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**Greg Burgess**

**THE HUMAN  
RIGHTS DILEMMA  
IN ANTI-NAZI  
PROTEST:**

**The Bernheim  
Petition, Minorities  
Protection, and the  
1933 Sessions of the  
League of Nations**



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Franz Bernheim, a 33 year old German citizen formerly of Gleiwitz in German Upper-Silesia, was discharged from his employment at the Deutsches Familien-Kaufhaus, Gleiwitz branch, in April 1933. On 17 May 1933, he filed a petition with the secretariat of the League of Nations claiming that as he was Jewish and his dismissal followed the introduction of the Nazis' anti-Jewish laws and administrative measures, it was in breach of the minorities protection provisions of Part III of the German-Polish Convention on Upper-Silesia of 15 May 1922.<sup>1</sup>

Bernheim's petition invoked the guarantees for the protection of racial, linguistic and religious minorities that the League of Nations had assumed as the sponsor of the minorities treaties. The League's responsibilities in fulfilment of its guarantees under Part III of the German-Polish Convention on Upper Silesia, the petition asserted, was to void the 'laws, decrees and administrative measures in contradiction' of the Convention, and order that 'Jews injured by these measures shall be reinstated in their rights and that they shall be given compensation'.<sup>2</sup> In short, his petition demanded that the League of Nations rule on the invalidity of the Nazi anti-Jewish measures as far as they affected German Upper Silesia, and order proper redress.

This provided a very real moment early in the life of the Nazi regime for the international community assembled in the League of Nations to rule on its race policies. The petition arose from international concern and protest at the situation confronting Germany's Jews, and turned the force of international law, of which the League was both sponsor and arbiter, onto a state whose actions and policies cast a dark shadow over Europe.

The petition was firmly grounded in Germany's convention obligations, but it was extremely sensitive politically. It directly demanded that the member states of the League of Nations confront another member state over the discriminatory treatment of certain members of its population. The League was both the representative body of sovereign states and the guarantor of the minorities protection treaties, which had come into force at the Paris Peace Conference of 1919. This exposed it to conflicts between upholding the sovereignty of states to act in their own interests, and protecting the rights of specific citizens of certain member states. If Bernheim, as he claimed, was a member of a protected minority under the German-Polish Convention on Upper Silesia, then his petition raised a profound dilemma. How could the rights of citizens be protected without breaching a state's sovereignty? His petition was all the more sensitive since this Convention related to one small part of German territory but the anti-Jewish measures of which it complained applied throughout Germany. Any act of the League in favour of Bernheim necessarily exposed it to direct intervention in German domestic affairs. The conflict between state sovereignty and principles of the protection of rights therefore exposed the League of Nations to the same dilemma with which the United Nations still wrestles today: how can states, even when acting in concert, respond to human rights abuses in another country? If we omit the emotive phrase 'human rights abuses', and pose the question more diplomatically, it becomes more difficult: by what right can one state, or a number of states acting collectively, interfere in the internal affairs of another sovereign state?

René Cassin, a member of France's delegation to the League of Nations in 1933, seems first to have considered the human rights

dilemma that Bernheim's petition raised.<sup>3</sup> On two occasions at the Academy of International Law in The Hague, in 1951 and in 1974, Cassin recalled the Bernheim petition and the serious problems to which it exposed the League of Nations. He believed it marked a turning point in the scope of international law, the conception of human rights, and in the capacity of international law to protect the human rights of individuals. He recalled in 1974 that the petition revealed the 'gaps' that suddenly emerged in the 'respect for the rights and liberties of all humans'.<sup>4</sup> In 1951 he was more expansive. The petition marked a 'rupture in the vital question of human rights' because it posed this question: was an individual an object of international law, or a 'person under international law', with obligations but also with juridical protection and the guarantee of rights?<sup>5</sup>

At the very time when the question of Germany's treatment of its Jewish population cast a heavy shadow, Cassin recalled Joseph Goebbels' entry into the League Assembly Hall surrounded by his armed bodyguard, signalling that 'his "sovereign" country could not support any external interference in its policies towards its nationals'. This left a profound impression on Cassin: it was the 'first indication', he recalled, 'of a will to defy humanity by defying human rights'.<sup>6</sup>

Cassin was not merely looking back from the substantial achievements in establishing international standards of the recognition of human rights following the Second World War to a moment when the absence of these standards was all too apparent. Indeed, he suggests much more than this. He recalls the important question of how human rights were conceived at this critical

moment of history, and challenges us to reconsider why the League of Nations could not confront this 'will to defy humanity'.

Historians of Europe's descent into a new world war and Holocaust have generally neglected this moment when the international community was asked to confront the Nazi race policies. Some important works have stressed the petition's significance in the context of the first wave of German Jewish refugees in 1933, observing its part in drawing international attention to the situation of the Jews in Nazi Germany. But they have not turned their attention to the challenge it made to this 'will to defy humanity'. Michael Marrus, for example, comments that the League's consideration of the petition illustrated Nazi sensitivity to international opinion at this time.<sup>7</sup> Vicki Caron concludes positively that the Bernheim 'affair', as she calls it, had the successful outcome of the reaffirmation of the principles of minority protection the League of Nations had assumed in 1919—a conclusion which, as will be shown below, misunderstands its significance.<sup>8</sup> On the other hand, Lucy Dawidowicz emphasises the view that the Bernheim petition revealed the limited effectiveness of the League's minority guarantees. She dispenses with it in a footnote, concluding that the outcome of the League's deliberation on it was of no more than academic interest since Germany quit the organisation in October 1933 anyway, and the League could exert no influence on German internal policies.<sup>9</sup>

Only recently, it seems, has Cassin's testimony as to the importance of the Bernheim petition been recalled in the context of human rights protection. Generally, the history of human rights seems poorly understood, because of the broad view taken of the evolution of contemporary human rights standards and international

conventions, and the search for recognisably contemporary discourses in quite different historical contexts.<sup>10</sup> Nevertheless, some recent attempts at writing the history of human rights in the early twentieth century consider the Bernheim petition a key moment, finding it a brief awakening of human rights ideals before they again became dormant. Burgers and Lauren represent it as an act of defiance to the severe challenges facing human rights, and as a device through which the failure to protect these rights can be viewed.<sup>11</sup> However, the historicism of their works contrasts the absence of a compelling 'human rights idea' during the interwar years with the collective will of the years after the Second World War to move towards consolidating human rights in international treaties. The attempt to institute human rights protection through the League of Nations seems, much like the League itself, a noble failure.<sup>12</sup>

Certainly, Bernheim's petition shows how the absence of international standards of human rights were felt as Jews turned to the League of Nations for protection. A review of the petition within this narrow context would be helpful in understanding the limits of protest and the constraints acting on the League member states, but would reveal little of the underlying pressures and ideals that shaped the League's responses to it. Therefore, this article re-evaluates the petition in its broadest context to shed new light onto how the League confronted the challenge of Germany's 'will to defy humanity'. It argues that Bernheim's petition transformed notions of rights, as principles of individual rights emerged to take the place of an incomplete and defective system of collective rights protection. Because the petition exposed the 'gaps' in the 'respect for the rights of liberties of all humans', to repeat Cassin's assessment, it inspired moves to place these rights onto firmer

ground. But the protection of individual rights, unlike the protection of collective rights, demanded greater limitations to state sovereignty, which none was prepared to concede. The petition therefore exposed the League to the dilemma of the protection of the human rights of the citizens of a sovereign state in the face of resistance to the very idea of limiting state sovereignty. It therefore had profound significance on how rights and their protection were conceived in the years before the Second World War.

### ***1. Minority Rights and the Upper Silesia Settlement***

The redrawn borders of Central and Eastern Europe and the creation of new nation-states had the adverse consequence of displacing many millions of people from a national homeland.<sup>13</sup> These large national minorities presented more than a problem of redefining citizenship on a geographical rather than a national basis. They were a potential threat to the peace. Their unresolved nationalist aspirations and desires to be incorporated, or reincorporated, into their national homelands endangered the viability of the redrawn borders and the security of the newly created states. The status of these minorities in their respective states was therefore seen to be essential to a lasting peace. The drafting of treaties to assure the protection of these minorities accordingly paralleled the peace negotiations because the security of their rights was vital to the post-war order. As a result, the new and reformed states were required to commit themselves to the protection of the minority populations in their territories from racial, linguistic and religious discrimination to secure recognition of their independence and membership of the League of Nations. By assuring the rights of minorities, it was believed, the loyalty of citizens to the state would be assured, the stability of the state

would be assured, and therefore the peace between states would not be troubled.<sup>14</sup>

This explains why the German-Polish Convention on Upper Silesia, the purpose of which was to resolve tensions between two countries over disputed territory, contained provisions for the protection of racial, linguistic and religious minorities. Prior to the First World War, Upper Silesia was German territory. At the Paris Peace Conference, Poland claimed that it was geographically, historically, and demographically Polish territory, and that its coal and industrial resources were necessary for the economic viability of the new nation-state. Under French pressure, the allies initially ceded Upper Silesia to Poland, but Germany refused to relinquish its claims because of its economic importance. This impasse threatened the progress of the peace settlement, and Britain and the United States sought a compromise through a self-determinative plebiscite. In the mean time, the territory was occupied by an allied force, which attempted to keep the peace between two hostile, demoralised and insurrectionary populations. The plebiscite was held in March 1921. Intended to resolve tensions between Germany and Poland, the plebiscite only further exacerbated them. The German and Polish populations were indivisibly mixed, and no definite frontier between the two could be drawn. Communes with a German majority could not be separated from those with a Polish majority.<sup>15</sup>

The League of Nations intervened to draw up a plan for the territory's administration during this difficult transition. The outcome was the German-Polish Convention on Upper Silesia, which divided the disputed territory into two parts, one ceded to Germany, the other to Poland. A Mixed Commission, composed of

an equal number of Polish and German commissioners, and an international Arbitral Tribunal to rule on disputed matters, would administer both territories. The Convention set out the framework for the economic, civil and social organisation of both parts. Broadly, it set in place a 'regime of convalescence' after partition that 'pursued the object of eliminating ... the chief inconveniences and dangers of territorial division and cession' until a definite settlement would again be attempted in 15 years time.<sup>16</sup> The convention came into force on 15 May 1922. Partition created two large minority populations in both territories detached from their national homelands: Poles assigned to German citizenship, and Germans to Polish citizenship. Part III of the Convention specifically addressed this, setting out the rights of both minority groups against discrimination based on race, language or religion.<sup>17</sup>

The minorities provisions of this Convention applied to the racial, linguistic and religious minorities of the partition territories the same protection regime as minorities treaties introduced at the Paris Peace Conference. Although their intended purpose was the protection of the peace through the protection of the interests of national minorities, the recognition of collective rights necessarily raised questions of rights more broadly. Was not the free exercise of racial, linguistic or religious difference a right of all people and not just minorities?<sup>18</sup> This awkward question was not new to the diplomats who negotiated the peace and the Covenant of the League of Nations. When the Japanese delegation proposed that the minorities problem could be resolved with a single clause inserted in the League of Nations' Covenant, the allied powers found its implications discomforting. This clause would have proclaimed the 'equality of nations' as its 'basic principle', while committing member states 'to accord ... to all other nationals ... equal and just

treatment in every respect, making no distinction, either in law or fact, on account of their nationality'.<sup>19</sup> But the proposal was quite deliberately rejected. States with indigenous or colonial populations would be held by this clause to recognise and protect the rights of all nationalities under their governance and therefore throw into question their hegemony over other races.<sup>20</sup> In the eyes of American delegates to the peace conference, the views of Britain's dominions decided its vote: Australia had more influence with London than Tokyo, they observed.<sup>21</sup> But President Wilson's opposition seems to have carried greatest weight.<sup>22</sup>

Because they raised broader questions about rights, the minorities treaties became human rights documents in spite of themselves. Their recognition of rights and the guarantees of protection of these rights gave them a humanitarian force the diplomats in Paris might not have envisaged. The Polish Treaty of 28 June 1919, which was the first to be drafted and therefore served as the model for the others, illustrates the clear humanitarian implications of the treaties despite their original political design. Article 2 stated that Poland was obliged to 'assure full and complete protection of the life and liberty of all inhabitants without distinction of birth, nationality, language, race or religion'.<sup>23</sup> This constitutes a general declaration of the responsibilities of the state towards its people. But the Polish state was held to a specific responsibility to national minorities in its territory because they had the protection of their life and liberty guaranteed by the League of Nations. Article 12 of the Treaty read: 'the stipulations in the foregoing Articles, so far as they affect persons belonging to racial, religious or linguistic minorities, constitute obligations of international concern and shall be placed under the guarantees of the League of Nations'.<sup>24</sup>

A state's obligation to those inhabiting its territory was clear. The minorities treaties classified minorities as peoples of international concern with specific international guarantees of protection should the treaty state fail in its obligations. The nature of these guarantees, however, was determined by administrative procedures within the League itself and was not made explicit in the treaties, but they commonly allowed grievances to be expressed through petitions to the League secretariat. The major fault in these treaties, however, was not ambiguities about the nature of the guarantees; rather, the disparities between treaty and non-treaty states created an unequal system of rights protection. The treaties placed obligations on some states and not others, and because of their position as victors, the 'Allied and Associated Powers' which dominated the peace conference could impose minorities obligations without adopting similar responsibilities.<sup>25</sup>

The treaties were consequently applied unevenly. A number of critical observations follow from this. First, the treaties imposed on the new and reformed states of Central and Eastern Europe the allies' vision of an harmonious Europe while the allies assumed no commensurate obligations. This created a sharp distinction between the major powers and other states despite the theoretical equality of all members of the League of Nations. This engendered resentments among the treaty states at their unequal status. Second, although the treaties assumed that minorities would become loyal members of the state in which they held their citizenship, and that over time this would diminish their claims to self-determination, the uneven status between the minority and the majority population among whom they lived created a permanent population of foreigners. This could lead to instability.<sup>26</sup> Third, the system of League guarantees for the protection of national

minorities in the treaty states raised the possibility of member states interfering in the internal affairs of another member state. The serious political questions that flowed from this raised many doubts about the effectiveness of these guarantees. How would the League act to enforce compliance to the treaty obligations against a recalcitrant state? Finally, the system of minorities protection contradicted, and even impeded, the recognition of more general notions of rights, as expressed, for example, in Article 2 of the Polish Treaty. This prescribed a state's responsibilities towards all its people, but the protection of rights was guaranteed only for those who did not fit this basis of state membership because of their racial, religious or linguistic difference. There were no similar guarantees for other members of the national population for persecution or discrimination for other reasons—such as political opposition to the regime. As this was not the intent of the minority treaties, they therefore left a gap in human rights protection.<sup>27</sup>

The minorities treaties were therefore uneven because they set in place a system that recognised the collective rights of minorities but not individual rights of all citizens. The treaties also introduced an imbalance into international affairs, creating a source of grievance between the new states of Central and Eastern Europe and the powerful allied states who gave no similar undertaking to protect their own minority populations. The League was sensitive to this imbalance. On 21 September 1922, the Assembly adopted a resolution whereby all member states committed themselves to apply the principles of the minority treaties to minorities of their territories:

The Assembly expressed the hope that the States which are not bound by any legal obligations to the League with respect to minorities will

nevertheless observe in the treatment of their own racial, religious and linguistic minorities at least as high a standard of justice and toleration as is required by any of the treaties and by the regular action of the Council.<sup>28</sup>

This commitment was not binding and without guarantees. No moves were made to give this undertaking conventional force, until 1933, when the Bernheim petition renewed concerns about the gaps in the protection of human rights.

The remaking of Central and Eastern Europe jeopardised the status of Jews who had enjoyed the rights of citizenship in the German and Austro-Hungarian Empires. In 1919 there was an urgent need to assure the protection of Jewish rights in the successor states. Jewish organisations therefore embraced the minorities treaties as an opportunity to pursue their concerns. This far outweighed any technical questions about whether Jews could properly be considered a 'national minority' or a 'religious minority', as these terms were understood in the context of the minorities treaties.<sup>29</sup> Jewish organisations therefore embraced the peace conference as a means of redressing some of the difficulties Jews encountered in Eastern Europe, notably the denial of citizenship in Romania, and the restrictions of rights imposed on Jews in Russia. Minorities protection would allay fears that similar situations could arise in an independent Poland and would grant Jews equal status throughout Central and Eastern Europe.<sup>30</sup> The French Alliance Israélite Universelle, and the British Jewish Joint Foreign Committee pressed these issues, demanding religious and cultural autonomy. In 1919, nationalist Jewish bodies, including those in Canada and the United States, formed the Comité des Délégations Juives—the forerunner of the World Jewish Congress—to represent Jewish national rights at the peace conference.<sup>31</sup> Although these

organisations were divided on their general objectives, they were nevertheless united in securing rights for Jews in the reconstructed Europe.<sup>32</sup>

The guarantees of collective rights in the minorities protection clauses of the Upper Silesia Convention were soon invoked to protect individual rights, as aggrieved individuals used their right of petition to protect their socio-economic interests.<sup>33</sup> Even before Bernheim made his petition in May 1933, the Convention had already become an instrument for the protection of individual rights. Furthermore, as the Convention was the only minorities protection obligation to which Germany could be held, it became the focus of Jewish protest.

## ***2. Jewish Protest and the League Council***

Jewish protest turned to the question of rights enforcement when popular protest at Nazi anti-Semitism only made the position of Germany's Jews much more precarious. From March 1933, an informal coalition of Jewish and Christian organisations emerged in the United States and Britain to channel the 'wave of indignation' at Nazi anti-Semitism into protests to spur their governments to intervene.<sup>34</sup> At the same time, an informal boycott of German trade was gaining momentum. By late March, New York businesses had cancelled an estimated two million dollars worth of orders in Germany, and Jewish importers were moving to stop more than half of Germany's sales in the city.<sup>35</sup> The growing strength of this boycott worried Jewish organisations as it was not organised and risked the 'blunder' of deflecting protest from Nazi anti-Semitism onto all that Nazism stood for.<sup>36</sup> Nevertheless, the boycott garnered much popular support and strengthened the general

protest movement.<sup>37</sup> For their part, official organisations channelled their energies into public meetings and massed rallies. The largest, held at Madison Square Gardens in New York on 27 March, was planned to coincide with similar meetings in London and across the United States, and other international protest. Jewish shops and factories in Warsaw, for example, closed as their first step in a boycott of German trade.<sup>38</sup>

German reaction overshadowed the success of the Madison Square Gardens rally, however.<sup>39</sup> Goebbels roundly condemned the anti-German attitude of the foreign press, and announced an organised campaign against Jewish business and professions in Germany. This, he said, was a 'counter-movement' to the foreign boycott and press campaign against Germany, and would only be cancelled if foreign governments repressed these anti-German activities.<sup>40</sup> Protests abroad about the treatment of the Jews under the Nazis was therefore an excuse for the 1 April boycott of Jewish business and professions. Goebbels' threat to continue the boycott if the anti-German campaign abroad did not cease revealed the futility of popular protest: it only worsened the position of German Jews.<sup>41</sup>

It had become quite clear that protests against Nazi anti-Semitism did little more than reinforce Nazi propaganda of an international Jewish conspiracy against the German nation. A new strategy was required. One had already been suggested. Louis Lipsky, national chair of the American Palestine Committee suggested in March that the minorities protection mechanisms of the League of Nations be invoked.<sup>42</sup> This could only be done in German Upper Silesia, however, where the treatment of the Jews had already given cause for concern within the League of Nations.<sup>43</sup>

It soon became clear that Jewish organisations had decided to use the minorities clauses of the Upper Silesia Convention to bring the conditions of German Jews squarely before the international community. On 17 May, the Secretariat of the League of Nations received a petition from twenty Jewish communities in Poland on behalf of 'German Jews of Upper Silesia and in Germany as a whole'. Another had been received from an unnamed Czech Jew, with the support of American and English Jewish associations.<sup>44</sup> Bernheim's petition was the third filed with the League of Nations on this day.<sup>45</sup>

The Comité des Délégations Juives once more stepped forward to represent Jewish minority interests in Central and Eastern Europe. Its leader, Leo Motzkin, along with Dr. Emil Margulies, President of the Jewish Party of Czechoslovakia, filed the petition with the League Secretariat on Franz Bernheim's behalf. At the same time, they both also filed a petition in their own names as representatives of various Jewish organisations, including the American Jewish Congress, and Jewish committees in Vienna, Warsaw, Sofia and other Central and East European cities. This petition listed the anti-Jewish measures instituted in Germany since April 1933 that were specific violations of the Upper Silesia Convention, but emphasised their impact on all German Jews.<sup>46</sup> A third petition, from Jewish members of the Polish parliament, the Club Juif à la Diète de la République Polonaise, was also filed, claiming that the situation in Upper Silesia concerned all Jews in Poland.<sup>47</sup>

Bernheim's petition made the strongest case of the three because he, unlike the other petitioners, was a member of the discriminated minority. Certainly, his personal petition was vital to

the general strategy of protest. As a Jew and German national formerly resident in German Upper Silesia, he could legitimately claim the protection of his rights from the League of Nations as a 'member of a minority' within the terms of the Upper Silesia Convention, whereas the collective petitions of Jewish organisations did not meet these terms. Indeed, the concerns raised in the various petitions under the Convention were concentrated onto Bernheim's. The League Council and Germany both agreed that as the contents of these petitions were similar, Bernheim's personal petition represented them all.<sup>48</sup> There was, consequently, no formal deliberation on these other petitions.

A 'flutter of expectation' greeted the Council's first deliberations on the petition on 27 May.<sup>49</sup> Public opinion and not procedural formalities obliged the Council to address it urgently, and its agenda was rearranged to bring it forward.<sup>50</sup> However, there were doubts about its admissibility, and it was uncertain how the League's Council would proceed. The anti-Jewish measures at the centre of its complaint—the restrictions on Jews in the legal and medical professions, and in German schools and universities, as well as the boycott of Jewish businesses—did not relate to Bernheim personally.<sup>51</sup> Germany contested the petition's admissibility on these grounds, and added that as Bernheim was living in Prague at the time he made the petition and had severed his ties with Upper Silesia, he was not a member of a minority under the terms of the Convention.<sup>52</sup>

At this point, the important issues raised in the petition might have been subsumed by technical questions of its validity. Recognising the intense public interest that the petition had stirred, the Council decided not to let itself be distracted by such

unproductive arguments, and referred the questions of admissibility to a special committee of jurists. Here it was found that, contrary to Germany's objections, the petition was indeed admissible under the terms of the Convention and under League procedures.<sup>53</sup> The Council then proceeded quickly to resolve the matter, and adopted a formal report into the specific issues raised in the petition. The report, prepared by Sean Lester of the Irish Free State, concluded emphatically that 'a mere perusal of the laws and administrative measures' referred to in the petition were in clear conflict with a 'number of clauses' of the Upper Silesia Convention. However, because these measures concerned Jewish civil servants, lawyers, doctors, and Jews in German schools and universities, the Council found that Bernheim had no valid claim of personal grievance resulting from them. He had been dismissed from a German business, which allowed the German delegate on the Council, August von Keller, to claim that this was due to 'errors' and 'misconceptions of the internal laws by subordinate authorities'.<sup>54</sup> As local procedures under the terms of the Convention were available in Upper Silesia to investigate the reasons for Bernheim's dismissal and award compensation if his grievance was upheld, the Council could do no more than refer the matter on to the Mixed Commission.<sup>55</sup> The Commission decided that he had been dismissed because of the bad quality of his work and his communist tendencies, and not because of instructions from any official agency. His complaint was finalised with compensation of 1,600 Marks.<sup>56</sup>

Bernheim's petition was one of 47 complaints by Jewish employees, doctors and lawyers under the minorities clauses of the Upper Silesia Convention brought before the Mixed Commission and dealt with under local procedures. Of these, 39 had a positive

outcome: 23 were resolved by some sort of compromise and 16 were resolved by reinstatement.<sup>57</sup>

The terms of the Convention restricted the Council to issues pertaining only to German Upper Silesia. It had no basis for ruling on the treatment of Jews elsewhere in Germany. Perhaps because this was recognised from the moment the Council received it, the petition did not arouse greater tension with Germany. The formalities passed very much as a matter of fact. No controversies followed the adoption of both the committee of jurists' report and Lester's report on the petition's specific complaints. Both Germany and Italy abstained from the final vote to adopt the reports, but von Keller accepted their findings and acknowledged that the anti-Jewish laws and measures conflicted with Germany's undertakings in the Upper Silesia Convention. Nevertheless, he concluded with the observation that the 'whole discussion served no purpose'.<sup>58</sup>

Perhaps he was right, as the limitations on the Council revealed serious gaps in rights protection. Some of the representatives on the Council immediately expressed their concerns. The particularities of Bernheim's petition, Poland's Count Raczynsky asserted, raised the general problem facing Germany's Jews. The League's inability to address this, he believed, only highlighted the defects in the system of minorities protection. The petition, however, gave the League the opportunity to correct these defects: a 'minimum of rights', Raczynsky declared, 'must be guaranteed to every human being, whatever his race, religion or mother tongue'. The League Council, he continued, was therefore morally obliged to pressure Germany, which, unlike Poland, had no general minorities obligations to ensure the equal rights of German Jews.<sup>59</sup>

The French Foreign Minister, Joseph Paul-Boncour, also pressed the view that the Bernheim petition raised matters of concern throughout the whole of Germany.<sup>60</sup> But he went still further, since this was 'only one aspect of a more general and more moving problem', the status of Jews generally. The moral obligation that Raczyński claimed the League faced went beyond pressuring Germany about the treatment of its Jews. It raised the more general problem of the protection of the rights of unprotected people. 'The League of Nations', Paul-Boncour continued, 'which had shown such legitimate anxiety for the rights of minorities belonging to nationalities living within other frontiers, could not really ignore the rights of a race scattered throughout all countries'.<sup>61</sup>

With these interventions in the deliberations on the Bernheim petition before the League Council, both Poland and France were anticipating issues that they would take up in the forthcoming sessions of the Assembly.

### ***3. The Generalisation of Rights***

The Bernheim petition therefore exposed two significant issues that went to the heart of the League of Nations' status as the guarantor of rights. It had no means of protecting the rights of peoples outside the scope of the minorities treaties, and because of the attention drawn to this deficiency, the meaning of rights in these treaties was brought into question.

A third issue also emerged. The minority treaty states, with Poland foremost among them, witnessed the impotence of the other major powers to confront Germany over the persecution of its Jewish people. This reinforced their perception of their unequal

status within the League of Nations.<sup>62</sup> Sensitive to this disquiet, the French Foreign Ministry instructed its European ambassadors on how to represent France's position. The specificities of the Bernheim case, it commenced, were not applicable to Jews elsewhere in Germany.<sup>63</sup> But because the imbalance of the minorities treaties divided western Europe from the new and reformed nation-states of Central and Eastern Europe, broader principles, not merely technicalities, needed to be impressed upon them. The minorities treaties, the instruction continued, rested not on division but on a 'general spirit of equality'. Their basic principle was the recognition of 'human rights' (*droits de l'homme*), which drew all states to the same liberal tradition.<sup>64</sup> The recognition of these rights was an important step in state development, it maintained: 'the recognition of the human rights of a minority, and the synthesis of these rights with the rights of the state, is not a danger to its internal strength; it can only enhance it'.<sup>65</sup> Therefore, if the western powers were not held to the same obligations as the treaty states, it was 'because the western powers are sufficiently confident in their liberal traditions [and] it is unnecessary to have these special obligations imposed on them'.<sup>66</sup>

The diplomatic character of this document might excuse its rationalisation of the evident imbalance between the treaty and non-treaty states. Nevertheless, its justification that the western powers did not need to adopt the obligations of these treaties because of their stronger liberal traditions suggests how substantial was this division. Yet one need look no further than Article 2 of the Polish Treaty to find an example of the 'general spirit of equality' with which the French Foreign Ministry claimed that the treaties had been framed. This 'general spirit of equality' might also be found in the Assembly's resolution of 21 September 1922, which

recommended that states not bound by the treaties should nevertheless observe their principles. If considered in this light, this resolution would appear more a statement of human rights principles, as it accepted the principle of the equality, and held that there were legitimate constraints on a state's dealings with its citizens.

The humanitarian importance of the prescription of rights contained in the minorities treaties led some contemporaries to look beyond their flaws to the principles of justice behind them. The jurist André Mandelstam, for example, considered them a significant advance towards the recognition of the implicit humanity of individuals, from which grew the recognition of the obligation to protect the right to life and liberty.<sup>67</sup> Writing in 1923 on the question of the protection of minorities, Mandelstam identified the tendency towards the generalisation of rights. He described the principles advanced by the minorities treaties as the emergence of human, or humanitarian, law (*droit humain*), because their objective was the protection of human rights (*droit de l'homme*).<sup>68</sup> Mandelstam's analysis of this advance in the recognition of rights through the minorities treaties system might be summarised as follows: the treaties circumscribed the sovereignty of states to act in ways that were contrary to the rights of racial, religious or linguistic minorities; this entailed the state's respect of the particularities of minorities within their populations; they expressed the principle of the equality of minorities before the law and the enjoyment of the same civil and political rights as all other members of the population, thereby reinforcing the general tendency of rights; the force of these rights rested in the League of Nations' guarantees.

This tendency towards the generalisation of rights, however, revealed the limitations of the treaties themselves. They recognised and guaranteed the rights of racial, religious and linguistic minorities, but the rights of nationals were not so prescribed. The treaties were also regional in scope, and different states were held to different standards of rights protection. Nevertheless, the certain minimum juridical standard that these treaties prescribed in the accord of a state with its inhabitants, citizens and minorities alike, inspired Mandelstam with its suggestion of generalisation.

Mandelstam's arguments against the particularity of the minority guarantees had hardened by 1931. He now believed that the nature of the protection guarantees, or in other words the enforcement of principles, undermined this tendency towards generalisation. Minorities could claim the protection of the League of Nations for violations of their rights, members of the majority population could not. The value of the 'simple international recognition' of human rights, Mandelstam continued, had immense moral and juridical value for humanity, but only on the condition that they were general. The lack of generality resulted in what he called a 'double malaise', which was unsustainable in the modern political sphere and in the advent of international law. The first aspect of this malaise was that the minorities treaty states resented the limitations on their sovereignty as dividing states into two categories, one constrained in its relations with its people and the other free to engage with them without constraint. This was contrary to the principle of the equality of states in international law. The second aspect was that the abuses of human rights in countries not protected by treaties unsettled the post-war international order. The war, Mandelstam argued, had proved that no state could remain indifferent to another, as local wars

contaminated humanity. Universal responsibilities followed, which lay behind the foundation of the League and the undertaking of its member states under Article 11 of the Covenant 'to safeguard the peace of nations'.<sup>69</sup>

Mandelstam therefore identified great advances in the recognition of human rights and the responsibilities of states for the protection of individual rights. Yet there were evident deficiencies in the international system of rights protection adopted in the minorities treaties. Only the generalisation of rights protection, he continued, could rectify them. Mandelstam's critiques of the flaws in the minorities treaty system were informed by his advocacy of a draft International Declaration on Human Rights, adopted at New York session of the Institute of International Law on 12 October 1929.<sup>70</sup> The draft declaration sought to universalise the human rights principles recognised in the minorities treaties by remodelling the main principles of individual rights first proclaimed in the American Declaration of Independence and the French Declaration of the Rights of Man and the Citizen. The draft declaration's first article proclaimed that 'it is the duty of each state to recognise the right of all individuals to life, liberty and property (*propriété*), and to accord all living on the state's territory full and complete protection of this right, without discrimination because of nationality, gender (*sexe*), race, language, or religion'.<sup>71</sup> This transcribes the fundamental principles of the minorities treaties, as written into Article 2 of the Polish treaty, with the significant addition of 'gender'. The remaining articles of the draft Declaration addressed issues of education, access to public services, and the exercise of religious beliefs.

The innovations in the conception of rights in this draft declaration would seem to respond to much more than the fragmenting of rights between minority groups and national citizens. Mandelstam found the need to proceed towards the generalisation of rights in public opinion, which, he argued, had turned towards the recognition of a *droit humain*. The 'horrors perpetrated under the government of the Soviet Union', he wrote, 'made this opinion manifest'. The use of forced labour and religious persecution were decisive for the emergence of this new *droit humain*, and to a dramatic growth in support for the notion of 'universal human rights' while reinforcing the belief that state sovereignty was not absolute when it came to the respect of human rights.<sup>72</sup> The question of enforcement, however, limited what this draft declaration could seek to achieve. Sanctions against states in breach of the recognised standard of human rights, Mandelstam concluded, could not be included in such a document as no state would be prepared to commit to it if sanctions of any kind were included.<sup>73</sup>

This draft declaration provided a model for the generalisation of rights when the Bernheim petition again influenced discussion on rights and the protection of minorities during the sessions of the League's Fourteenth Assembly, which met in Geneva during September and October 1933.

#### ***4. The Bernheim Petition and the Fourteenth Assembly***

The year 1933 was critical in the League's history because of the convergence of world affairs. Its failure to act decisively against Japanese aggression in Manchuria in 1931, which was precisely the kind of act of war that the League was established to prevent, left

many wondering still in 1933 about its status in international affairs.<sup>74</sup> Within a month of the Japanese invasion, the last step back from free trade was taken. Tariff barriers and the contraction of international trade turned countries inward and only exacerbated the economic crisis.<sup>75</sup> Isolation and self-interest turned states away from the League's international ideals at this critical time. Then, in 1932, Sir Eric Drummond, Secretary-General since the League's foundation, announced his intention to stand down. This marked the definite end of the League's initial, idealist phase, and the hopes of international co-operation and a belief in a peaceful world order seemed now aspirations of the past. Old national rivalries over status and influence emerged in the search for a successor, upsetting the delicate balance hitherto sustained in the co-operative idealism of League affairs.<sup>76</sup> The Disarmament Conference, the great unfinished task of the Versailles Treaty, had stalled, leaving tensions between France and Germany unresolved. This entered its endgame in 1933.<sup>77</sup> Finally, during the 1933 Assembly itself, the League faced a new regime in Germany that was violently antipathetic to the Versailles Treaty and the principles on which the League stood, and which set about vigorously asserting its national sovereign interests. Its disdain of the League was blatant. Goebbels' entry into the Assembly hall with his armed bodyguard was received so coldly that he abandoned his plans to deliver an address, preferring instead to give a private press briefing.<sup>78</sup>

It is not surprising, then, that there was a palpable despair in some of the general addresses to the Assembly's plenary sessions. Jonkher de Graeff, the Dutch Foreign Minister, perhaps most succinctly expressed this gloom when he spoke of a 'wave of pessimism [that] has broken over this world'.<sup>79</sup> For some delegates, however, the new challenges posed by Germany's

treatment of its Jews was an opportunity for the League to reassert its ideals and to demonstrate what a profound impact it could have in human affairs. The Bernheim petition was still strong in memory, and Senator Henri Bérenger of France went so far as to assert that it was the starting point for renewing the principles that the League stood for. Bérenger expressed a common view that the persecution of the Jews in Germany was a matter of justice, and that the minorities treaties gave the League responsibility for just and humanitarian intervention on behalf of vulnerable peoples. This, he believed, was a source of strength that the League should build upon.<sup>80</sup> Again Bernheim's petition provided the opportunity to confront Germany and for the nature of rights protection to be canvassed.

The issue of minorities protection was an annual item on the agenda of the Assembly's Sixth Committee, which was responsible for political matters. Its discussions usually concerned uncontroversial procedural matters, but in recent years suggestions for innovation and improvements had been a source of contention.<sup>81</sup> In 1933, the question took a new form, not because of criticisms levelled against Germany, or because advocates of rights had posed new questions, but because Germany itself expressed its dissatisfaction with the system of minorities rights protection. The German representative on the Committee, August von Keller, who had earlier represented Germany on the Council during its deliberations on the Bernheim petition, acknowledged the general feeling that there were significant problems with the mechanisms for the protection of minorities that went well beyond procedural issues. The conception of minorities protection, as set down in the minorities treaties, was at fault, he claimed. The redrawn borders of Central and Eastern Europe separated minorities from their national

homelands, and forced their assimilation into foreign national cultures. 'The essence of the problem', von Keller asserted, was a 'spiritual dispute on the principle of nationality'. The '*Volkstum*', or 'ethnic nationality', directed this principle of nationality towards the affirmation of the national culture to which the individual was tied, 'by common blood or by common language'.<sup>82</sup>

Germany had acquiesced to the Council's decision on the Bernheim petition the previous June. The German Foreign Minister, Baron von Neurath, had written to the Secretary-General confirming von Keller's verbal assurance that German national legislation would not affect international conventions to which Germany was a signatory.<sup>83</sup> As a sign of the growing assertiveness of the Nazis in international diplomacy, however, von Keller now gave clear expression to their national and racial ideas. The minorities treaties, von Keller asserted, contradicted the tendency towards the unity of the '*Volkstum*' and therefore impeded legitimate nationalist aspirations. Consequently, Germany would resist the forcible assimilation into other national cultures of Germans who, by accident of redrawn boundaries, now lived outside their national homeland.<sup>84</sup>

Von Keller's defence of the rights of German minorities while Germany itself flagrantly abused the rights of its own Jewish citizens outraged other members of the committee. Bérenger returned to the Bernheim petition to illustrate how far Germany had withdrawn from the principles to which it had committed itself under the Upper Silesia Convention and by its membership of the League of Nations. Although on a strictly legal basis the breach of convention pertained only to one small region in the south eastern corner of the Reich, Bérenger declared, the Council had found that,

*'ipso facto'*, the anti-Jewish laws were in contravention of the principles of rights enunciated in the minorities treaties, to which all member states had committed themselves by supporting the Assembly's resolution of 21 September 1922.<sup>85</sup>

Although this resolution placed a moral obligation on member states, it was not supported by law or convention. Therefore, if the League was truly committed to these principles, the Swedish representative Sandler intervened, it had to consider converting these principles into 'more far-reaching undertakings'.<sup>86</sup> Two of the 'lesser powers' supported him: Poland, as the first of the minorities treaty states, maintained the need to broaden their scope, and Haiti, whose representative in the Assembly at this time, Antoine Frangulis, was one of the leading figures in international law and the advancement of human rights.

Poland was adamant that the system of minorities protection was flawed and needed far-reaching reform. As the first state obliged to sign a minorities treaty to win recognition of its independence in 1919, Poland was extremely sensitive to the imbalance of the minorities protection system, and was wary that suggestions from the major powers for procedural reform and improvements might consolidate this imbalance. Now Count Raczynski claimed that procedural change and innovation could not resolve the inherent problem of the 'lack of permanency and authority'. The system was 'unbalanced, fragmentary, and incomplete', and could not 'arrest or preclude great injustices'.<sup>87</sup> Having stated during the Council's debates on Bernheim's petition that it highlighted the need for a general system of rights protection, Raczynski now proposed that the Assembly work towards drafting a 'General Convention on the Protection of

Minorities' to be presented to the 1934 session. This would resolve the main point of contention: the distinction between protected and unprotected minorities, which conflicted with principles of equality and justice.<sup>88</sup>

Frangulis, a jurist and diplomat who had formerly represented Greece in the League, now representing Haiti at the 1933 Assembly, took a greater leap than Raczynsky was prepared to take.<sup>89</sup> He had earlier declared in an address to the plenary session of the Assembly that the lack of a declaration of rights was a flaw in the League's Covenant, and that the desire for the equality of rights had not been given any 'guarantee in the domestic sphere of the different countries'.<sup>90</sup> This had weakened the League and substantially weakened the system of rights protection of which it was guarantor. Now, he maintained, two vital principles needed to be affirmed: that all citizens were entitled to the same freedoms, and that the problems identified in the system of minorities protection had to be considered from the 'aspect of the human rights' (*droits de l'homme*). Therefore, rather than supporting the general convention on minorities rights, Frangulis proposed instead a 'world convention' that would bring into law the 'generalisation of human rights as already laid down in Article 2 of the Minorities Treaties'.<sup>91</sup> The model for this 'world convention' was the draft International Declaration of Human Rights adopted by the Institute of International Law in 1929.<sup>92</sup>

Neither Sandler's, Raczynski's, nor Frangulis's propositions won sufficient support to be carried forward, however. Britain would agree to nothing more than modifications to the existing procedures for receiving and considering petitions, and had nothing at all to say about broadening rights protection. France adopted quite a different

strategy. As it was clear that little could be gained from broad propositions that would not gain unanimous support, Bérenger moved in small steps to isolate Germany. He put forward two resolutions. The first called for a reaffirmation of the Assembly resolution of 21 September 1922 so that member states could again commit themselves to the principles of minority rights. This reflected the consensus reached in the Sixth Committee that the protection of minorities was a responsibility of all states. The second was directed quite deliberately against Germany. It proposed the extension of Article 67 of the Upper Silesia Convention to oblige Germany to guarantee the rights of all German citizens, and its adoption would have imposed specific protection obligations on Germany. The resolution used the precise wording of this article:

All German nationals shall be equal before the law and shall enjoy the same civil and political rights without distinction as to race, language or religion.

Differences of religion, creed or confession shall not prejudice any German national in matters relating to the enjoyment of civil or political rights, as, for instance, admission to public employments, functions and honours, or the exercise of professions and industries.<sup>93</sup>

Bérenger must have expected that Germany could do nothing other than veto this proposition. Von Keller criticised it as an unprecedented attempt to interfere in its domestic legislation, stating that its real intention was to bring the treatment of Germany's Jews within the political interests of the League itself.<sup>94</sup> The proposals of Sweden, Poland and Haiti, however, were not even put to a vote, as the remainder of the committee was adamantly opposed to them. Its final report to the Assembly did not explain the reasons for their divisions, and concluded meekly: 'Certain delegates having explained the reasons why they were unable to accept it, the Swedish delegation and the Polish and Haitian

delegations agreed not to press for a vote on their respective proposals'.<sup>95</sup> Frangulis recalled afterwards, however, that both Haiti and Poland were persuaded to withdraw their proposals and stand behind France's because of the anxiety among the other members that the generalisation of rights protection could provoke minorities problems where they did not yet exist.<sup>96</sup>

Such resistance to broader ideals and the lack of firm resolve to contemplate real innovation in the protection of rights led to the adoption of a resolution that no more than reaffirmed the resolution of 21 September 1922:

The Assembly,

Reiterating the recommendations which it passed on September 21st, 1922:

'Expressed the hope that the States which are not bound by legal obligations to the League with respect to minorities will nevertheless observe in the treatment of their own racial, religious or linguistic minorities at least as high a standard of justice and toleration as is required by any of the treaties and by the regular action of the Council'.<sup>97</sup>

The French proposition originally included a second paragraph to give this added strength. It stated that the principles adopted in this resolution would 'be applied without exception to all classes of nationals of a State that differ from the majority of the population in race, language or religion'. But as Germany also considered this an attempt to interfere in its domestic legislation, it again used its veto.

This was the first occasion on which the League's unanimity rule resulted in the defeat of a resolution. Because it gave all member states equal standing, and allowed any one state to defeat

a resolution by its negative vote, a resolution had to win unanimous approval in the Assembly's committees before it would be taken forward to the plenary sessions. The unanimity rule therefore had the beneficial consequence of nullifying political conflict; but this also meant that only the least controversial propositions would be carried forward. It would seem reasonable to conclude therefore that German antipathy to any semblance of interference in its internal affairs would inevitably lead to the defeat of the French proposal to apply Article 67 of the Upper Silesia Convention to Germany as a whole. Nevertheless, France insisted that it be put to a vote, resulting in the German veto. France and the other committee delegates achieved a propaganda victory of sorts, Margaret Burton finds, as the 'solemn words approved by the great majority of the League's members were given added weight by the single negative vote of Germany'.<sup>98</sup> The outcome, Burton concludes, was that the League members made their 'solemn' protest against the Nazi's treatment of the Jews, and Germany was isolated by the exercise of its veto.<sup>99</sup>

Nevertheless, the resolution reaffirming that of 21 September 1922 exposes a contradiction. The members of the League had declared again their commitment to the principles of equality and the general recognition of minority rights, but it resiled from adopting these in any substantive form, either by a generalisation of the existing minorities treaty provisions, or by the bold step of a new 'world convention' on human rights. The principles could be acknowledged without fear that they might be used against national interests. A general convention, on the other hand, raised the prospect that minorities and other groups suffering inferior rights could then use declarations of equal rights against the state. The defeated French resolution attempted to force this onto Germany in

the belief that the affirmation of the equal rights of Jews would give them protection. But as this resolution was defeated, no doubt as was expected, the question of League enforcement did not arise.

Quite simply, there was no will among the member states to take the extra step from the affirmation of principle to the adoption of a new convention. Germany quit the League on 15 October 1933, using the trigger of French intransigence at the Disarmament Conference. Even without Germany's presence and its threat of veto, however, the League refused to move closer towards a generalisation of rights. Poland presented its 1933 proposal to the 1934 Assembly, making the case once more that the unevenness of minorities protection obligations would be eliminated only by holding all states to them and by the affirmation of the true equality of nations.<sup>100</sup> Poland was supported by other treaty states, but the opposition of Britain and its dominions, France, Switzerland, and Belgium, all states with minority or colonial populations, showed that its proposal was doomed. Two objections were put. First, if the system of minorities protection was flawed, what would be the benefits of expanding it? Second, the existing treaties were framed for specific conditions in each of the treaty states and therefore addressed the specific issues of the various national minorities. A general treaty would not be responsive to such specific concerns.<sup>101</sup>

Poland's 1934 proposition and the opposition to it provide a clear example of the unequal power divisions between the treaty and non-treaty states. The support of other minority treaty states counted much less than the opposing voices of Canada, Australia, Britain, and France, for example. Poland conceded before this opposition and politely withdrew its draft resolution to maintain a semblance of unity. In September 1934 it signalled its intention to

withdraw from its own minorities obligations, leading to the collapse of the international system of minorities protection.<sup>102</sup>

## **5. Conclusion**

The Bernheim petition has its origins in Jewish protest against the Nazi anti-Jewish measures of April 1933. It was placed before the League of Nations at a critical moment, when the Nazi regime seemed prepared to 'defy humanity by defying human rights', to use René Cassin's expression, and when there were many doubts about the League's effectiveness in international affairs.

The petition, therefore, presented the League with a very real opportunity to confront both these challenges. It inspired a renewed will to advance the cause of human rights and gave the League the opportunity to reassert its place in world affairs by upholding the protection of rights. But the petition also revealed the weaknesses of the League, the limits of rights ideals, and the international system established for their protection. The League could not make decisions outside the narrow terms of the Upper Silesia Convention under which the petition was made and it therefore had no grounds on which it could intervene against the persecution of Germany's Jews. Although there was general consensus about the principles that the petition affirmed, the League's member states resiled from making any formal commitment to them.

Two explanations are commonly given for this failure to take a bold step forward. The first, as Burgess argues, is the weak hold of the 'human rights idea' in interwar international affairs. Talk of freedoms was present, Burgess finds, but a compelling discourse of human rights was not.<sup>103</sup> The second is power interests, as Lauren

and Jackson Preece emphasise.<sup>104</sup> The most powerful actors in international diplomacy shaped outcomes that suited their interests, and the universalisation of human rights was not in their interests.

Both explanations illustrate the constraints on the emergence of a strong resolve to protect vulnerable minorities. Yet, while valid, both nevertheless seem inadequate. The first explanation is a view from within the framework of contemporary human rights and humanitarian law, which seeks out a quite specific 'human rights idea' in past discourses. This teleology overlooks important aspects of the historical moment in which the Bernheim petition was received and debated. Principles were evoked to a striking degree during the debates it inspired. While these might not have clear resonances with the contemporary 'human rights idea', they nevertheless carried certain ideas of a state's responsibility to protect the civil and political rights of its citizens. This itself gives the petition historical significance. Only by admitting the principles of protection from the abuse of rights, which the petition asked the League to enforce, could the League member states acknowledge the gravity of the conditions afflicting Germany's Jews. These principles were firmly grounded in rights ideals. Those already written into the minorities treaties, exemplified by Article 2 of the Polish Treaty, were the starting point for the attempts to write them into a general convention. The Assembly resolutions of September 1922 and September 1933 confirmed that these principles were perceived to be at the foundations of state governance in this new international order.

The second explanation should not prevent us from making a more critical appraisal of state motivations. Power interests then, as they do now in international affairs, inevitably shape diplomatic

outcomes, but the reasons why these interests shape certain outcomes also need to be understood. Power interests were not so negative and their exercise reveals important contradictions. The same powers that rejected a general convention, for example, were nevertheless foremost in affirming the principles behind them.

The difference between declarations of principles and the proclamation of a convention was the matter of enforcement. This was the issue from which these powers resiled. They rejected moves towards the generalisation of the minorities treaties, or a world convention on human rights, because the enforcement of these rights raised the prospect of the interference of other League member states in their internal affairs.

Two issues can now be singled out. One is that the system of rights protection related to the collective rights of specific minorities, but the human rights ideals that the Bernheim petition inspired related to individual rights, which, to be effective, had to be general. The guarantees of collective rights were adopted as a means of keeping the peace, but individual rights had the potential to raise problems of a much different kind. The second is that effective rights protection required enforcement. It was on this point that the tendency towards the generalisation of individual rights foundered, since the adoption of a treaty to generalise minority rights, or a world convention on human rights, would expose a state to the scrutiny and interference of others. France might well proclaim that its more highly developed liberal institutions put it above the new nation-states, whose nascent institutions had to be nurtured through compulsion, but in reality it would have faced the unpalatable intervention of states with less

developed liberal traditions, or even of inferior races, should it have adopted the same rights protection obligations.

The strength of the interwar conception of rights lay in the protection guarantees assumed by the League of Nations. The status of minorities was considered a matter of concern to all nations, and peaceful coexistence required the respect for, and protection of, all peoples. This included the protection of sovereign nation-states through the mutual protection clause of Article 11 of the League Covenant, and the protection of racial, religious and linguistic minorities through the minorities treaties. The weakness of these rights arose from the imbalance between the major powers and the new and reformed states of Central and Eastern Europe. The Bernheim petition exposed the problem of enforcement as another, more profound weakness, as it raised extremely fraught political problems.

This, then, was the human rights dilemma in the protests made against the Nazi persecution of Germany's Jews in 1933. Declarations of principles could isolate Germany. But the problem of the enforcement of rights presented the League with the dilemma of intervention in the affairs of a sovereign member state. Moreover, the recognition of individual rights had even greater implications for enforcement. Each state would need to concede a degree of sovereignty to the international cause of the protection of the rights of all. Franz Bernheim had tested the League's resolve to protect these rights but he revealed the failings of its protection guarantees.

This dilemma influenced the nature of the human rights system after the Second World War. The adoption of a declaration

of universal human rights in 1948 was not so much the result of a conceptual awakening as a revision of human rights standards. The declaration of rights was divorced from any mechanisms of protection and enforcement. The solution to the problem of enforcement, Mark Mazower and Jennifer Jackson Preece both separately conclude, was to avoid it, and instead adopt a passive commitment to individual rights.<sup>105</sup> They confirm André Mandelstam's conclusion of 1931 that no state would voluntarily commit itself to an international convention on human rights if it included sanctions.<sup>106</sup>

This would seem to suggest that power interests have, and continue to play, a substantial part in the progress of human rights. If so, we may need to reassess our understanding of the human rights idea itself. Human rights are only as great as the willingness of states to concede their sovereign interests. The human rights idea seems locked into these interests since protection is, as it has always been, a matter for governments. The advance of human rights, it would therefore seem, has been due less to conceptual breakthroughs or breakthroughs of conscience, than to incremental limitations on a state's sovereignty in its relations to its people. The example of the minorities treaties and the Bernheim petition highlight the political imperatives that both constrained and inspired human rights ideals. Draft conventions to universalise these ideals emerged to fill cracks exposed in the minorities protection system. The intention was to place equal constraints on all states, and to prescribe acceptable norms in the manner in which these states could govern their peoples. But this was the point at which these grand ideas collapsed.

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The human rights dilemma came full circle between 1933 and 1935. One definite act of the League for German Jews in 1933 was the appointment of a High Commissioner to assist the dispersal and settlement of refugees in flight from Nazism. Because of German resistance, however, the office was made autonomous of the League, and had neither League funding nor administrative support. For two years, the High Commissioner, the American diplomat James McDonald, struggled vainly to negotiate refugee resettlement, finding no country prepared to admit them in sufficient numbers. In 1935, he decided to resign from his post.

McDonald intended to make a dramatic statement by his resignation to strike at the conscience of those who had failed to aid his work. He prepared a long statement to accompany his letter of resignation, detailing the causes and consequences of the German refugee problem while also bitterly condemning the international community's lack of humanitarian response. He asked a number of prominent international jurists to comment on the draft statement, among them Professor Hersch Lauterpacht, then a young international law theorist at the London School of Economics, who would later become a prominent judge on the International Court of Justice.<sup>107</sup> He replied:

I believe that, if only possible [...] action ought to be taken on the basis of the Resolution of the Assembly of 1933 affirming the rights of minorities as a general principle of international law and morality. The matter could ... be brought before the Council by the High Commissioner [...]. He could [...] draw attention to the Council of the limitations as revealed by experience of his mission, to the continued persecution in Germany and to the daily increasing hardships and tragedy of the sufferer; to the necessity of re-affirmation of the principles laid down in 1933. This is very little, but it seems to me the

only possibility of political, as distinguished from humanitarian action in this matter.<sup>108</sup>

Very little indeed. The only course forward, it seemed, was to return to previous statements of principle and to attempt, again, to instil them with substantive authority, from which the League member states had already resiled in 1933.

**NOTES**

<sup>1</sup> Petition of M. Franz Bernheim, of May 12th, 1933, concerning the situation of the Jewish Minority in German Upper Silesia, L[eague of] N[atations] D[ocument] C.314.1933.I.B, 19 May 1933, p.7.

<sup>2</sup> Ibid., p.8.

<sup>3</sup> René Cassin went on to become Charles de Gaulle's legal advisor during the war. Afterwards, he was appointed to the United Nations Commission on Human Rights, and was selected to write the first full draft of the Universal Declaration of Human Rights. He was awarded the 1968 Nobel Peace Prize for his work on human rights. Marc Agi, *René Cassin, 1887-1976. Père de la Déclaration universelle des droits de l'homme* (Paris: Perrin, 1998).

<sup>4</sup> René Cassin, 'Les droits de l'homme', *Recueil des cours de l'Académie de droit international*, vol.140, no. 4, 1974 (Leyde: A. W. Sijthoff, 1976), p.324.

<sup>5</sup> René Cassin, 'La déclaration universelle et la mise en oeuvre des droits de l'homme', *Recueil des cours de l'Académie de droit international*, vol.79, no. 2, 1951 (Paris: Sirey, 1951), p.242.

<sup>6</sup> Cassin, 'Les droits de l'homme', p.324.

<sup>7</sup> Michael Marrus, *The Unwanted. European Refugees in the Twentieth Century* (New York: Oxford University Press, 1985), p.160.

<sup>8</sup> Vicki Caron, *Uneasy Asylum: France and the Jewish Refugee Crisis, 1933-1942* (Stanford: Stanford University Press, 1999), p.37.

<sup>9</sup> Lucy Dawidowicz, *The War Against the Jews, 1933-45* (London, Penguin Books, 1987), p.231, note. See also Sir John Hope Simpson, *The Refugee Question. Report of a Survey* (London: Oxford University Press, 1938), pp.214-5, which also linked the petition to the recognition of the scope of the German-Jewish refugee problem.

<sup>10</sup> For example, Geoffrey Robertson, *Crimes Against Humanity. The Struggle for Global Justice* (London: Penguin, 1999), pp.16-21. Robertson admittedly can

provide only a very brief historical summary, but this shows clearly the propensity to search for contemporary ideas of human rights in the past.

<sup>11</sup> Jan Herman Burgers, 'The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century', *Human Rights Quarterly*, vol.14 (1992), pp.447-77. Paul Gordon Lauren, *The Evolution of International Human Rights. Visions Seen* (Philadelphia: University of Pennsylvania Press, 1998), pp.131-5.

<sup>12</sup> See also A. W. Brian Simpson, *Human Rights and the End of Empire: Britain and the genesis of the European Convention* (Oxford and New York: Oxford University Press, 2001), pp.142-5.

<sup>13</sup> 3,000,000 Hungarians became Romanian citizens after Transylvania was stripped from Hungary. Similar divisions and territorial realignments affected 400,000 Ruthenes of the western Ukraine, 700,000 Hungarians, and 70,000 Poles who became Czechoslovakian citizens. 6,000,000 Ukrainians and Russians were brought into Polish territory after its eastern border was decided. Germans were scattered all about: 3,250,000 in Czechoslovakia, 500,000 in Hungary, 800,000 in Poland, 750,000 in Romania. Elizabeth Wiskemann, *Europe of the Dictators, 1919-1945* (Fontana Collins, 1971), p.267. Wiskemann's data is based on census estimates of 1930. Only 'mostly unassimilated' Jews were counted: 3,000,000 in Poland, and 700,000 in Romania. A detailed compendium of Central and East European minorities was compiled by C. A. Macartney, *National States and National Minorities* (London: Oxford University Press, 1934), Appendix III, pp.510-34. Macartney is more expansive on the Jewish population of the minorities treaty states, reporting, 3,000,000 in Poland, 354,338 in Czechoslovakia, 250,000 in Austria, 520,000 in Hungary, between 900,000 and 1,000,000 in Romania, 65,000 in Yugoslavia, and 46,000 in Bulgaria.

<sup>14</sup> *Ibid.*, p.279.

<sup>15</sup> Georges Kaeckenbeeck, *The International Experiment of Upper Silesia: A Study in the Working of the Upper Silesia Settlement, 1922-1937* (London: Oxford University Press, 1942), pp.5-6. The results of the plebiscite were: 707,605 votes for inclusion with Germany, and 479,359 votes for inclusion with Poland. Kaeckenbeeck comments that these results 'made Germany claim that Upper

Silesia had decided in favour of remaining German'. But this clear division of votes disguised the indivisibility of the two populations.

<sup>16</sup> Ibid., p.23.

<sup>17</sup> The population of Upper Silesia in 1910 was 1,250,000 Poles and 700,000 Germans. From 1872, Kaeckenbeeck comments, 'there was not one Polish school', and 'no Pole could become a magistrate, public prosecutor, civil servant, or medical officer'. Ibid., p.17, note 1. The portion of territory ceded to Poland had a population of approximately 1,330,000, which included between 300,000 and 350,000 Germans. German Upper Silesia had a population of 892,547 in 1925, including 154,740 Polish speakers and 373,505 bilingual in German and Polish. There were 10,069 Jews. Macartney, *National States*, pp.516-7.

<sup>18</sup> Lauren, *The Evolution of International Human Rights*, pp.97-8.

<sup>19</sup> Macartney, *National States*, p.220.

<sup>20</sup> Mark Mazower, *Dark Continent. Europe's Twentieth Century* (New York: Vintage, 1998), pp.56-7.

<sup>21</sup> Edward M. House and Charles Seymour, eds., *What Really Happened at Paris: the Story of the Peace Conference, 1918-1919* (London: Hodder and Stoughton, 1921), pp.414-5.

<sup>22</sup> Lauren, *The Evolution of International Human Rights*, pp.100-1, notes President Wilson's arbitrary decision to reject the resolution when a majority of delegates had voted in favour of it.

<sup>23</sup> Macartney, *National States*, p.503.

<sup>24</sup> Ibid., p.506.

<sup>25</sup> The States that signed minority treaties at the peace conference were Poland, Czechoslovakia, Romania, Greece, Yugoslavia, Austria, Hungary, Bulgaria, and Turkey. The states later admitted to the League of Nations after making minority declarations were Albania, Finland, Estonia, Latvia, Lithuania. Apart from the Upper Silesian Convention, there was one other Special minorities convention, the Memel Territory provisions of the Lithuanian Declaration (the Memel was

Lithuanian territory attributed to Germany as a self-governing territory on 8 May 1924).

<sup>26</sup> Macartney, *National States*, p.277.

<sup>27</sup> On the criticisms of the minorities treaties, see also Jennifer Jackson Preece, *National Minorities and the European Nation-States System* (Oxford: Clarendon Press, 1998), pp.89-93, and Lauren, *The Evolution of International Human Rights*, pp.98-134, *passim*.

<sup>28</sup> *O[fficial] J[ournal of the League of Nations,] S[pecial] S[upplement]*, No.120, 1933, p.28.

<sup>29</sup> Macartney, *National States*, p.4, notes that the term 'national minority' was not used in the treaties, but was adopted to describe the intent of the treaties.

<sup>30</sup> Macartney, *National States*, p.216-7

<sup>31</sup> *Ibid.*, p.217.

<sup>32</sup> *Ibid.*

<sup>33</sup> [Archives Diplomatique,] M[inistère des] A[ffaires] É[trangères, Paris], S[ociété] d[es] N[ations], 1E, Minorités, vols. 454, 455, 456, Allemagne, Minorités polonaise en Haut-Silésie, 1921-1930.

<sup>34</sup> 'Nation-Wide Protests on Hitler Demanded', *New York Times*, 13 March 1933, p.1; 'Christian Leaders Protest on Hitler', *New York Times*, 22 March 1933, p.1

<sup>35</sup> 'The Treatment of Jews in Germany', *The Times*, 24 March 1933, p.13.

<sup>36</sup> 'Nation-Wide Protests on Hitler Demanded', *New York Times*, 13 March 1933, p.1.

<sup>37</sup> 'The Treatment of Jews in Germany', *The Times*, 24 March 1933, p.13.

<sup>38</sup> 'Equity for Jews in Reich Demanded', *New York Times*, 27 March 1933, p.5.

<sup>39</sup> The rally attracted some 55,000 members of the public, with another 35,000 congesting the streets outside. '55,000 Here State Protest on Hitler Attacks on Jews. Nazis Order a New Boycott', *New York Times*, 28 March 1933, p.1, pp.12-13.

<sup>40</sup> 'Anti-Jewish Campaign. New Measures by Nazis', *The Times*, 28 March 1933, p.13.

<sup>41</sup> *The Times*, 3 April 1933, p.15.

<sup>42</sup> 'Urges Jews Here to Act', *New York Times*, 22 March 1933, p.8.

<sup>43</sup> Massigli, 28 March 1933, MAE, SdN, 1E Minorités, Dossiers Géographiques, vol.446, Minorités Juives en Allemagne, 1933, folio 2. Massigli specifically notes the irritation of the 'smaller states' of Europe at the treatment of Jews in German Upper Silesia, as this demonstrated the refusal of the 'great powers' to abide by the same conditions that were imposed on them.

<sup>44</sup> Massigli, 17 May 1933, *ibid.*, folios 105-6.

<sup>45</sup> Massigli, 18 May 1933, *ibid.*, folios 109-10.

<sup>46</sup> 'Pétition présenté par M. Motzkin et M. Margulies', 16 May 1933, LND C.315.1933.I.B, 19 May 1933, pp.2-10. See also Max J. Kohler, *The United States and German Jewish Persecution—Precedents for Popular and Governmental Action* (New York: Jewish Academy of Arts and Sciences, 1933), p.53.

<sup>47</sup> 'Pétition de Club Juif à la Diète de la République Polonaise', 11 May 1933, LND C.315.1933.I.B, 19 May 1933, pp.11-14.

<sup>48</sup> Baron von Neurath, 13 July 1933, LND C.438.1933.I.B, 26 July 1933.

<sup>49</sup> Kaeckenbeeck, *The International Experiment*, p.262.

<sup>50</sup> 20 May 1933, MAE, SdN, Minorités, vol. 446, folios 212-5.

<sup>51</sup> Kaeckenbeeck, *The International Experiment*, pp.262-3.

<sup>52</sup> Minute 3294, 30 May 1933, *O[fficial] J[ournal of the League of Nations]*, July 1933, pp.839-40. Under League procedures, the government against whom a petition for a breach of a minorities treaty was made had the opportunity to respond before any formal deliberations were made. These procedures are detailed in Julius Stone, *Regional Guarantees of Minority Rights. A Study of Minorities Procedures in Upper Silesia* (New York: Macmillan, 1933), pp.129f.

<sup>53</sup> The right of petition under the Convention was limited to 'members of a minority'. This specifically required that the petitioner be 'domiciled' in the

'plebiscite area'. 'Domicile' was defined in Article 29 as 'the principle place where personal and economic activities are concentrated' ('le principal endroit de concentration de ses activités et intérêts, tant personnels qu' économiques'). Stone, *Regional Guarantees*, pp.22-3 and pp.44-6. The Committee of Jurists concluded that this did not require Franz Bernheim to have been residing in German Upper Silesia when he made his petition. Indeed, it found that there were no provisions under the Convention that the petitioner had to be in the 'plebiscite area' when the petition was made, that required the petitioner to have been domiciled in the 'plebiscite area' for a minimum period, or have connections of a specific nature with it. 'Opinion of the Committee of Jurists', LND C.483.1933.I.B, 26 July 1933. Also, Minute 3297, 6 July 1933, *OJ*, July 1933, p.844.

<sup>54</sup> Minute 3294, 30 May 1933, *ibid.*, pp.839-40.

<sup>55</sup> *Ibid.*, p.839.

<sup>56</sup> Kaeckenbeeck, *The International Experiment*, p.266.

<sup>57</sup> *Ibid.*, note 2. Kaeckenbeeck does not provide a breakdown by dates, so it is not possible to place them in the context of Bernheim's petition.

<sup>58</sup> Minute 3297, 6 June 1933, *OJ*, July 1933, p.845.

<sup>59</sup> Minute 3294, 30 May 1933, *ibid.*, p.841.

<sup>60</sup> 21 May 1933, MAE, SdN, Minorités, vol. 446, folios 216-8.

<sup>61</sup> Minute 3294, 30 May 1933, *OJ*, July 1933, pp.840-1.

<sup>62</sup> Massigli, 28 March 1933, MAE, SdN, Minorités, vol. 446, folio 2.

<sup>63</sup> 11 April 1933, *ibid.*, folios 53-6.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> André Mandelstam, 'La protection internationale des droits de l'homme,' *Recueil des cours de l'Académie de droit international*, vol. 38, no. 4, 1931 (Leyde: A. W. Sijthoff, 1931), pp.129-32. Mandelstam, a jurist and former

Russian diplomat who had left Russia after the Bolshevik Revolution, lived in Paris and taught international law at the Institut des Hautes-Études Internationales of Paris, and the Academy of International Law at the Hague, and was a member of the Institute of International Law, for which he served as *rapporteur* of the 22nd Congress promoting its draft International Declaration of Human Rights. 'Notice biographique' to *ibid.*, p.365; Burgers, 'The Road to San Francisco', pp.450-4.

<sup>68</sup> André Mandelstam, 'La protection des minorités', *Recueil des cours de l'Académie de droit international*, vol. 1, no.1, 1923 (Leyde: A. W. Sijthoff, 1962), pp.367-8.

<sup>69</sup> Mandelstam, 'La protection internationale', pp.129-32.

<sup>70</sup> *Ibid.*, p.204, note.

<sup>71</sup> *Ibid.*, p.205.

<sup>72</sup> *Ibid.*, pp.229f.

<sup>73</sup> *Ibid.*, p.212.

<sup>74</sup> E. H. Carr, *The Twenty Years Crisis, 1919-1939. An Introduction to the Study of International Relations* (new edition) (Basingstoke and New York: Palgrave, 2001), p.36; George Scott, *The Rise and Fall of the League of Nations* (London: Hutchinson, 1973), pp.207-41.

<sup>75</sup> Sally Marks, *The Illusion of Peace. International Relations in Europe, 1918-1933* (New York: St. Martin's Press, 1976), p.122.

<sup>76</sup> James Barros, *Betrayal from Within. Joseph Avenol, Secretary-General of the League of Nations, 1933-1940* (New Haven and London, Yale University Press, 1969), pp.1-14.

<sup>77</sup> *Ibid.*, pp.31f.; Scott, *The Rise and Fall*, pp.257-90 *passim*.

<sup>78</sup> 'World Disfavor Found by Germans at Geneva', *New York Times*, 1 October 1933, p.1; 'M. Goebbels a fait à la presse une longue déclaration de propagande hitlérienne', *Le Matin*, 29 septembre 1933, p.3.

<sup>79</sup> Item 29, 29 September 1933, *OJSS*, No.115, 1933, p.47.

<sup>80</sup> Item 19, 3 October 1933, *OJSS*, No.120, 1933, p.28.

<sup>81</sup> Ibid., p.30.

<sup>82</sup> Ibid., pp.22-3.

<sup>83</sup> Baron von Neurath, 13 July 1933, LND C.438.1933.I.B, 26 June 1933.

<sup>84</sup> Item 19, 3 October 1933, *OJSS*, No.120, 1933, p.23.

<sup>85</sup> Ibid., p.28.

<sup>86</sup> Ibid., pp.28-9.

<sup>87</sup> Ibid., pp.30-1.

<sup>88</sup> Ibid.

<sup>89</sup> Frangulis had represented Greece between 1920 and 1922. He moved to Paris in 1926 following the Venizelos revolution, where he founded the International Diplomatic Academy. Here, he and André Mandelstam established a commission on the question of the protection of rights. Burgers, 'The Road to San Francisco', pp.451-2

<sup>90</sup> Item 20, 4 October 1933, *OJSS*, No.120, 1933, pp.32-4.

<sup>91</sup> Ibid., p.34.

<sup>92</sup> Burgers, 'The Road to San Francisco', p.452. On the collaboration of Frangulis and Mandelstam on the drafting of this declaration, see *ibid*, pp.450-8, and Lauren, *The Evolution of International Human Rights*, pp.110-2.

<sup>93</sup> Item 19, 3 October 1933, *OJSS*, No.120, 1933, p.28.

<sup>94</sup> Ibid., pp.41-2. At the same time as the Sixth Committee was discussing the minorities question, the Second Committee was concerned with a proposal for the appointment of a High Commissioner to assist the refugees from Germany, which the German delegate also rejected as an attempt by the League to interfere in German domestic affairs and to bring the Jews within its political interests. Item 13, 4 October 1933, *OJSS*, No.117, 1933; Item 18, 7 October 1933, *ibid*.

<sup>95</sup> 'Protection of Minorities. Report of the Sixth Committee to the Assembly, LND A.52.1933.I, October 1933, published as Annex 6 to *OJSS*, No. 120, 1933, pp.70-2.

<sup>96</sup> Quoted by Burgers, 'The Road to San Francisco', p.458.

<sup>97</sup> Annex 6 to *OJSS*, No. 120, 1933, p.71. Published as League of Nations document A.52.1933.I.

<sup>98</sup> Margaret E. Burton, *The Assembly of the League of Nations* (1941) (New York: Howard Fertig, 1974), p.196.

<sup>99</sup> *Ibid.*

<sup>100</sup> 'Conclusion of a General convention on the International Protection of Minorities. Draft Resolution Submitted by the Polish Government', LND A.7.1934.I.B, 14 April 1934.

<sup>101</sup> Item 25, 20 September 1934, *OJSS*, No.130, 1934, pp.38-48; Items 27 and 28, 21 September 1933, *ibid.*, pp.58-70. Also 'Protection of Minorities. Report of the Sixth Committee to the Assembly', LND A.57.1934.I, 26 September 1933, 26 September 1934.

<sup>102</sup> Jackson Preece, *National Minorities*, p.93. Jackson Preece gives the date of Poland's renunciation of its minorities obligations as 13 September, before Poland acknowledged the defeat of its proposal at the Sixth Committee on 21 September 1934.

<sup>103</sup> Burgers, 'The Road to San Francisco', pp.447-77.

<sup>104</sup> Lauren, *The Evolution of International Human Rights*, pp. 123-38; Jackson Preece, *National Minorities*, pp.87-9.

<sup>105</sup> Mazower, *Dark Continent*, p.199; Jackson Preece, *National Minorities*, pp.106-7.

<sup>106</sup> Brian Simpson, however, observes that the European Convention on Human Rights, adopted in 1950, permitted individuals or groups to initiate complaints and have them adjudicated in the European Commission and the European Court of Human Rights. This, he says, marked the beginnings of international jurisprudence on human rights. Brian Simpson, *Human Rights and the End of Empire*, pp.3-4.

<sup>107</sup> A Polish Jew by birth from Austrian Galicia, Lauterpacht arrived in London in 1923 and carved out a career as an eminent theorist in international law before the war. In 1945 he published *An International Bill of Human Rights*, which has

been described as 'a pioneering work advocating the desirability and possibility of the protection by treaty of fundamental human rights. The influence of this work was real and virtually immediate, being directly reflected in the European Convention of Human Rights'. Elihu Lauterpacht, 'Sir Hersch Lauterpacht: 1897-1960', *European Journal of International Law*, vol 8, no, 2 (1997), pp.313-4. He was elected as a judge of the International Court of Justice in 1954. See also Chaim Herzog, 'Sir Hersch Lauterpacht: An Appraisal', *European Journal of International Law*, vol 8, no, 2 (1997), pp.299-300.

<sup>108</sup> Lauterpacht to Neville J. Laski, 3 July 1935, McDonald Papers, Columbia University, Statement of Resignation and Drafts, Dec. 1935, D356 H13.

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This article is drawn from research for his MA and PhD theses. An earlier version of this article was presented as a public seminar at the Contemporary Europe Research Centre, University of Melbourne, in June 2002.

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