
DRAFT of 10/24/16; please do not cite or quote without author’s permission

Human Rights Workshop, Schell Center for International Human Rights, Yale Law School
November 3, 2016, 12:10 to 1:45 pm, Faculty Lounge

Author’s Note:

Thank you in advance for any attention you may be able to offer to this chapter in progress, which is approximately 44 double-spaced pages of text. If time is short I recommend starting with the final section, pp. 30-42. I look forward to learning from your reactions and suggestions.

Chapter Abstract:

This history aims to show how the 1945-49 series of trials in the Nuremberg Palace of Justice distilled the modern idea of “crimes against humanity,” and in the process established the groundwork for the modern international human rights regime.

Over the course of the World War II era, a 19th century version of crimes against humanity, which might be rendered more precisely in German as *Verbrechen gegen die Menschlichkeit* (crimes against “humane-ness”), competed with and was ultimately co-opted by a mid-20th-century conception, translated as *Verbrechen gegen die Menschheit* (crimes against “human-kind”).

Crimes against humaneness – which Hannah Arendt dismissed as “crimes against kindness” – were in effect transgressions against traditional ideas of knightly chivalry, that is, transgressions against the humanity of the perpetrators. Crimes against humankind – the *Menschheit* version -- by contrast, focused equally on the humanity of victims. Such extreme atrocities most notably denied and attacked the humanity of individual victims (by denying their human rights, or in Arendt’s iconic phrasing, their “right to have rights”). These transgressions also amounted to crimes against pluralism, impoverishing the world’s diversity for everyone (including perpetrators).

The key conceptual move of this “Nuremberg idea” was a displacement of a 19th-century civilizational discourse in favor of the more inclusive and pluralistic visions of humanity we see today. This *Menschheit* version is in turn what makes crimes against humanity into a human rights idea. That displacement happened at Nuremberg. It did not occur at the flagship trial, the 1945-46 International Military Tribunal, however, but rather at the so-called ”subsequent” Nuremberg trials, convened by the Americans from 1946-49.
Chapter 6: Crimes Against Humanity

a. Pell’s Bombshell
b. The St James’s Declaration
c. The Influential Middle
d. Crimes against Humanity Transformed
e. “Hang All Gestapo Says the Dismissed Mr. Pell”

Herbert Claiborne Pell was an unlikely choice to serve as U.S. representative on the United Nations War Crimes Commission. The Commission’s brief was to develop an integrated approach to apprehending and punishing Axis war criminals, in large part by compiling lists of suspected violators and dossiers of witnesses and evidence. Initially a group of thirteen representatives of Allied nations meeting in London starting in the autumn of 1943, the UNWCC was soon pushing to burst the bounds of its modest mandate.¹

A rather feckless friend of FDR’s, Pell had been raised in Emily Post’s “Tuxedo Park,” founded by one of Pell’s ancestors, Pierre Lorillard. A member of New York’s Knickerbocker and Union Clubs, as well as the Athenaeum in London, Pell traveled a great deal, collected French Romantic literature and English tailors, and considered himself an expert on which club a young man should join, a frequent topic of his correspondence. Bertie Pell was always attentive to looking the part, and at an impeccably-tailored 6-foot-5, others often noticed that he seemed physically to embody a certain patrician legitimacy, as well.²

Pell had chosen Harvard for undergraduate study because it did not require a background in Greek or that a student keep up his Latin. His disillusionment with his alma mater was nevertheless “quick in coming,” in the words of his biographer Leonard Baker, when the young patrician soon realized that he would nevertheless be expected to work hard. He dropped out in
his sophomore year, referring disdainfully to those who “worked for marks” and “crammed” for exams. He later attended some courses at Columbia University but never did take a degree.³

In 1918 Pell “surprised everyone,” in Baker’s assessment, by running for Congress in New York’s so-called Silk Stocking district – and winning. He ran as a Democrat, seeking to distance himself from his father’s big-business associates, with whom the younger Pell had often played poker at the Gooseberry Island Club at Newport. “They felt the government was for them,” Pell observed of pro-business politicians such as his father’s friend, Senator Nelson Aldrich of Rhode Island. Pell felt it was unfortunate that “they controlled the resources of the country. Government assistance to them was proper helping of business. Government assistance to the poor was Socialism.”⁴

Pell had been a steadfast supporter of FDR since their brief time together as undergraduates, and in 1937 Roosevelt appointed his friend as minister to Portugal, and then in 1941, as minister to Hungary. After Hungary declared war on the United States, Pell began lobbying the president for some new opportunity to serve.

Pell’s longstanding friendship with FDR galled some bureaucrats – as did the president’s relationships with other Hudson Valley chums who could often bypass official channels to speak with the commander-in-chief directly, such as Treasury Secretary Henry Morgenthau, Jr. and Undersecretary of State Sumner Welles (who himself had a dagger out for Pell). Pell once explained that he had cast his lot with FDR because of their similar worldviews, although neither would have used that term, to the effect that “[t]here is more good to be accomplished in the world by those who work for small changes which can be attained than by uncompromising Utopians.”⁵
After a series of increasingly pointed requests from Roosevelt which eventually needed to be re-routed around a recalcitrant Welles, officials at State finally found a suitably out-of-the-way berth for Pell as the U.S. representative at the United Nations War Crimes Commission in London. Their exasperation and even disdain for Pell already evident, this appointment was if anything emblematic of how little State Department officials cared about war crimes-related issues in the summer of 1943. Of the UNWCC, Pell’s biographer noted that “Almost all the delegates were famous lawyers, jurists, or persons experienced in international law – with the exception of Herbert Pell.” Unlike the other Allied countries, U.S. diplomats treated the War Crimes Commission like a dusty corner where they could stash an unwelcome interloper.⁶

**a. Pell’s Bombshell**

Pell had been keen to set sail in the summer of ‘43, even though the Commission’s British hosts delayed the start date of the group’s official consultations into the autumn while trying to smooth over a diplomatic kerfuffle with the Soviets. Pell had hoped to meet the other delegates and discuss the issues with them informally. He was surprised to learn that the American embassy in London had indicated that they did not want him to arrive in advance. The Soviets ended up refusing to join, and the UNWCC eventually pressed ahead anyway with a series of “informal” meetings starting in the autumn of 1943.⁷

Pell acquiesced in a series of delays that caused him to miss these preliminary meetings, learning only later that he had been kept away intentionally. Upon his belated arrival in London in November he installed himself in an apartment at the Ritz and promptly set about expanding the Commission’s original mission.⁸
Prime Minister Churchill’s initial 1942 suggestion had been for a “Commission on Atrocities” to investigate and gather evidence about alleged violations of the laws of war. This proposal had emerged from a meeting between Churchill and FDR, with FDR aide Harry Hopkins taking notes. This June 1942 outline is striking in its minimalism: a group should prepare “[a]n authoritative presentation of the atrocities committed by the Germans and Japanese in Lidice, Poland, Nanking, Hong Kong, and other places.” The group’s purposes would be informational, along the lines of what contemporary human rights activists might call ‘naming and shaming’: “to keep the people of the United Nations informed of the nature of our enemies,” and also “to deter those committing the atrocities by naming their names and letting them know that they are being watched by the civilized world.”

These initial notes also suggested that in order to “avoid any implications of propaganda,” group members “should not officially represent their governments” and should “be persons of a world-wide reputation for integrity and ability to appraise the evidence.” The 19429(53,712),(933,999) Churchill proposal allocated only two specific tasks to this allied group: it should “investigate the atrocities” by assembling evidence, including interrogating witnesses; and it should “[r]eport to the United Nations, from time to time, on the shooting and maiming of hostages and prisoners, the beating and torturing of women and children, and the other violations of the fundamental rights of human beings.” In other words, as skeletal as this framework was, the atrocities that were even then becoming known as “crimes against humanity” were already rhetorically linked, in Churchill’s preliminary formulation, to ideas about human rights.

The Prime Minister referred to this project as “a suggestion of mine” and then appended the typed outline in a Minute to his War Cabinet. By the end of July 1942, the Cabinet had established a “Committee on the Treatment of War Criminals,” which quickly went on to
develop a slightly more fleshed-out proposal -- one and a half pages rather than half a page -- and then asked U.S. ambassador John Winant to present it to FDR for the president’s comments.11

In addition to investigating and reporting “war crimes (or atrocities),” this commission would be instructed to “direct its attention in particular to cases of organized war crimes (or atrocities) committed in pursuance of a settled policy.” This unusual language may have been an oblique reference to concentration camps. Still, the group was meant to be limited to the role of a “fact-finding body.” The U.K.’s War Cabinet found it necessary to note rather pointedly that “[t]he suggestion of some sort of international court for the trial of war criminals should be deprecated. Nor is it necessary or desirable to create a new body of law, for war crimes are already sufficiently well defined.”12 Whatever the problems with the Nuremberg International Military Tribunal – and there were many, as discussed below – there is no denying that by the summer of 1945, British and U.S. planners had traveled a long way from these initial notes.

As of 1942, then, the British vision was that the vast majority of the accused would be tried by national courts in the particular Allied countries where the atrocities had been committed, with perhaps a handful of top leaders to be summarily executed. Accordingly, the focus of any War Crimes Commission would be on supporting the work of these various domestic courts, and helping with “the selection of persons to be prosecuted in Allied countries” – not with international trials, and certainly not with modifications to the laws of war.13

By contrast, Herbert Pell was inclined to think in more grandiose terms, perhaps due in part to his lack of legal training. While cooling his heels at “Pellbridge,” his family estate in Dutchess County, New York, during his State Department-engineered delay, Pell was already surmising that “the task of the War Guilt Commission is new work and it will have to prepare its instruments from the ground up.”
A furious Pell discovered from an announcement in the *New York Times* that the UNWCC had already begun meeting informally at the end of October 1943, although the group did not have its first ‘official’ meeting until January 18, 1944. Amazingly, it turned out that the War Crimes Commission had designated its early meetings as “informal” and even “secret” at least in part *because they were waiting for Pell* (as well as for a decision from the Soviets, who as noted, ultimately chose not to participate). More than this: on the first of September, the British Foreign Office was formally requesting Pell’s presence, and even suggesting that he should serve as the Commission’s chair. Pell himself did not learn about these machinations until months later.\(^{14}\)

Upon arrival in London, Pell soon fell in with like-minded delegates from what were then known as the “smaller powers” -- notably the Australian delegate, Lord James Atkin, the Czech delegate, Bohuslav Ecer, and the Belgian delegate, Marcel de Baer, as well as the Chinese delegate, the urbane and Columbia-educated V.K. Wellington Koo, an acquaintance of Pell’s from before the war.\(^ {15}\) These representatives agreed that the UNWCC could not act effectively without generating a more thoroughgoing approach to the apprehension and trial of war criminals. After all, how could it be possible to assemble rosters of suspected war criminals without knowing what a war crime actually was?

Two weeks into his official deliberations, Pell expressed concern in a letter to FDR: What to do with a hard core of mass murderers who would be left over, even after those who had committed more traditional war crimes such as battlefield atrocities had been dispatched? Even after returning individual defendants to be tried by particular national court systems, “There remains, however, a very large class of people who have committed crimes against the citizens of more than one country, or who have directed inhuman policies in Germany itself,” Pell
explained in his January 27, 1944 update to FDR. Accordingly, “The consensus is that they will have to be tried by an international tribunal . . . “16 A new court, however, was exactly what many Allied policymakers did not want, particularly in Britain, where memories of the debacle of the post-World War I Leipzig trials were still vivid.17

Pell asserted that such a court was necessary for two reasons: Firstly, to supplant private or local instances of revenge-seeking: “It seems clear that unless some machinery of justice, which can act rapidly and firmly, is provided before the defeat of Germany and Japan no power on God’s green earth can prevent a great deal of private revenge, taken by the soldiers of countries which for years have suffered under the brutality of the German army.”

Secondly, Pell felt that the speedy establishment of a tribunal was necessary to fulfill the lofty promises of international justice in previous Allied warnings to the Axis powers, particularly pronouncements by Roosevelt himself. As Pell soberly reminded the president, “Delay and undue legalism will certainly make it impossible to execute the policies which you have outlined in many statements.”18

Pell was particularly taken with a turn of phrase from one of FDR’s famous “Fireside Chats.” On July 28, 1943, while Pell was still marooned Stateside waiting for authorization to depart for London, the president had assured his fellow Americans that “war criminals should be tried for their crimes against humanity.”19

From a darkened London wreathed in “pea-soup fogs” the following winter, Pell cited this and other Roosevelt administration assertions about accountability to argue that “These statements have been received throughout the world with the utmost enthusiasm and have been almost the only foundation of hope for nearly a thousand million people in Europe and Asia, who
unite in a demand for justice more deeply (and certainly more permanently) felt even than their request for the necessities of life."\textsuperscript{20}

Much to the dismay of the British Foreign Office and Pell’s own assistant, the perfidious Lawrence Preuss, Pell began advocating that the War Crimes Commission should also consider Nazi atrocities against Axis nationals and stateless persons as war crimes, as opposed to focusing exclusively on crimes against Allied nationals.\textsuperscript{21} For Pell, arguing that German nationals and stateless persons could also be victims of Nazi atrocities was primarily a way of capturing what were then often labeled as “massacres” against European Jews, including German Jews. Pell wrote repeatedly to FDR, lamenting, “What are we to do about the Jews in Germany . . . ? The offenses against them certainly seem to be described in your phrase ‘crimes against humanity.’”\textsuperscript{22}

“Crimes against humanity,” Pell elaborated, included atrocities committed “against any person because of their race or religion.” He based this expanded mandate on a letter from FDR, where the president had concurred that “there can be little reason for disagreement on the general proposition that Germany and her satellites should be required to answer for atrocities against the Jews.” Pell reminded FDR that “crimes against humanity” was actually the president’s own term and explained that he felt this letter gave him “the green light” to proceed with these ideas.\textsuperscript{23} As we shall see below, however, Pell was already deploying the label “crimes against humanity” in a very different manner than his boss.

Several of the other delegates, including the very hesitant British chair of the Commission, Sir Cecil Hurst, had similarly concluded by the summer of 1944 that their mandate to investigate atrocities against residents of Axis nations – such as European Jews or other stateless persons -- was simply too narrow. They supported Pell in his insistence that the UNWCC mission should include formulating the relevant legal definitions and principles and
developing policy for punishment as well as the less controversial tasks of investigating allegations and assembling evidence.  

Pell’s passion and independence were becoming more and more of a problem throughout the spring of 1944. Pell himself observed almost wonderingly, “I think I have thrown a bombshell into the Commission in the form of a proposal to take up the case of the Jews in Germany.” As Pell summed it up in his diary: “On the 29th of May, 1944, almost entirely due to my efforts, the Commission instructed its chairmen to notify the various governments that crimes committed, even though against German citizens in Germany, because of race or religion should be treated as war crimes. It is manifest that these crimes were the first of the Nazi performances that shocked the conscience of mankind.”

**b. The St. James’s Declaration**

One important (and often overlooked) source of pressure for accountability against Axis transgressors was the so-called “smaller” countries occupied by Axis powers, notably the European governments-in-exile headquartered in London. These exiled officials – Poles, Czechs, Belgians, Free French, and others – were receiving harrowing firsthand reports of German atrocities in their overrun and occupied home countries. Sometimes these outrages included violence against these representatives’ own families, often by virtue of being related to such prominent exiles in the first place.

Leaders among this group included Free French representative and former League of Nations official René Cassin; Belgium’s Prime Minister-in-exile Paul-Henri Spaak; and former President of Czechoslovakia Edvard Benes. (After the war, Cassin would serve on the UN War Crimes Commission and assist in drafting the 1948 Universal Declaration of Human Rights, for
which he would garner a Nobel Peace Prize. Spaak would go on to serve again as Prime Minister of Belgium, as the first president of the UN General Assembly, and as the Secretary-General of NATO; Benes would continue to serve as the president of Czechoslovakia until his death in 1948.)

Their London location and status as exiles in many instances served to bring these European leaders together -- or as a chipper cover story in *Life* magazine put it, “[a]nother advantage is that they get a chance to know not only England but also each other on an intimate misery-loses-company basis which would by definition be impossible if they were all functioning at home.” A segment of London’s Eaton Place “has now acquired the nickname of ‘Mon Vieux Corner’ because of the regularity with which that greeting is used by exiled officials who meet on the sidewalk,” the *Life* reporter noted. Many of these diplomats regularly rubbed shoulders with British and U.S. officials, journalists, and society leaders.

This *Life* article was a profile of the glamorous Anthony Joseph Drexel Biddle, Jr., the London-based U.S. envoy to six of these governments in exile. ‘Little Portnall,’ the country house of the independently-wealthy Biddle and his wife, the fashionable heiress Margaret Thompson Schulze, was often the scene of weekend parties where “the [guest] list usually includes high-ranking U.S. officers, clients, and a select handful of U.S. newspaper correspondents.” The article concluded tidily that “the whole huge, nightmare world of European misery sometimes seems magically reduced to the size and shape of the Little Portnall croquet lawn.” (That such an image could even be offered in late 1943 and not considered in atrocious taste suggests the extent to which many American commentators were simply out of touch with wartime developments in Europe.)
This proximity -- to decision-makers, press representatives, and each other -- helped to amplify these diplomats’ voices, although some were inevitably also destitute and demoralized, having barely escaped with their lives. Historians Jay Winter and Antoine Prost note that wartime exile was particularly harsh for the spouses of these (overwhelmingly male) leaders; many of the wives did not speak English, and some had been relocated again far from London after having been traumatized by the German bombing of urban areas during the blitz. While future UNWCC representative René Cassin “was close to many British leaders and influential figures,” giving talks in Cambridge and serving as “part of a rich and complex exile world in London,” his wife Simone was “unraveling emotionally and a bit physically too . . . her morale is very fragile,” as René wrote in his diary in 1942.30

The first landmark call for accountability – “landmark” in that many countries together were formally calling for accountability for wartime atrocities – was a joint declaration released by nine of these governments-in-exile in January 1942. The St. James’s Declaration emphasized that “among their principal war aims [was] the punishment, through the channel of organized justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them.” The declaration was part of wider series of conferences held at St. James’s Palace in London, where its signatories additionally resolved “that (a) those guilty or responsible, whatever their nationality, are sought out, handed over to justice and judged, [and] (b) that the sentences pronounced are carried out.”31

This framing is noteworthy for several reasons. By insisting that suspects be “handed over,” the Declaration of St. James’s offered a pointed contrast with the post-World War I scenario, as would so often be the case with these pronouncements as the Second World War unfolded. The statement then ran through the chain of command, fingeri
ordered, perpetrated, or participated in atrocities, and indicating that “justice” would not only pursue these bad actors, but also follow through with punishments -- another contrast with the Leipzig fiasco of twenty years before.

These small and embattled Allies were at their most grandiose, in terms of the scope and ambition of their plans for a future peace, when the outlook on the battlefield was at its bleakest. Winter and Prost have highlighted this as ironic, although such timing was hardly a coincidence. Amid ubiquitous outdoor placards exhorting Londoners to “take up the challenge” of supporting the war effort, only the portrait of a postwar order painted in the very brightest colors could justify the deepest sacrifices and support morale in the darkest times. Cassin and the other St. James’s delegates were proud nationalists whose homelands had been overrun. Their reorientation to acting in concert was a response to the most extreme circumstances of exile and defeat. It was abundantly apparent, in rubble-strewn London, that these governments-in-exile would need to work together in order to clear a path forward, despite past enmities and continuing tensions.

It is of course unsurprising that Allied nations at war would use diplomacy to protect their own power and interests among themselves; it is rather more of a puzzle why the remnants of wartime cooperation proved so enduring in the wake of World War II. The advent of the most virulent phase of the Cold War has obscured what some social scientists like to call the “stickiness” of this wartime cooperation, which was able to persist in so many realms even after the worst of the military threat had passed. This multilateralism, where shards of sovereignty were shared through institutions such as the United Nations and various precursors to the European Union, owes an important debt to these smaller, exiled powers.32
Among other inspirations, Cassin and many of the other St. James’s delegates were interested in the British “Beveridge Plan,” which advocated reducing inequality both domestically and internationally in order to avoid future economic depressions and instability. The exiled delegates also described themselves as seeking to make more concrete such abstract policy pronouncements as Roosevelt’s January 1941 “Four Freedoms” and the August 1941 Roosevelt-Churchill Atlantic Charter, both of which aligned human rights ideas with war aims.33

The St. James’s Declaration quickly became a touchstone for pronouncements related to war crimes. The U.S. and U.K. were decrying Axis atrocities by 1942 as “crimes beyond war crimes, “barbaric crimes against civilian populations,” or “crimes against world public order,” often with reference to the January 1942 Declaration. Even British Foreign Secretary Anthony Eden, notoriously uninterested in this “war crimes business,” referred to “barbarous and inhuman treatment,” and warned that his government intended “to ensure that those responsible for these crimes shall not escape retribution.”34

Several of the more well-researched and thoughtful histories of Allied war crimes policies start with the St James’s Declaration, in large part because the 1942 pronouncement successfully elevated criminal accountability to a war aim, a status echoed in many later statements (notably the 1945 Potsdam Declaration). As part of a vision of a future post-war order based on the rule of law, the exiles of St. James’s offered an implicit contrast to the Nazi “New Order” which in 1942 seemed as if it might indeed emerge ascendant, at least in much of Europe.

c. The Influential Middle
The smaller or mid-sized powers of the Inter-Allied Conference continued to prod their Great Power allies to live up to this high-flying wartime rhetoric. Describing the St. James’s
Declaration as “an urgent appeal to the United States,” three U.S.-based European diplomats secured an appointment with Secretary of State Cordell Hull in July 1942 to elaborate upon their concerns. They presented Hull with a memo highlighting “the recrudescence of violations of international law and especially of acts of oppression and terror in those territories in Europe now under enemy occupation.” They explained that recent pronouncements by highly-placed Nazi officials were “giving rise to the fear that . . . the barbaric and unrelenting character of the occupational regime will become more marked, and may even lead to the extermination of certain populations.”

Their appeal included a detailed appendix documenting specific atrocities in the occupied countries, which Hull dismissed as “a self-explanatory letter . . . together with an annex in French.” Hull put off his visitors, noting smoothly how he had “thanked the gentlemen for their documents and said that . . . the State Department has been working for sometime on atrocities and is giving every attention to all phases thereof. I added that I hoped within a few days it would be possible to reach some conclusion with respect to plans.”

British and American officials describe themselves as responding to the St. James’s Declaration with their UN War Crimes Commission proposal, avoiding the World War I-era mistake of waiting until the war was over, also putting potential transgressors on notice that they would be held to account this time. Yet almost a year later, neither the U.S. State Department nor Churchill and his War Cabinet was exactly burning to address the punishment of such transgressors.

General calls for accountability did not necessarily imply any kind of formal deliberative process, for one thing, much less actual trials. Each of the allied “Big Three” had notoriously called for punishment without trial of Axis war leaders at one time or another as World War II
unfolded. While Stalin most famously offered a hearty after-dinner toast in 1943 to the speedy “liquidation” of 50,000 Nazi officers, Churchill had also indicated that he favored summary execution for at least the very top leaders, and FDR had briefly adhered to the so-called Morgenthau Plan, which called for the immediate execution upon identification of a top layer of leaders of the Third Reich.\(^\text{37}\)

The fact that these positions are now often cited as shockingly draconian is arguably due, at least in part, to the later influence of Nuremberg and its rhetoric about civilization and the rule of law. During the war, however, these opinions were if anything lagging behind Allied public opinion, which robustly supported harsh and summary punishments for German and Japanese leaders. In the autumn of 1944, for example, a Gallup Poll showed that thirty-four percent of Americans wanted to destroy Germany as a political entity, thirty-two percent wanted continuing supervision and control over Germany, and only twelve percent were interested in somehow ‘rehabilitating’ Germany.\(^\text{38}\)

The British sent along Churchill’s “suggestion for a Commission on Atrocities” to FDR – the group which went on to become the UN War Crimes Commission after the Americans lobbied to rename it – in the summer of ‘42. Yet as noted, the Commission was not constituted until 1943 and, to Herbert Pell’s frustration, did not meet formally until the beginning of 1944, even as the “frightfulness” and atrocities accelerated into massacres, and what would now be called ethnic cleansing accelerated into systematic genocide. The UNWCC – itself a rather pallid initiative -- was a rearguard response to external pressures.\(^\text{39}\)

A circular dynamic was creaking into motion: Smaller powers and various non-governmental organizations had more information and more passionate constituents demanding responses; Great Powers would react by making inspirational pronouncements; then these
constituents (by now often including the press), would seek to hold decision-makers to account by reminding them of this rhetoric and crying out about hypocrisy. Such a dynamic would in turn lead to yet more rhetoric and, occasionally, some action.

Whatever the precise workings of this process, the engine turning the wheel was clearly not the governments themselves, nor was it necessarily the grass roots of popular uprising. Mid-level historical actors -- smaller powers, professional associations, mid-level bureaucrats, and organized constituencies such peace activist groups and, especially, religious organizations – were providing the spark.40

A mid-level U.S. official speaking to the National Council of Christians and Jews in 1942 offered a case in point: Raymond Geist, who had served as the American Consul-General in Berlin from 1929 to 1939, wove together FDR’s four freedoms address with accounts of German atrocities to excoriate the idea of “bigotry.” After noting that the Axis powers were drawing their force from “brutality and callous inhumanity” – that is, the opposite of civilization and tolerance – Geist framed the Allied war aims as a contest over human rights. “The four freedoms which our president has proclaimed as the incontestable rights of man and which we have enjoyed from the earliest times were not permitted the Germans. These four freedoms were not in accordance with the policy and aims of the [German] government.”41

What animated Geist’s speech was not so much his platitudinous words as his engaged and energized audience. Activists and community leaders attended these kinds of rallies; such constituencies would of course have been all but absent at FDR’s 1941 State of the Union (the “Four Freedoms” address). Extensive earlier studies of the deployment of the Four Freedoms in particular have shown how the president’s rhetoric needed to be processed through local outlets, including war bond posters and radio programs that were experienced and discussed locally,
before it could really be metabolized by the American public; the same was true of language about pluralism, civilization, and atrocity.\textsuperscript{42}

The U.S. branches of Rotary Clubs International circulated a discussion draft for club meetings in late 1941, for example, composed of questions designed to guide discussants toward developing an anti-Nazi ideology. Questions included: “What about the rights of minorities – political, linguistic, racial, and religious – and what recognition must in fairness be given them?” and “What interferences are there with the free interchange of ideas and knowledge which is necessary to the advancement of civilization?” In a more florid register, Raymond Geist concluded: “What intolerable crimes against humanity would have to be expiated before atonement and reconciliation with the rest of the world would be achieved!” -- rhetorically linking legalist, globalist, and Biblical themes in ways that he felt might resonate with the orientation and background of his well-connected listeners.\textsuperscript{43}

This process by which abstract goals are metabolized by an “influential middle” builds upon the insights of historians Paul Kennedy, Kirsten von Lingen, Gretchen Heefner, and others: That mid-level officials and mid-sized countries were the true “problem-solvers” in this era, and also that mid-level NGOs – lodged as two-way transmission devices between elite opinion-makers and the grass roots – were also a key inflection point.\textsuperscript{44}

The early war years had marked an unusually vulnerable time for the Allied “Big Three.” The democracies in particular were seeking to motivate sacrifices on the part of their respective publics and to be reasonably inclusive of other Allies, in order to inspire further sacrifices there as well. Generating pressure to live up to inflated rhetoric was a way for smaller powers and semi-official hybrid groups to call the great powers to account. To be sure, plenty of inspirational rhetoric had circulated in the World War I era as well, but these words were later widely
perceived as hollow. In the early 1940s, these unsettling memories were fresh enough to create additional pressure on Allied decision-makers: In order to be inspirational, this round of rhetoric could not be hollow, or at least not starkly so.\textsuperscript{45}

d. Crimes against Humanity Transformed

It is arguably a fruitless quest to seek to identify a particular “moment” when crimes against humanity as a concept was born, if such pinpointing were even possible. The point here is not so much a lack of appropriately detailed or numerous records, but rather to support a position in terms of how intellectual history works, especially in an international context.\textsuperscript{46}

As we have seen in earlier chapters, the term “crimes against humanity” appeared in British diplomatic documents in 1915 in connection with Turkish massacres of Armenians, as “crimes against humanity and civilization.” The Commission on Responsibility at the Paris Peace Conference concluded in 1919 that the German Kaiser and High Command had been “guilty of offenses against the laws and customs of war, or the laws of humanity.”\textsuperscript{47}

In both cases, these World War I-era uses harked back to the so-called “Marten’s Clause” of the 1899 Hague Convention, which referred to “the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the dictates of the public conscience.” The locution crimes against humanity had also popped up occasionally earlier in the 19\textsuperscript{th} century -- usually with reference to struggles against slavery, or occasionally, “tyranny” -- with scattered references in the 18\textsuperscript{th} century and before.\textsuperscript{48}

Kirsten von Lingen has recently posited what she calls a “continuity thesis,” arguing that the concept of crimes against humanity dates from the era of the Crimean and U.S. Civil Wars and then resurfaces in the World War I era and again at the Nuremberg IMT. Yet neither her
continuity thesis nor what might be called a ‘discontinuity’ thesis – the perennially-popular assertion that the notion of crimes against humanity sprang whole from the brow of Robert H. Jackson in 1945 -- captures the whole picture of how ideas compete in real time to inform policy. These kinds of periodization debates also mirror broader discussions about ‘human rights’ generally, with some scholars tracing that concept back to ancient times, and others dating it from the 1970s or even the 1990s.49

We are, however, able point to a moment of transition when our Nuremberg-era historical actors realized that the pre-existing label of crimes against humanity could be useful to them. They distilled it anew, or in ways that seemed newly-relevant (and were newly-contested by various groups). This contestation process was not just an example of old wine in new bottles or other such clichés about the history of ideas.

Over the course of 1942 to 1948, a version of crimes against humanity distilled in the 19th century, which might be rendered more precisely in German as Verbrechen gegen die Menschlichkeit (crimes against “humane-ness”), competed with and was ultimately co-opted by a mid-20th-century conception, translated as Verbrechen gegen die Menschheit (crimes against “human-kind”). That displacement happened at Nuremberg. But it did not occur at the flagship trial, the 1945-46 International Military Tribunal.

These differing shades of meaning were remarked upon at the time, most famously by Hannah Arendt as the main International Military Tribunal unfolded. The official German translation of the Nuremberg charter contained a mistake, Arendt argued: Crimes against humane-ness had been employed, when crimes against human-kind was called for instead. Verbrechen gegen die Menschlichkeit in effect described crimes against niceness, she argued
scornfully, “as if the Nazis were simply lacking in human kindness -- certainly the
understatement of the century.”

But calling the Nuremberg crimes *Verbrechen gegen die Menschlichkeit* – against
humane-ness --was not a mere mistranslation. As discussed in earlier chapters, the 18th and even
19th century vision of crimes against humane-ness tended overwhelmingly to focus on the
diminished humanity of the perpetrators.

The term’s roots in the laws of war drew on chivalric codes, where knightly honor would have been at stake. Later social and cultural undertones among abolitionists were entwined with aspersions about the tarnished virtue and religiosity of enslavers, or societies that kept slaves. As we saw with the 1784 litigation around the murders committed by the captain and crew of the slave ship *Zong*, antislavery activists saw the *Zong* massacre in particular, and the institution of slavery in general, as clouding British claims to be a Christian nation worthy of divine favor. Crimes against the Christian faith (or “Christendom”) and crimes against civilization often appeared as virtual synonyms to *Verbrechen gegen die Menschlichkeit*, including in treaties and other official documents.

Crimes against humankind – the “Menschheit” version -- by contrast, focused equally on the humanity of victims. Such extreme atrocities most notably denied and attacked the humanity of individual victims (by denying their human rights, or in Arendt’s iconic phrasing, their “right to have rights”). Such transgressions also amounted to crimes against pluralism, impoverishing the world’s diversity for everyone (including perpetrators). Crimes against humankind or pluralism is in turn one of the major themes for which we remember Nuremberg today – at the core of what this history calls the “Nuremberg idea.”
As with most processes of conceptual change, the *Menschlichkeit-Menschheit* transformation was messy. A scattergram from say, 1942-46 would show various kinds of uses. One of Roosevelt’s speechwriters, Assistant Secretary of State Adolf Berle, Jr., offers an example of ideas in motion when he drafted talking points for FDR’s press conference of August 21, 1942. One set of notes read “these [German atrocities] cannot be justified on any theory of war . . . they are, in beastly fact, crimes against civilization.” Another version read “. . . they are, in beastly fact, crimes which revolt every instinct of humanity.” Berle continued to noodle around with additional formulations as well: crimes “inflicted in a total spirit of depravity,” or crimes committed “as part of a campaign of criminal barbarism,” for instance, as labels for atrocities that were, for Berle, essentially synonyms.54

Herbert Pell was advocating something rather different in correspondence with FDR in the early months of 1944, however. It was not just that Pell was being more specific, by focusing on a particular persecuted population. He was trying to capture a category of atrocity that simply did not fit under the more traditional designation of “war crimes” -- as senior State Department officials would soon be patronizingly pointing out to him.

Pell’s interpretation was all-in on the *Verbrechen gegen die Menschheit* version, that is, crimes against humankind or pluralism, a 20th-century iteration that was much closer to the definition of crimes against humanity that we use today.55

Importantly, the idea was decoupled from any underlying state of war. A crime against humankind – that is, the *Menschheit* version -- was an atrocious crime against civilians that could be committed at any time. Unlike ‘crimes against humane-ness,’ this *Menschheit* version also explicitly focused on victims (although it encompassed others, including persecutors, bystanders, and people not involved with conflict or violence at all), since as noted everyone would be
harmed by reducing the world’s human diversity.\textsuperscript{56}

In a more philosophical vein, sociologist and anthropologist Didier Fassin has recently analyzed “both dimensions encompassed by the concept of humanity.” As he elaborates: “on the one hand the generality of human beings who share a similar condition (humankind), and on the other an affective movement drawing humans toward their fellows (humaneness),” which we may map onto Arendt’s humaneness versus humankind critique. Fassin goes on to argue that the humankind/humaneness duality embodies other related-but-distinct kinds of pairings such as human rights/humanitarianism and reason/emotion in international politics. Such high-flying abstractions, while evocative, can seem as unmoored as the proverbial “brain in a jar,” up on a bare shelf in a sterile laboratory somewhere, devoid of context.\textsuperscript{57}

Arendt’s contribution, by contrast, derived much of its analytic heft from being both historicized and normative. That is, firstly, she gave the debate a concrete context: she was not only writing specifically about the main Nuremberg trial, but writing about it as that trial was unfolding. Secondly, she offered a value judgment informed by her assessment of recent history. For her, crimes against humaneness (or “niceness”) was a backward-looking, 19\textsuperscript{th}-century version that was not appropriate for Nuremberg, while crimes against humankind was an idea that captured the future promise of international law.

Her analysis was further energized by the concrete politics of the era – that is, by the role of mid-level, often unsung, historical figures such as Pell, Berle, and Glueck as well as by the more famous headliner-types upon whom historians so often focus, such as Roosevelt, Jackson, and Lauterpacht.

Arendt’s \textit{Menschheit} version blossomed over the course of the early war years in response to two kinds of pressures: one was a focus on the lofty war aims discussed above. As
content began to fill in behind aspirational statements such as the Four Freedoms and Atlantic Charter, which advocated a normative order that would contrast with the Nazi “New Order,” the result was a new focus on the human. As one of many possible examples, in a 1942 nation-wide radio broadcast, U.S. Secretary of State Cordell Hull discussed the Axis as “international desperadoes” who could only be defeated by values based on “acceptance and cultivation of the concepts and the spirit of human rights and human freedom” before elaborating that these values were embodied in “a program of principles and purposes by which mankind may advance toward higher standards of national and international conduct. That program is embodied in the Declaration made on August 14, 1941 by President Roosevelt and Prime Minister Winston Churchill, now known as the Atlantic Charter.”

In speeches, editorials, letters to the editor, sermons, radio programs, magazine articles, government and NGO informational pamphlets, and other kinds of civic displays such as war bond posters, we may see terms such as human rights, human dignity, human freedom, and “the human personality” appearing over and over again. Also, terms such as “Human Rights” and “Fundamental Freedoms” became somewhat more likely to be capitalized by about 1943, suggesting a certain process of reification as these labels crystallized into what lawyers sometimes call a “term of art,” at least among English-speakers.

This cultural politics of the human built on longer-term changes from the interwar era and before, such as transatlantic dialogues around personalism and even transcendentalism. And of course, one’s wartime enemies would have embodied an opposing set of values, reflected in adjectives such as inhuman, bestial, or “anti-man.”

A second notable shift was the way moralistic words and phrases of longstanding pedigree such as “civilization,” “Christian values,” and “barbarity” (as un-civilized or un-c
Christian) themselves became stand-ins for more pluralistic and universalistic ideas over the course of the war, particularly in 1942-43. For instance, British diplomats delicately urged FDR in 1942 to reconsider the wording of a press release, submitted to the British in advance of distribution, accusing the Nazis of atrocities which “violate every tenet of the Christian faith” to something a tad more ecumenical. Their own statement, timed to be released the same day, called instead for individual accountability for “atrocities which violate every tenet of humanity.”

In the United States, films, pamphlets, advertisements, and radio programs increasingly came to assert religious, ethnic, and to a much lesser extent, racial pluralism as an affirmative American value, again in explicit contrast to Nazi or other fascist ideologies. A sunny series of “war buddy” films, books, and cartoons such as the *Three Pals* comic book series emphasized inter-ethnic harmony and shared sacrifice among Protestants, Catholics, and Jews. The cover of *The Union* magazine for August 1944 was much more bold, featuring a swastika-bordered “Invitation to Commit Suicide” alongside sketch of a handgun. The graceful script on the card invited the reader to “Hate the Negroes . . . Hate the Protestants . . . Hate the Catholics . . . Hate the Jews . . . RSVP,” while a small, framed square in the corner of the cover image quoted from the Declaration of Independence that “all men are created equal.” In a more official vein, the 1943 training film “A Welcome to Britain,” implored white U.S. servicemen to leave their prejudices behind – prejudices which were taken for granted -- as part of representing American values abroad. “We have promised to respect each other, all of us . . . ” mused a white southern general whose family had “fought for the Confederacy.” The general concluded by telling the actor Burgess Meredith and an unnamed black serviceman that this melting-pot notion of pluralism was “one of the reasons that makes our world worth fighting for.”

25
There is a longstanding interest among postwar students of Nuremberg in finding a lone progenitor of the term crimes against humanity, perhaps as an outgrowth of ever-popular “Great Man” theories of history. Usually that person is thought to be Hersch Lauterpacht, Whewell Professor of International Law at Cambridge, future Judge of the International Court of Justice, and co-author of the opening and closing addresses at Nuremberg for the British delegation.53

Lauterpacht had been among those leading a wartime working group known as the Cambridge Commission, composed of British academics and members from nine of the London-based governments in exile who had drafted the St James’s Declaration on war crimes. The commission focused on the refinement of various concepts in international criminal law. From 1941 Lauterpacht served on a committee within that expert group charged with analyzing the broad category of “crimes against world public order” – of which crimes against humanity would eventually become a lesser-included subset.64

Lauterpacht wrote a confidential memo for that group in July 1942, where he offered a number of arguments that would later prove central to the Nuremberg case, including the foundational idea that individuals, as opposed to the state, could be held accountable for war crimes. Even some of his language and syntax in this early memo would later be echoed at the main Nuremberg trial, in Robert H. Jackson in Jackson’s iconic Opening Statement for the Prosecution and of course in the British prosecution’s opening statement, presented by Sir Hartley Shawcross, of which Lauterpacht was a co-author. Yet before the 1944 Pell phase of the UN War Crimes Committee, Lauterpacht’s vision of crimes against humane-ness was an updated version of the Hague Convention preamble, citing standards of behavior that were shocking to civilization.65
The famous Lauterpacht origin story regarding crimes against humanity concerned a week-long break that the chief of the U.S. negotiating team at the London Conference, Supreme Court Justice Robert H. Jackson, took from the four-power negotiations over what would become the Nuremberg charter at the end of July 1945. At a particularly frustrating juncture towards the end of the six weeks of talks, Jackson and a small entourage left London to confer with other U.S. officials who were attending the Potsdam Conference outside of Berlin (State Department lawyer Katherine Fite described the area where the group was billeted as “the Hollywood of Berlin”).

The Jackson team also spent a few hours surveying the general devastation comprising “the carcass of Berlin,” in the words of one diarist at the time, with its attendant infestation of buzzing flies. Fite wrote to her parents: “The destruction in the city center is colossal – those enormous Teutonic buildings in ruins, and I mean ruins. It’s staggering and unreal.” They picked their way around Hitler’s abandoned and vandalized Chancellery office in Berlin’s Soviet zone. Fite tried to gather up some of the bulky files strewn on the floor, but worried about smuggling them out past the Russian guards. Jackson presented Fite with another souvenir: a cross with an embossed swastika on a ribbon, ceremonially placing it around her neck and joking that she was receiving a “Cross of Honor of the German Mother.”

Upon returning to the UK, Jackson and his entourage ended their travels with a day trip up to Cambridge on July 29 to visit Hersch Lauterpacht and his family. The most detailed record of the Jackson-Lauterpacht conversations is probably the diary entries of Jackson’s son, Ensign William E. Jackson, then serving as his father’s general aide-de-camp at the London negotiations. Jackson père hosted Sunday lunch at a country pub followed by afternoon coffee in the Lauterbachs’ garden on Cranmer Road in Cambridge, with its lawn as “smooth as a tennis
court,” in Katherine Fite’s description. According to the younger Jackson, the discussion that touched on crimes against humanity was primarily about the value of inserting headings into the draft charter, as opposed to redefining concepts. 68

The next day, Monday July 30, an American outline of a “Preliminary Trial Brief” on a large piece of posterboard bore the new heading “Crimes Against Humanity” over a list of transgressions that before the weekend had been categorized as “Atrocities against civilian populations.” 69

[IMAGE #1 ABOUT HERE]

For the first time, we see what would become the iconic three-part heading identified with the Nuremberg IMT of Crimes against Peace, War Crimes, and Crimes against Humanity in other oversize posters that were part of this handwritten draft. The same three headings were then quickly incorporated into the next draft of the Nuremberg charter presented by the U.S.
delegation at the next official negotiating session of the London Conference, held on August 2, 1945.

Jackson referred to the insertion of the ‘Crimes against Humanity’ heading only briefly in the official record, where he indicated, “I think it is a very convenient designation. I may say it was suggested to me by an eminent scholar of international law.” This three-part heading, including Crimes against Humanity, then became the organizing idea of the final Nuremberg charter, [appended to the London Agreement of August 8, 1945.] Even the staunchest promoters of Lauterpacht’s role end up wording their claims rather carefully: the émigré professor “put crimes against humanity into the Nuremberg charter” in the context of a conversation that was really more about using topic headings to make the draft document clearer.  

Yet if we are interested in “firsts,” arguably Herbert Pell was the first to try to plug what we might call in shorthand the Menschheit version of crimes against humanity into the political process. Advised by Bohuslav Ecer, Marcel de Baer, Sheldon Glueck, and other legal scholars, Pell used the label “crimes against humanity” to mean “crimes committed against any person because of their race or religion,” as he had phrased it in one of his letters to Roosevelt. (Lauterpacht seemed to be using the term the same way in his discussions with Jackson, which took place more than a year later.)

The final version in the Nuremberg charter, signed by representatives of the U.S., U.K., the Soviet Union, and France as part of the London Agreement of August 8, 1945, was a kind of hybrid. Its plain language seemed to at least contemplate including pre-war atrocities -- and many commentators have assumed, incorrectly, that it did -- and yet it did include atrocities against domestic populations, as long as they took place during wartime.
In fact the 1945 Nuremberg charter version of crimes against humanity, as interpreted by the Tribunal in its 1946 judgment, was much closer to the older “crimes against kindness” or Verbrechen gegen die Menschlichkeit version, to use the official German translation of the Nuremberg charter that troubled Hannah Arendt so much. Such crimes were in effect simply really, really heinous war crimes.

e. “Hang All Gestapo Says the Dismissed Mr. Pell”

As 1944 began, the UN War Crimes Commission was hamstrung by lack of funds, lack of staff, and the almost complete lack of responsiveness from the diplomatic higher-ups in the U.S. and U.K. As Robert H. Jackson recalled in 1952, “the [UNWCC] had been something of an orphan. It hadn’t been well supported . . . But this Commission had given a great deal of thought and study to the problem of war crimes and their place in law. It was perhaps the best informed group in existence on that subject.”

Jackson’s tone was respectful – he was after all mindful that he was speaking for the historical record here, with a transcription that that bears his handwritten corrections on many points -- yet strangely dismissive: why not spend a bit more time consulting this “best informed group”? 

As Herbert Pell peevishly noted: “It is a curious fact that I was appointed in the early part of July [1943], and now at the end of the year have received no written instructions whatsoever from the State Department . . .” In the absence of official guidance, Pell repeatedly wrote directly to Roosevelt and also to British officials, which doubtlessly did little to endear him to the U.S. Department of State.
As noted, Pell had been lobbying for the War Crimes Commission’s mandate to be expanded to include “something more than the arrangement of dossiers,” as he caustically put it; to him, the UNWCC was in the best position “to propose to the various Governments the machinery for carrying out international justice against war criminals.”

Specifically, Pell wanted instructions about Jews: He observed bluntly that “The question of the Jews in Germany will come up before the War Crimes Commission in the near future. It is, of course, a very thorny one.” He elaborated:

There can be no doubt that the atrocities against the Jews clearly brought the horror of Nazism to the attention of the world . . . It would hardly do to tell these people, who are clamoring for justice, that although the German government has deprived them of their German nationality, their wrongs are of no interest to us,
because they have not acquired citizenship in one of the United Nations. There are plenty of people who are not Jews who would be indignant at such a betrayal.

Pell added that “this [situation] is something beyond the mere letter of the law” and also that “no other organization today exists in the world which can do anything about it.” As one of only two non-lawyers on the Commission, Pell had stated from the outset that one contribution he felt he could make would be to keep the group from “getting bogged down in legalism,” observing later that “we cannot wait months while pettifoggers consider precedents.”

Pell wanted the War Crimes Commission to investigate atrocities committed from January 30, 1933 forward – that is, from the day Hitler became Chancellor, rather than from the initiation of transborder armed conflict in Poland in 1939, or the Japanese invasion of Manchuria in 1937.

The instructions on this topic, which had enormous implications for the meaning of crimes against humanity and for which Pell had been lobbying for the better part of a year, arrived at last, but not with the answers for which Pell had been hoping.

After tartly noting that “For the present purposes of the United Nations, ‘war crimes’ are those committed during the existing war,” Secretary of State Cordell Hull’s letter then pedantically proceeded to pinpoint the various appropriate starting points for a state of war in different parts of the world (“The War in Europe may be said to have begun on September 1, 1939 . . . as between Germany and Czechoslovakia, it would probably be permissible to say that March 10, 1939, when German forces invaded Czechoslovakia, might be regarded as the beginning of war between those two countries.”) The memo then spelled out the bottom line, as far as Pell’s more expansive vision was concerned: “Punishment for war crimes and for atrocities
committed against individuals or minority groups prior to the outbreak of war are believed to be separate problems.”

And not only separate problems, but problems about which presumably nothing could be done, ever: “the [State] Department is of the opinion that to assume to punish officials of enemy governments for taken against their own nationals pursuant to their own laws would constitute an assumption of jurisdiction probably unwarranted under international law.” The letter then concluded that sticking with a more restrictive definition of “war crimes” would likely have little impact on which defendants would ultimately be held accountable anyway: “It has been pointed out in previous communications to you [Pell] that many of the perpetrators of atrocities in the prewar period have also perpetrated atrocities and crimes during the war period and hence would be subject to be dealt with as war criminals. In fact it is believed that the arch offenders in these respects would be reached in this way.”

In addition to a series of disputes with his higher-ups over the substance of the UNWCC’s work, as his time in London unfolded Pell came to learn of behavior that “savors more of sabotage” by the U.S. Department of State, as Pell confided to his diary. Pell described an eye-opening dinner with John Winant, U.S. Ambassador to the U.K., in December 1944. Winant confirmed that the delays in sending Pell to London were not due to requests from his embassy, as the State Department had originally indicated:

On Thursday the 23rd of December Mr. Winant dined alone with us in our apartment at the Ritz. He commented on the lateness of my arrival in England. I told him the story of my appointment and how I had on many occasions during the summer written to Washington, and twice gone down, to see if my departure could not be expedited . . . At one time [I was told] that it might be six or eight months before I would be able to go to England, and that all of these instructions had come through the Ambassador here. The Ambassador told me that on no occasion had he sent any cables to the Department suggesting delay and that the British Government had been seriously put out by my delay in arriving.”
Ambassador Winant then “told me the story of this Commission.” In the eyes of the State Department, Churchill and FDR cooking up the proposal for a UNWCC with only Harry Hopkins present taking notes was an affront to State’s authority. “It seems apparent that some members of the State Department were put out at the impudence of the President in interfering in foreign affairs and decided to give him a lesson. Hence the extraordinary lack of cooperation and support given to this Commission,” Pell elaborated sourly.⁸⁰

And the plot soon thickened: Early in the spring of 1944, Pell discovered that his assistant, Lawrence Preuss, had been sending unflattering memos about Pell and dictating the contents of confidential memos to Pell’s secretary. (Pell had tried to bring along Sheldon Glueck as legal advisor, but Glueck had been vetoed by the State Department.) Pell was enraged and felt beleaguered: He fired off an angry letters to Ambassador Winant and Secretary of State Cordell Hull on what he would later call “the matter of Preuss,” requesting the latter’s “immediate recall.”⁸¹

Preuss’ behavior had also included taking other Commission members aside and explaining that he, not Pell, had U.S. government backing for his proposals and was the real “organ” of the American delegation, whereas as a political appointee Pell was a mere figurehead. Preuss’ own letters to other State Department officials indicated that the ambitious young lawyer was not happy with the appointment either: In addition to patronizing comments about Pell, a cranky Preuss elaborated that “I was lonely and found living conditions almost intolerable” and that he had been suffering from “two bouts of flu and a perpetual cold.” Preuss’ correspondence also suggests that he felt he had been promised some kind of professional advancement in exchange for his service on the UNWCC, and that he was eager to get back to the States to work on a “wider range of problems.”⁸²
For Pell, the last straw had been Preuss standing up in a meeting and openly opposing Pell’s proposal that “crimes committed in Germany for race, religion or political opinion, regardless of nationality” be taken into account. After outlining his grievances, Pell wrote, “It is manifest that this kind of thing cannot go on,” noting in April 1944 that Preuss’ “attitude during the last two months has changed completely” and that he was now “disagreeable and completely uncooperative.”

Despairing State Department handlers saw their chance when Pell returned to the U.S. for his son’s wedding in December 1944. The State Department in effect de-funded Pell’s job when they failed to include his salary and expenses in their budget request to Congress; nor could supplemental funds be found to return him to London. Basically, Pell was “bounced,” as he later put it – and with FDR’s clear collusion. A flabbergasted Pell even offered to fund himself, but to no avail.

Pell had returned to the U.S. with firm indications from his fellow delegates that he would be elected to chair the UNWCC upon his return to London, together with his opinions that had such alarming implications for U.S. domestic jurisdiction. For example, if a “crime against humanity” could involve the persecution of a domestic minority population without an ongoing state of war, what would prevent some future international tribunal from going after lynching in the U.S. South?

Pell continued to write plaintive letters to FDR, muttering about the “bitter enemies” he had made, and emphasizing that he felt that “the leading nation of the world should take less than ten months to decide whether or not internal persecutions for race and religion are war crimes . . . “ The foreign policy advisors around FDR preferred to freeze out Pell, ignore the UNWCC, and develop their own approaches to the problem of handling Axis war criminals.
Parallel developments on the British side meant that the Foreign Office was if anything even more interested in marginalizing the UNWCC. When the British chair of the Commission, Sir Cecil Hurst, resigned in disgust, initially claiming ill health, the controversy started to garner press attention: in January of 1945, the *New York Post* ran a story headlined “Hint Pell Fired for Plan to Avenge Jews,” while the *Washington Post* supported Pell’s position that the Allies should “punish far down the line” of responsible officials.\(^8^6\)

Pell went public. He fumed in an April letter to Stettinius that “I felt that as a private citizen there could be no complaint if I made public statements containing nothing that had not previously been published.” Drew Pearson published a long letter from Pell in the morning edition of the *Washington Post* with an unflattering account of Green Hackworth’s role in Pell’s firing (with the Legal Adviser sniffing that “you are the President’s appointee and not mine”) – a quote which was cut out of the late edition. The *London Express* publicized Pell’s assertion that “unnamed” American officials were undermining the Commission’s work and expressed doubts that Hurst’s resignation was really due to health concerns. On January 29 this same paper had run the headline “Hang All Gestapo Says the Dismissed Mr. Pell” on its front page.\(^8^7\)

Pell was even more scathing in letters to friends and sympathizers: “The whole story seems to me to be scandalous,” Pell huffed in a May 1945 letter to Vaclav Benes, then a delegate to the United Nations conference unfolding in San Francisco, representing Czechoslovakia: “The War Crimes Commission, during the course of 1944, recommended plans which, if carried out, would have been ample for the punishment of war criminals.” However, these plans had been “left to gather dust” in Legal Adviser Green Hackworth’s capacious circular file, and the problem was now acute: “Germany has surrendered and the entire problem remains in the air.”
We will probably get the same result that we did after the last war, and give an added sense of security to those who are planning a third [World War]. In his own diary Pell was blunt to the point of sounding a little unhinged: “The hideous mass murders which have horrified the world have been no surprise to me, and they should not surprise the lawyers of the State Department who are to a great extent responsible for them.” (While plenty of contemporaneous historical actors were frustrated or even furious with the State Department for all kinds of reasons, few if any actually held U.S. diplomats responsible for the Holocaust.)

Pell spent the rest of 1945 dolefully following the progress of the UN San Francisco conference and resulting United Nations Organization from afar, complaining to anyone in government or the press who would listen (and many who wouldn’t), and coughing up the occasional conspiracy theory in the process. He suggested that more than simply straightforward “anti-Semitism, which is, to a large extent, prevalent in the State Department,” might be responsible for State’s recalcitrant attitudes:

We cannot forget that one of the big war factories in Germany was the Opel Company which was owned and financed by the General Motors Corporation, a company in which Secretary Stettinius had a great interest. The biggest electric power company in Germany was owned and financed by the General Electric Company of New York. We have here very potent reasons why a large and important group in this country is trying to pipe down on the serious investigations of German war preparations.

Pell concluded wanly that “The only hope is public agitation.”

Pell had favored mass punishments, most dramatically in his calling for the hanging of the entire Gestapo. He noted laconically that this would mean “only one execution for every ten murders” committed by the Nazis. As one scholar wrote of Pell, “one can hardly imagine, for
example, a State Department bureaucrat living on a modest income demanding the death penalty for the entire Gestapo.”

One source of Pell’s independent spirit may indeed have been his independent income; another was arguably the fact that he had no legal training. In this sense he was similarly situated to Eleanor Roosevelt, who was criticized by various senators and prominent lawyers during her postwar confirmation hearings as US Ambassador to the UN because she “was not in any sense a person who was trained in legal concepts.” Pell was able to stay anchored in a wide-ranging and non-technical agenda.

Yet neither of the above rationales precisely captures the likely wellsprings of Pell’s striking sense of empathy. As U.S. ambassador to Hungary for most of 1941, Pell still had many contacts in that Axis country who were informing him of the horrific deportation of the Hungarian-Jewish population there, which was achieving its apogee (or nadir) in June 1944, coinciding with Pell’s increasingly acute frustration and more open advocacy. Yet his attitudes and predispositions must have long predated that crisis. Pell had not experienced personal struggles analogous to FDR’s experience with polio, for example. (When Eleanor Roosevelt was once asked whether the president’s illness had “affected your husband’s mentality” she reportedly replied, “[t]he answer is yes. Anyone who has gone through great suffering is bound to have a greater sympathy and understanding of the problems of mankind”).

In his work on the UN War Crimes Commission, Pell indicated that he had in mind certain lessons that he felt he had gleaned from his own childhood. Born not quite twenty years after the end of the U.S. Civil War, Pell recalled visiting relatives in the American South as a young man and seeing the old Confederate veterans holding court as they leaned against the statues of their favorite generals in the town square. He noticed how these old-timers seemed to
be universally venerated as local heroes in their small home towns. Pell predicted how, perhaps in “the future world of 1965,”

in a small German village, the local member of the Gestapo will be the hero of every beer garden and meeting place. He will tell the young boys of the excitement of Norway, the fun of shooting Jews in Poland, or the profit of looting France. They will look up to him, if for no other reason, because he is the only person in the village who will talk of anything but local gossip. Presently along will come someone hopeful of succeeding Hitler, who will tell these boys he is ready to take the risk of Hitler’s fate. He will ask these boys to join him, and tell them that by following him they can have the life of their glorious uncle who was the village hero who was honored and listened to by the entire population.

Above all Pell sought mechanisms for accountability that would “make clear to every last German that war is the most unprofitable enterprise in the world.”

* * * *

Standard narratives of the Nuremberg story often unfold without much reference to the UN War Crimes Commission. One of very few (minor) mistakes in Telford Taylor’s *Anatomy of the Nuremberg Trials* is his placid assessment that Herbert Pell had “resigned” because “the UNWCC had become a pretty discouraging place to work,” followed by the assessment that “the UNWCC played no significant role in shaping the Nuremberg enterprise.” In my own earlier work I erroneously accepted the common characterization of the Commission as “a weak evidence-collecting body” and the assessment of one otherwise excellent account that the controversy around the group was due to its “deciding not to include the Holocaust in its purview,” which didn’t really capture how these controversies unfolded or what was at stake.

One way to frame the significance of the UNWCC might be simply to argue that, for a brief moment at least, the Commission was able to crystallize some of the analysis and advocacy of what this chapter has been calling the “influential middle.” This relatively under-studied zone
of NGO, academic, mid-level bureaucrat, and mid-sized state activity was in turn further energized by the éclat of the “Pell affair.” The “radical” elements in the UNWCC alarmed U.S. and British planners enough to goose [them] into offering their own proposals more quickly, and making these plans more detailed and (a little) more thoroughgoing.96

It may be time to move beyond this minimalist narrative, however. Most broadly, the very idea of an inter-allied tribunal for the “major criminals” whose transgressions crossed various kinds of boundaries, as well as setting up a separate Far Eastern iteration, came to us in its most operational form from the UNWCC. The Commission had drafted various versions of its own charter for an international criminal court that could be “heard” in the bureaucratic world of the U.S. State and War Departments, in a way that quite similar earlier charters from the London International Assembly or other NGOs could not.

The State Department also managed to make the dismissal of Herbert Pell into a minor press scandal – or rather, to put Pell in a position where he could create a scandal -- and in the process garner much more attention for Pell’s views than if the Department had simply left him to stew in the London fog.97

More specifically, three of the desiderata of the 1943-44 “Pell phase” of the War Crimes Commission -- namely the basic label of crimes against humanity, the notion that heads of state do not have immunity from prosecution, and the companion concept that superior orders do not protect one from responsibility -- ultimately made it into the August 1945 Nuremberg charter. All three of these ideas had previously been evaluated unfavorably at various times in Whitehall and DC. These three ideas then went on to form the core of the UN’s postwar distillation of the “lessons” of the IMT for the world community, a set of human rights precepts known as the Nuremberg Principles.98
As noted, the more conservative State Department approach to crimes against humanity triumphed at the main Nuremberg trial, the IMT. The four-judge panel of the International Military Tribunal chose to interpret its charter restrictively, requiring a nexus with an underlying state of war. Language that was already in the air in the early World War II era had included crimes against Christian morality and crimes against civilization and humanity (the formulation from the 1899 Hague Conventions). By 1943-44, the label of “crimes against humanity” seemed to be striking just the right modern, inclusive tone with content that was for many simply a synonym for these older Verbrechen gegen die Menschlichkeit – Arendt’s “crimes against kindness.”

The legal scholars Hersch Lauterpacht, Sheldon Glueck, Bohuslav Ecer, Marcel de Baer, and arguably Jacob Robinson took the lead in using the pre-existing label of crimes against humanity as a vehicle for ideas that were meant to be conceptually distinct from war crimes.99 Yet the thin-skinned and blue-blooded Bertie Pell, who was no one’s idea of a thought leader, was the one capturing headlines by arguing for Menschheit --“humankind.”

Looking ahead, several of the twelve so-called ‘subsequent’ Nuremberg trials interpreted the count of crimes against humanity as much closer to the full-on Pell version, notably the Einsatzgruppen Trial of 1947-48.100 Chief Prosecutor Benjamin Ferencz -- whose journey from serving as Sheldon Glueck’s research assistant to concentration camp forensic examiner with Patton’s Third Army was discussed earlier in this section -- argued in his opening statement that:

War Crimes are acts and omissions in violation of the laws and customs of war. By their very nature, they can affect only nationals of a belligerent, and cannot be committed in time of peace. The Crime against Humanity is not so delimited. It is fundamentally different from the mere war crime, in that it embraces systematic violations of fundamental human rights, committed at any time, against the nationals of any nation.101
Ferencz’ analysis marks an astonishing leap: in effect, human rights violations on a massive enough scale may legitimate an intervention on the part of the international community. Rife as this assertion is with ambiguities -- who decides on behalf of the international community? Who actually does the intervening? – the implications are nevertheless quite radical. It is the use of the expansive, *Menschheit* version in this and other subsequent Nuremberg trials (1946-49) that is actually the best candidate for the much-vaunted title of “Nuremberg moment” in the history of ideas.

An even more capacious ‘maximum *Menschheit*’ version was perhaps conceivable, which would also have included a reference to stateless persons. However, in Ferencz’ opening statement above we can see the key conceptual move: a displacement of what some social scientists call a “nineteenth-century civilizational discourse” in favor of the more inclusive and pluralistic visions of humanity we see today.102

Not all at once, of course, but on the whole the trajectory going forward from Nuremberg was for Arendt’s “crimes against kindness” to be absorbed and then supplemented by what we would now consider to be the modern definition of crimes against humanity: Severe mass atrocities that may be committed against any civilian population at any time (that is, not just during wartime). This *Menschheit* version is in turn what makes crimes against humanity into a human rights idea. Such an analysis also suggests why any study of Nuremberg and its legacies beyond the superficial needs to incorporate an analysis of these 1946-49 trials, as well as the main International Military Tribunal.
[Poster from Hong Kong street, “Umbrella Movement” protests of September-December 2014]
Initial UNWCC member states were Australia, Belgium, China, Czechoslovakia, France, Greece, India, Netherlands, Norway, Poland, the U.K., the U.S., and Yugoslavia. By October 1945, the group had expanded to include Canada, Denmark, Luxembourg, and New Zealand. 

See, for example, this later description of Pell’s appearance as an elder statesman: “Towering a half-foot above his tall son [the newly-elected Senator Claiborne Pell] . . . [Herbert Pell] impressed the students there as the true diplomat -- distinguished white hair, pince-nez, well-filled vest, and a distinct, erudite speech with a slight European accent.” [Smith, 1960]

Baker, Cox, Blayney, Pell Oral History. Pell had also studied at Columbia but did not complete a degree.

Baker at 53.

Pell, 1936 letter.

“Tell Welles we have to give him something to do,” FDR instructed his presidential secretary, Marvin McIntyre, in July 1942. Pell’s appointment letter from Roosevelt specified a salary of $9,000 a year and was addressed to Pell at the Knickerbocker Club. Dated June 14, 1943, it indicated that Pell should proceed to London “as soon as possible.” FDRPL.

As a price of participation in the UNWCC, the USSR was insisting on seating all seven of the Soviet Republics actively engaged in the war as separate delegations. The request was based on an analogy with the British empire and dominions: India, Australia, and later, New Zealand, and Canada were each seated as separate delegations at the UNWCC. The British ultimately deemed the Soviet request “inadmissible,” in the words of Foreign Secretary Anthony Eden, because it increased “the possibility of the USSR demanding at future conferences separate representation for each of the Soviet Republics.” (The demand for seven seats was in fact famously reprised by the Soviets early on at the San Francisco conference to negotiate the UN Charter, meeting from April-June 1945.) FDRPL Pell to Secretary of State, Jan 20, 1944. On the unsuccessful Soviet attempt to insist on multiple seats in the UN General Assembly for individual Soviet republics, see chapter [X].

Pell to FDR, July 15, 1943 and August 28, 1943; Memorandum of FDR to Hull, Sept. 2, 1943; Personal to Secretary of State (Hull) from Herbert Pell, April 24, 1944, UNWCC.


Churchill War Cabinet Minute, June 25, 1942. (Interestingly, while the Hopkins Memo is only half a page, it mentions specific leading jurists as possible Commission members: “former Chief Justice Hughes, Tolstoy of Russia, Del Vayo of Spain, Sforza of Italy, Holdworth of England, and Dr. Wu of China.”)

Ibid; the second meeting of this British War Cabinet Committee (Committee on the Treatment of War Criminals) was on July 27, 1942. The Minutes included the proposed draft as an Annex. War Cabinet, Committee on the Treatment of War Criminals, “Proposal for a United Nations Commission on Atrocities.” marked “TO BE KEPT UNDER LOCK & KEY” and chaired by the Lord Chancellor (Viscount Simon); other attendees were the Lord Privy Seal (Sir Stafford Cripps), the Attorney General (Sir Donald Somervell), the Foreign Secretary (Anthony Eden), the Solicitor General (Sir David Maxwell Fyfe), and Sir Alexander Cadogan and Sir William Malkin of the Foreign Office, in addition to U.S. Ambassador John Winant and three other...
administrators. David Maxwell Fyfe went on to play a leading role at the Nuremberg IMT as the British Assistant Prosecutor.

12 1942 “Proposal,” 2-4. The Proposal indicates that the United Kingdom, United States, the USSR and China should be invited to send representatives, as should Belgium, Czechoslovakia, Greece, Holland, Luxembourg, Norway, Poland, Yugoslavia, as well as “the Fighting French” and “the Dominions.” At the meeting, Ambassador Winant agreed to seek President Roosevelt’s views on the proposal.

13 There is an exciting and quickly-growing literature on the UN War Crimes Commission, driven largely by historian Dan Plesch’s work in making the UNWCC deliberations more accessible and his own important scholarship emphasizing the group’s significance. See Dan Plesch, America, Hitler, and the UN: How the Allies Won World War II and Forged a Peace (London: I.B. Tauris, 2011); Kerstin von Lingen, others.

14 “War Crimes Listing to be Started Soon,” New York Times, October 21, 1943; John G. Winant, Telegram to the Secretary of State, October 26, 1943; John G. Winant, Telegram to the Secretary of State, September 1, 1943; see generally, War Crimes Commission, PSF, FDRPL.

15 During World War II, Nationalist China was often unblinkingly discussed as a “smaller” or “weaker” power in Western (and other) pronouncements about international relations, due in part to its partial occupation by Japan, and also due to its 19th-century history of being pressed for concessions by European powers. Koo sought and obtained Pell’s agreement that “a separate body of individuals must be gathered together to consider the Japanese question separately from the German . . . It is manifestly impossible to handle the Japanese affair except separately.” Pell Diary, Friday, 10 December 1943.


17 On the many shortcomings of the Leipzig trials in the wake of World War I, see chapter [X]

18 Pell to FDR, Jan 27, 1944.

19 Franklin Roosevelt, “Fireside Chat on Progress of War and Plans for Peace,” July 28, 1943. In context, Roosevelt was speaking specifically of Mussolini and his “fascist gang” shortly after Mussolini’s fall. (This was the same speech in which FDR announced the G.I. Bill of Rights.)

20 Letter of Jan 27, 1944. “Pea-soup fogs,” see Lawrence Preuss letter to Durward Sandifer (Division of Political Studies, Department of State, later of the Division of International Security and Organization), January 22, 1944.

21 On Lawrence Preuss as perfidious, see below, XX.

22 Pell to FDR, February 16, 1944.

23 FDR to Pell, March 1, 1944; Pell, “The Reminiscences of Herbert C. Pell,” 520.

24 Pell Oral History at 569

25 Pell Diary entry, n.d. but likely Spring 1945, after he had been relieved of his duties and the April 1945 death of FDR made it clear he would not be given a new position; see also Pell to Adolf A. Berle, Assistant Secretary of State, June 5, 1944 (Personal): “As you know I have been working ever since the Commission started to get the question of the Jews in Germany taken up by the Commission.” Letter of June 5, 1944.

26 See the descriptions of exile life in London in Jay Winter and Antoine Prost, René Cassin and Human Rights: From the Great War to the Universal Declaration, (Cambridge: Cambridge University Press, 2013), 144. See also Lynne Olson, Citizens of London: The Americans Who
A leader of the St James’s exiles, the Polish General Władysław Sikorski, garnered permission to locate many of the 30,000 or so Polish exiles accompanying him in Scotland, supposedly to supplement the defense of the Scottish coast. The Sikorski loyalists promptly established a series of detention camps, starting with one on the Isle of Bute for Poles whom Sikorski deemed his political enemies or simply undesirables, including communists, Jews, and those suspected of “moral failings” such as drunkenness or homosexuality. These camps continued to hold detainees until the spring of 1946, almost a year after the European war has ended; their most famous inmate was probably the historian Isaac Deutscher. See Simon Webb, *British Concentration Camps: A Brief History from 1900-1975* (London: Pen and Sword, 2016).

Noel F. Busch, “Ambassador Biddle: As multiple envoy to governments-in-exile, he is foremost U.S. expert on postwar plans and problems of Europe’s courageous little nations,” *Life Magazine*, Oct 4, 1943, 111, 118, 120. Anthony Joseph Drexel “Tony” Biddle was a (very) distant relative of Francis Biddle, the U.S. judge at the main Nuremberg Trial; their great-great-grandfathers were brothers.

Busch, “Ambassador Biddle” at 118, 120. Biddle liked to refer to the governments-in-exile as his “clients.”

Winter & Prost, *René Cassin* at 141; Cassin Diary quoted in *ibid* at 142.

St. James’s Declaration. Initial signatories included representatives of Belgium, Free France, Greece, Luxembourg, Poland, Norway, the Netherlands, Czechoslovakia, and Yugoslavia. Representatives having “observer” status at the meeting included the U.K., the British Dominions, India, China, and the U.S.S.R. British Foreign Secretary Anthony Eden opened the meeting, which was led by Sikorski.

Schemes favoring some kind of European union had a long history, but after the start of World War II were mostly limited to Anglo-American circles; see, for example, Pell’s observation: “Twenty nations, only four of which have more inhabitants than the State of New York, and none the area of Texas, in a territory no larger than that of the United States, manifestly cannot continue as totally independent units in the modern world. Inevitably some sort of economic union will have to be devised and some sort of political alliance developed.” [Pell cite] plus a huge amount of secondary literature, see especially A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (New York: Oxford University Press, 2001).

The final November 1942 Beveridge Plan, officially titled “Social Insurance and Allied Services,” had a number of earlier versions publicized throughout 1941. FDR once quipped that British economist William Beveridge’s various social safety-net proposals ought really to have been known as the Roosevelt Plan, since so many of the proposals were based on New Deal programs. I thank James T. Kloppenberg for directing me to this quote, which appears in Kloppenberg, *The Virtues of Liberalism*, (New York: Oxford University Press, 2000), 143. On the Four Freedoms and Atlantic Charter as human rights-related pronouncements, see generally Elizabeth Borgwardt, “‘When you state a moral principle you are stuck with it:’ The 1941 Atlantic Charter as a Human Rights Instrument,” *Virginia Journal of International Law* 46(3), November 2006, 501-562, and *NDFW*. 

---


---

27 A leader of the St James’s exiles, the Polish General Władysław Sikorski, garnered permission to locate many of the 30,000 or so Polish exiles accompanying him in Scotland, supposedly to supplement the defense of the Scottish coast. The Sikorski loyalists promptly established a series of detention camps, starting with one on the Isle of Bute for Poles whom Sikorski deemed his political enemies or simply undesirables, including communists, Jews, and those suspected of “moral failings” such as drunkenness or homosexuality. These camps continued to hold detainees until the spring of 1946, almost a year after the European war has ended; their most famous inmate was probably the historian Isaac Deutscher. See Simon Webb, *British Concentration Camps: A Brief History from 1900-1975* (London: Pen and Sword, 2016).

28 Noel F. Busch, “Ambassador Biddle: As multiple envoy to governments-in-exile, he is foremost U.S. expert on postwar plans and problems of Europe’s courageous little nations,” *Life Magazine*, Oct 4, 1943, 111, 118, 120. Anthony Joseph Drexel “Tony” Biddle was a (very) distant relative of Francis Biddle, the U.S. judge at the main Nuremberg Trial; their great-great-grandfathers were brothers.

29 Busch, “Ambassador Biddle” at 118, 120. Biddle liked to refer to the governments-in-exile as his “clients.”

30 Winter & Prost, *René Cassin* at 141; Cassin Diary quoted in *ibid* at 142.

31 St. James’s Declaration. Initial signatories included representatives of Belgium, Free France, Greece, Luxembourg, Poland, Norway, the Netherlands, Czechoslovakia, and Yugoslavia. Representatives having “observer” status at the meeting included the U.K., the British Dominions, India, China, and the U.S.S.R. British Foreign Secretary Anthony Eden opened the meeting, which was led by Sikorski.

32 Schemes favoring some kind of European union had a long history, but after the start of World War II were mostly limited to Anglo-American circles; see, for example, Pell’s observation: “Twenty nations, only four of which have more inhabitants than the State of New York, and none the area of Texas, in a territory no larger than that of the United States, manifestly cannot continue as totally independent units in the modern world. Inevitably some sort of economic union will have to be devised and some sort of political alliance developed.” [Pell cite] plus a huge amount of secondary literature, see especially A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (New York: Oxford University Press, 2001).

33 The final November 1942 Beveridge Plan, officially titled “Social Insurance and Allied Services,” had a number of earlier versions publicized throughout 1941. FDR once quipped that British economist William Beveridge’s various social safety-net proposals ought really to have been known as the Roosevelt Plan, since so many of the proposals were based on New Deal programs. I thank James T. Kloppenberg for directing me to this quote, which appears in Kloppenberg, *The Virtues of Liberalism*, (New York: Oxford University Press, 2000), 143. On the Four Freedoms and Atlantic Charter as human rights-related pronouncements, see generally Elizabeth Borgwardt, “‘When you state a moral principle you are stuck with it:’ The 1941 Atlantic Charter as a Human Rights Instrument,” *Virginia Journal of International Law* 46(3), November 2006, 501-562, and *NDFW*. 

46

35 Memo of Luxembourg Minister Hughes Le Gallais, Ambassador from the Netherlands Dr. A. Loudon, and Yugoslav Minister Constantin Fotitch to Secretary of State Cordell Hull, July 30, 1942; Hull MemCon July 31, 1942. The provisions of the St. James’s Declaration had already been the subject of appeals to the other “Great Powers,” Britain and the Soviet Union. See Punishment for War Crimes: Collective Notes Presented to the Governments of Great Britain, the USSR and the USA and Relative Correspondence, HMSO 1942.

36 Id. Many senior U.S. diplomats of this era could not speak, read, or understand French. This is perhaps unsurprising – numbers of U.S. policymakers such as Cordell Hull and Robert H. Jackson were initially educated in rural areas, where the early acquisition of additional languages tended not to be a priority – but it had certain concrete consequences when we study the intellectual and legal history of this era. For example, Ensign William E. Jackson, who like his father did not speak French, took his own notes at the 1945 conference negotiating the London Agreement, which contained the charter of the main Nuremberg trial (the IMT). These notes were valuable both to his father and to subsequent chroniclers of the IMT. But the contributions of André Gros and Robert Falco, the French delegates, remained untranslated in William’s notes, (which simply read “speaking French”). One might accordingly be able to argue that the influence of these delegates’ contributions was thereby reduced. [London Conference discussed in chapter 7.]

37 On the Morgenthau Plan, see U.S. Treasury Department, “Program to Prevent Germany from Starting a World War III,” September 9, 1944, in Foreign Relations of the United States, Quebec, 1944, 131–40; this proposal elaborated on a September 5, 1944 memorandum from Morgenthau to Roosevelt entitled “Suggested Post-Surrender Policy for Germany” in ibid., 101–6; see also Henry Morgenthau, Germany Is Our Problem (New York: Harper, 1945).


40 On the influence of religiously-based organizations on policy in this era, see especially the relevant chapters in Andrew Preston, Sword of the Spirit, Shield of Faith: Religion in American War and Diplomacy (New York: Alfred A. Knopf, 2012) and David A. Hollinger, “The Realist-Pacifist Summit Meeting of March 1942 and the Political Reorientation of Ecumenical Protestantism in the United States,” Church History 79(3) (September 2010), 654-77. See also

41 Raymond H. Geist, “Masters of Bigotry,” Delivered before the National Council of Christians and Jews in Washington DC on May 22, 1942 (Geist was then serving as the chief of the State Department’s Division of Commercial Affairs; his affidavit about the nature of the Nazi regime would later be quoted as part of the U.S. opening arguments at Nuremberg.) On FDR’s “Four Freedoms” (freedom of speech and expression; freedom of religion; freedom from want and freedom from fear), see, for example, the discussion in Borgwardt, “‘When you State a Moral Principle, You are Stuck with It: The 1941 Atlantic Charter as a Human Rights Instrument,” *Virginia Journal of International Law* 46(3), 2006: 501-63; and in “FDR’s Four Freedoms,” *Organization of American Historians Magazine of History*, special issue, Human Rights, 22(2), April 2008: 8-13.


43 Walter D. Head, Committee on Research as to Participation of Rotarians in Post-War World Reorganization, Rotary International, November 11, 1941; Geist at 468-69.


On the ultimate sterility of arguments about periodization, see, for example, Robert Brier, “Beyond the Quest for a ‘Breakthrough’: Reflections on the Recent Historiography of Human Rights,” *Jahrbuch für Europäische Geschichte* (2015), 155-173, warning against declaring any particular decade or “moment” as “the definite breakthrough for human rights.”


For a discussion of chivalry, the *Zong* litigation, and late eighteenth and nineteenth-century religiosity as it related to Abolitionism, see chapter 2.


Although do note that crimes against humanity as a legal label was by no means the focus of the main Nuremberg trial in real time. As the International Military Tribunal was being designed and as it was subsequently litigated, its main focus was on consolidating the idea of aggression or crimes against peace as an international crime for which individuals could be held accountable. See *NDFW*.

Berle speech notes, all dated August 1942, (no day of the month specified but before August 21). Holocaust/Refugee Collections, Materials from the Adolf A. Berle Jr. Papers and Diary. In the end, FDR used neither version, and quoted the Inter-Allied Commission (the authors of the St. James’s Declaration), who used the term “crimes against civilization.” Press Conference of August 21, 1942.

On the contemporary definition of crimes against humanity, see note XX below.

On exasperation with Pell at the State Department, especially on the part of Cordell Hull, Edward Stettinius, and State Department Legal Advisor Green Hackworth, see below, pages xx-xx.


“The War and Human Freedom: Address by Cordell Hull, Secretary of State, over the National Radio Network, July 23, 1942.”

Various U.S. government agencies such as the Office of War Information tended to use capitalization to signify importance, to make their layout more readable, and arguably also to suggest that terms such as ‘Fundamental Freedoms” had a specific content, usually by issuing pamphlets where pretty much every turn of phrase Roosevelt used was capitalized. This rather bombastic approach was selectively adopted by press commentators and others who by 1943 were referring to the Four Freedoms Address much the way one might refer to the Gettysburg Address, (and both are usually capitalized today). Capitalization norms are of course quite different in French and Russian, and radically different in German.

One reason for the possibly limited impact of Christian personalism among Anglo-American planners for war crimes trials in the early war years may be that it was a largely continental movement, sometimes with pronounced fascistic tendencies. See generally Samuel Moyn, “Personalism, Community, and the Origins of Human Rights,” in Stefan-Ludwig Hoffmann, ed., *Human Rights in the Twentieth Century*, (New York: Cambridge University Press, 2010), 85-106; on the “anti-man” see Jean Améry’s memoir *Jenseits von Schulde und Sühne* (“Beyond


64 The International Commission for Penal Reconstruction and Development (Cambridge Commission) held its first conference in Cambridge on November 14, 1941. The subcommittee on Crimes against International Public Order included Lauterpacht and Arnold D. McNair (the chair and one of Lauterpacht’s mentors), as well as V. Benes (Czechoslovakia), René Cassin (France), Marcel de Baer (Belgium), J.M. de Moor (Netherlands), Constantin Stavropoulos (Greece), among others. Confidential Report of the International Commission for Penal Reconstruction and Development, Section D (1942).

65 “The rules of warfare, like any other rules of international law, are binding not upon impersonal entities, but upon human beings.” Hersch Lauterpacht, “Confidential Memorandum on Punishment of War Crimes,” Committee Concerned with Crimes against International Public Order, Papers of the International Commission for Penal Reconstruction and Development under the Chairmanship of Arnold D. McNair, established by the Department of Criminal Science in the University of Cambridge (Cambridge Commission), n.d. but later referenced as being from July 15, 1942, at p.17. For the Jackson Opening Address, see chapter XX.

66 Who else was at Potsdam, etc.


69 State Department lawyer Katherine Fite (who was mistaken for a secretary in Elihu Lauterpacht’s reminiscences, as well as at the July 1945 Potsdam Conference), letter to her parents, August 5, 1945, Fite Papers, Nuremberg Collection, Truman Library; U.S. “Preliminary Trial Brief,” July 30, 1945, courtesy USHMM.
International Conference on Military Trials, Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945 (Washington, DC: USGPO 1949), 416. (There is a consensus among scholars that that this “eminent scholar” was pretty definitively a reference to Lauterpacht: see, for example, Schabas, Unimaginable Atrocities, 51.

See Pell to FDR, supra note XX. It bears underlining that Pell was not developing these ideas himself, but was corresponding with Glueck – whom Pell had tried to take to London as his legal advisor – and reading reports from the London International Assembly and the Cambridge Commission provided to him by the authors of those analyses, his fellow UNWCC members Bohuslav Ecer and Marcel de Baer.


Pell to Stettinius, Oct 30, 1944; (Pell mentions that he was writing to Stettinius, at that time serving as Undersecretary of State, because Secretary Hull was ill.) On the lack of resources and other support for the UNWCC, see also Arieh J. Kochavi, “Genocide and Crimes against Humanity: United Nations War Crimes Commission,” Genocide Encyclopedia, http://www.enotes.com/genocide-encyclopedia/united-nations-war-crimes-commission consulted January 26, 2016, and see generally Kochavi, Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment (Chapel Hill: University of North Carolina Press, 1998).

Pell to Stettinius, Oct 30, 1944.

Pell to Stettinius, April 18, 1944. See Pell Diary for Saturday, December 11 1943: “I lunched with Lord Atkin [the Australian UNWCC representative] at the Reform Club. We again discussed the possibilities of the Commission and he once more expressed his fear of ‘legalism.’ I told him I would do everything I could to prevent the Commission from being turned into a political tool or farce.” Pettifoggers: undated diary memo but likely April or May 1945.

Blayney, “Diplomat and Humanist,” 164, 175, 190-192; Pell Oral History at 587, 603. Glueck continued to send memos to Pell and especially to General Marcel de Baer, the Belgian representative who was chair of the Committee on Facts and Evidence of the UNWCC.

Hull to Pell, July 15, 1944, (drafted by State Department Legal Adviser Green Hackworth.)

Id.

Pell to Stet, April 17, 1945; “Memorandum” (appended to diary entries), describing a Dec 23, 1944 dinner with the U.S. Ambassador to the Court of St James’s, John Winant, (Pell Diary n.d. p.3).

Id.

Pell undated memo to diary [spring 1945]; Pell to Stet, April 17, 1945.] See also Pell: “I had asked to have my as my assistant, Professor Sheldon Glueck, of the Harvard Law School, who had specialized in the study of war crimes. The [State] Department did not send him, but sent me a Mr. Lawrence Preuss, who had been a lecturer on international law at a mid-western university. I very soon discovered that an essential part of his duty was to write letters . . . derogatory of me, and obviously designed to undermine my influence.” Pell undated memo [spring 1945].
To ERS Jr.
ok – You do it – at last

FDR

Memorandum from Secretary of State Stettinius to FDR, Dec. 27, 1944, Pell mentions his offer to serve without pay in a letter to Walter Lippmann, June 4, 1945.

Pell to FDR, April 5, 1945. It is unlikely that FDR ever saw this communication. Pell never worked for the government again, although in the wake of FDR’s April 12 death Pell lobbied hard for another diplomatic post and later sought to be appointed as Librarian of Congress. He somehow wrangled an April 15 meeting with a very reluctant Stettinius, where Stettinius apparently took phone calls for virtually the whole meeting. See Pell to Stettinius, April 19, 1945.


[April 17, 1945, Pell to Stet]; Drew Pearson column, Washington Post, June 6, 1945; “long version” and excerpt of what was cut for the late edition in “Miscellaneous,” Bernays Papers; London Sunday Express, January 28, 1945, 3; London Express, January 29, 1945, 3. [Hurst resignation].

Pell to Vaclav Benes at UNCIO SF, May 7, 1945, Pell Papers, Box 28. Pell to Adolf A. Berle (Assistant Secretary of State), June 5, 1944 (Personal), Pell Papers. Green Hackworth, the State Department Legal Adviser, was the official who had actually fired Pell and who had drafted some of the harshest instructions seeking to rein Pell in. Pell later described his nemesis as “a very limp anti-Semite.” Pell to Representative Emanuel Celler (D-NY), February 4, 1946, Correspondence Files.

April 24 1945 Diary entry, Pell Papers.

Pell to David Drucker, Secretary of the International Lawyers Committee, September 28, 1945.

FDR to Pell, March 1, 1944; Pell, “Omission and Commission,” undated paper written shortly after his dismissal from the UNWCC, Pell Papers, 63; Pell Oral History, 655; Blayney, “Diplomat and Humanist,” 12.


Eleanor Roosevelt quoted in Geoffrey C. Ward and Ken Burns, The Roosevelts: An Intimate History, (New York: Alfred A. Knopf, 2014), 335 (Geoffrey Ward himself suffers from polio). FDR had contracted the disease in 1921. In later life, FDR would mention both the suffering involved with his case of polio and the time he spent in Hot Springs, Georgia -- where he purchased a house which came to be known as the ‘Little White House’ and established a treatment center for polio victims—and where he was also a firsthand witness to poverty and racial inequality that shocked him. I thank Richard Breitman for suggesting that Pell’s
experiences as ambassador to Hungary (and Portugal) might also offer a clue to the strength of Pell’s advocacy.

94 Pell correspondence quoted in Baker, 255-56; 265.

95 Telford Taylor, The Anatomy of the Nuremberg Trials: A Personal Memoir (New York: Alfred A. Knopf, 2002), 28 (Taylor had served as an associate prosecutor at the main IMT, and then as Chief Prosecutor for the subsequent Nuremberg trials); NDFW; Gary J. Bass, Stay the Hand of Vengeance.

96 Bass; Washington Post, January 31, 1945, 10; “Punishment of War Criminals,” USDSB.

97 Out of numerous possible pre-Nuremberg examples, see, for example, Resolution adopted by the London International Assembly (October 12, 1942), recommending that “some crimes against mankind should be branded as such and made punishable by international law,” LIA Reports at 2139.


99 Jacob Robinson of the Institute of Jewish Affairs served as a “special adviser on Jewish affairs” to Robert H. Jackson at the main Nuremberg trial, and then as an adviser to Telford Taylor at the Flick trial (one of the “subsequent” Nuremberg trials). Robinson’s memo of December 6, 1945, “General Report to the Combined Staffs of the Office by Dr. Jacob Robinson on the Nuremberg War Crimes Trial,” expressed disappointment about the limited interpretation of crimes against humanity in the Nuremberg charter: “Many of us took it for granted that crimes against humanity are within the jurisdiction of the IMT; this is true, however, only for such acts as are tied up either with the crime of the war of aggression or with ‘war crimes’ in the technical sense.” Nuremberg Collection (on-line), Truman Library, 1-2. See also Robinson’s essay, “The Nuremberg Judgment: Crimes against Humanity,” in IJA Congress Weekly (October 25, 1946). On Robinson and Lemkin’s roles, see chapter XX.

100 The Einsatzgruppen were SS mobile killing units working in Nazi-occupied Eastern Europe, most actively from 1941 to 1943. Evidence from the Einsatzgruppen trial showed how these units had been responsible for the deaths of roughly 1 million Jews, and unknown numbers in the tens of thousands of Soviet local leaders, Sinti/Roma, disabled persons, and other anti-Nazi partisans. Twenty-four defendants were tried and twenty-two were convicted of crimes against humanity in what the Associated Press dubbed “The Biggest Murder Trial in History.” Einsatzgruppen Trial, U.S. v. Otto Ohlendorf, et al., Trials of War Criminals before the Nuremberg Military Tribunals (NMT), Case No. 9, Session of September 27, 1947. For discussion and analysis of these subsequent Nuremberg trials, see chapters XX and XX.

101 Given the archival evidence presented in this chapter, this quotation marks an astonishing conceptual leap. (The Subsequent Nuremberg Trials were convened under the authority of Control Council Law No. 10, which governed the U.S. Zone and was based on the Nuremberg Charter but not identical to it. For a discussion of these differences see chapter XX.)