers its traumas and those of its ancestors in its own way. And they would already shiver at the mere thought of future atrocities and bitter memories following in their wake. The philosopher of history would describe the world's gratitude and debt for all positive achievements of the ancestors but simultaneously emphasize its acute awareness of the dazzling frequency with which human rights have been trampled underfoot in a long chain of untold atrocities. For the contemporary historian, the world's retrospection would be colored by specific recent acts: it would denounce the impunity of the perpetrators of crimes and advocate remedies for each breach. On the latter view, the first reparation would consist in naming each single victim, trying not to forget anyone—as the victim lists of truth commissions have hesitantly begun to do.

*If the world had a conscience, how would the drafters want it to pass judgment on history?* Both the philosopher of history and the contemporary historian would explain that “the conscience of humanity” is an expression referring to the conscience of all persons who have ever lived on earth, and especially of present generations. They would surely warn that the “conscience of humanity” is always at risk of being invoked abusively by false prophets, for who decides when the “conscience of humanity” speaks and what it says? In their eyes, though, the world would pay tribute to human dignity and express deep compassion for the victims of history. However, they would also reluctantly observe that even perpetrators of gross crimes and even the greatest enemies of humanity possess human rights.

The philosopher of history would refrain from establishing a Tribunal of History but would simultaneously argue that this does not absolve us from an unceasing search for meaning, if any, behind the human suffering in history. In contrast, the contemporary historian would establish international criminal courts to lay blame. For both, the overriding purpose of humanity—before any claim to happiness—would be located in preventing the recurrence of past suffering in the future and achieving a modicum of peace. They would do so on one condition: nonrecurrence would require remembrance, “lest we forget” would precede “never again.”<sup>132</sup> However, whereas the philosopher of history would search the whole landscape of violence and conclude resignedly that, despite everything, it happened again and again, the contemporary historian would refer to a recent double and unresolved trauma: the shock, in 1945, of seeing that it had happened again under our eyes, despite the world’s principled determination, in 1918, to stop atrocities once and for all. Both would agree that the failed nonrecurrence pledge will haunt the conscience of humanity for a long time coming.

Here the thought experiment stops. What should we make of it? The historical recitals give predominantly historical, not metaphysical, answers to the metaphysical questions. Still, these historical answers blend with metaphysical concepts used in some of the historical and nonhistorical recitals.

Viewed on their own, the historical recitals have several characteristics in common. Their overwhelming approval rates mean that they are based on consensus. Their content is constructed—not in the sense that it is false (the historical claims in the recitals are true by all accounts) but in the sense that condensing macrohistorical views into just a few words compelled the drafters to extreme and negotiated selectivity. Their time-sensitive but abstract narratives have narrators who tell stories about crimes and victims to a diverse worldwide audience. Their rhetorical and poetic power conveys moral lessons. Above all, the historical recitals are enacted in service of the future. However, this future is not transcendental but immanent: the goal sought is not redemption but nonrecurrence.

The metaphysics enters through two doors. It emerges in the expression “conscience of humanity” in two historical recitals. And it colors some of the nonhistorical recitals (especially in the Universal Declaration) and then reflects natural

132. Useful comments on the phrase “never again” can be found in Hans Kellner, “‘Never Again’ Is Now,” *History and Theory* 33, no. 2 (1994): 127–44.

law language with ahistorical overtones.<sup>133</sup> Accordingly, the immanent processes of change described in the historical recitals are immersed in some timeless truths about human beings, in a metaphysics of permanence. What we see here in the end is a paradox: future-oriented historicity embedded in metaphysics.

It is easy to dismiss the historical recitals as fantasy with worn-out formulas of yesteryear, dusted off at ceremonial occasions—“stale epigrams,” as Bentham called them.<sup>134</sup> But perhaps they contain the outline of a consistent and plausible human rights view of the past. As the philosopher Theodore Sider once remarked, “a realistic picture of science leaves room for a metaphysics tempered by humility.”<sup>135</sup> If infused with humility, then, preambular history can inspire us all.

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133. See the discussion about natural law language in part 1 of this article.

134. Jeremy Bentham, *Anarchical Fallacies*, in Waldron, “Nonsense upon Stilts,” 49.

135. Theodore Sider, introduction to *Contemporary Debates in Metaphysics*, ed. Theodore Sider, John Hawthorne, and Dean W. Zimmerman (Blackwell, 2008), 6. Similar pleas for modesty appear in Adrian Bardon, “Transcendental Arguments,” *Internet Encyclopedia of Philosophy*, <https://iep.utm.edu/trans-ar>, and Peter van Inwagen, Meghan Sullivan, and Sara Bernstein, “Metaphysics,” *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta and Uri Nodelman, last modified 4 May 2023, <https://plato.stanford.edu/entries/metaphysics>.