



The Invention of European Human Rights

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Major historical overviews of human rights frame human rights in an exclusively European or western narrative, even if not necessarily as a simple story of progress.¹ By referring to documents such as the Cyrus Cylinder created by King Cyrus the Great in the sixth century BCE, the Edicts of the ancient Indian King Ashoka (269–232 BCE), and the Constitution of Medina (622 CE) the *Wikipedia* entries on ‘human rights’ and ‘history of human rights’ are remarkably less blatantly Eurocentric, but they nevertheless also focus on European legal history, referring to the Magna Carta (1215), the development of natural rights in European early modernity and the introduction of ‘universality’ in the US Declaration of Independence (1776) and the Declaration on the Rights of Man and of the Citizen (1789).² The next major milestones in the history of human rights referenced after the late eighteenth-century grand declarations then appear to be the Universal Declaration of Human Rights (UDHR) of 1948 and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950. The time in between gets remarkably little attention. Apparently, human rights did not advance much in ‘Modernity’.³ And they remain perceived as quintessentially European: the ‘decolonization of human rights’ advocated by postcolonial scholars still has a long way to go, although *The Human Rights Revolution* edited by Akira Iriye, Petra Goedde and William I. Hitchcock (2012) effectively constitutes ‘a quantum leap forward’ (blurb, Ben Nathans) (alas not so much followed).⁴

¹ e.g. Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia, PA, 2003) and Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley, CA, 2004); Lynn Hunt, *Inventing Human Rights: A History* (New York, 2007) and Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA, 2010). For a critical review see Devin O. Pendas, ‘Toward a new politics? On the recent historiography of human rights’, *Contemporary European History*, 21/1 (2012), pp. 95–111 and the following notes.

² See <<https://www.britannica.com/topic/human-rights#toc10501>>; <https://en.wikipedia.org/wiki/Human_rights>; <https://en.wikipedia.org/wiki/History_of_human_rights> [accessed 1 Jan. 2018].

³ See the devastating critique of Stefan-Ludwig Hoffmann, ‘Genealogies of human rights’, in Stefan-Ludwig Hoffmann (ed.), *Human Rights in the Twentieth Century* (Cambridge, 2011), pp. 1–28.

⁴ José-Manuel Barreto, ‘Introduction: decolonial strategies and dialogue in the human rights field’, in Barreto (ed.), *Human Rights*, pp. 1–43, at p. 3. See also Walter Mignolo, ‘The many faces of

Cultural historian Lynn Hunt, author of one of the more novel and original histories of human rights, highlights the role of humanitarian culture (rather than Enlightenment thought) in explaining how human rights became prominent in European political discourse – how they became ‘evident’ as she astutely comments – but devotes the last chapter of her book, covering the modern period, to trying to explain ‘Why human rights failed only to succeed in the long term?’⁵ Basically nationalism and imperialism get the blame, though this answer leaves far more questions open than are answered. In his iconoclastic *The Last Utopia* (2010), legal historian Samuel Moyn dismissed these long-term narratives, arguing that, because of their close association with the emerging nation-state system, the conceptual gap between eighteenth-century rights of man and what we understand as universal human rights today is so wide as to make any attempt to connect them meaningless.⁶ Moyn indeed sees human rights as universal, while post-French Revolution history largely annihilates this universality by associating human rights with the rights and duties of citizenship. From this perspective post-Second World War debates on human rights may be viewed as a ‘re-emancipation’ of human rights from the national straitjacket.

The reference to the ECHR associates the narrative of human rights with that of the EU and its forerunners, which successfully substituted itself for the whole (sub)continent.⁷ They received international recognition, as in 2012 when the Norwegian Nobel Committee awarded the Nobel Peace Prize to the European Union (EU) for ‘the union and its forerunners have for over six decades contributed to the advancement of peace and reconciliation, democracy and human rights in Europe’. Human rights, however, have made it into *histories* of European integration much less. In fact, until Marco Duranti’s recent *The Conservative Human Rights Revolution* (2017), the subject is all but ignored, except in specific, often legal, literature.⁸

I will not in the following essay investigate the multiple origins of today’s human rights or actually question the importance of human rights for Europe. My purpose is to review some recent developments in the interdisciplinary and quite fragmented historiography of human rights (including by jurists) and discuss its significance for European history and identity. My emphasis is on the formative period after the Second World War, but considered in its long-term setting.

cosmo-polis: border thinking and critical cosmopolitanism’, *Public Culture*, 12 (2000), pp. 721–48; Kenneth Cmiel, ‘The recent history of human rights’, in Akira Iriye, Petra Goedde and William I. Hitchcock (eds), *The Human Rights Revolution: An International History* (Oxford, 2012), pp. 27–51.

⁵ Hunt, *Inventing Human Rights*.

⁶ Moyn, *The Last Utopia*.

⁷ Kiral Klaus Patel, ‘Provincialising European Union: co-operation and integration in Europe in a historical perspective’, *Contemporary European History*, 22 (2013), pp. 649–73.

⁸ Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford, 2017). A notable exception is Claus Leggewie, *Der Kampf um die europäische Erinnerung: Ein Schlagfeld wird besichtigt* (Munich, 2011), who does reflect on the significance of human rights in European self-perception and representation.

I

Notwithstanding their absence in European historiography, it is not difficult to demonstrate how central human rights have become in the self-perception of the EU.⁹ The EU actively promotes human rights as one of its core values and refers in this respect to the EU Charter of Fundamental Rights (adopted in 2000 and binding EU countries since 2009) and the ECHR, preceded by the Hague Congress of Europe in 1948 and signed on 4 November 1950, entering into force on 3 September 1953.¹⁰

It was, however, not the first, not even the predominant post-war human rights declaration, as on 10 December 1948 the United Nations General Assembly in Paris proclaimed the Universal Declaration of Human Rights (UDHR). Some still view this largely as a European document as well: signed in Paris, the UDHR allowed France to reconnect with its glorious past and, in particular, with the Declaration of the Rights of Man and of the Citizen (1789). More important than the symbolism was the fact that Europeans were among the main inspirers and drafters, with French jurist René Cassin being its chief author.¹¹ This, however, ignores the impact of non-Europeans, who realized a synthesis of different philosophical traditions, western and non-western. Moreover, these non-Europeans criticized the emphasis on the European origins of human rights (mostly referring to the Enlightenment), effectively arguing that Europeans since the French Revolution had abandoned the universalism of the Enlightenment.¹² In the course of its post-war history the rift increased, not only between Europeans and non-Europeans (who were

⁹ See e.g. <https://europa.eu/european-union/topics/human-rights_en>; <https://eeas.europa.eu/topics/human-rights-and-democracy_en> [accessed 1 Jan. 2018].

¹⁰ The ECHR has been the subject of much legal and historical research. The standard history is Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford, 2011).

¹¹ Tom Buchanan, 'Human rights, the memory of war and the making of a "European" identity, 1945–1975', in Martin Conway and Kiran K. Patel (eds), *Europeanization in the Twentieth Century: Historical Approaches* (Basingstoke, 2010), pp. 157–71. Compare with Gurminder K. Bhambra, 'Postcolonial Europe: or, understanding Europe in times of the postcolonial', in Chris Rumford (ed.), *The Sage Handbook of European Studies* (London, 2010), pp. 69–85.

¹² Zehra F. Kabasakal Arat, 'Forging a global culture of human rights: origins and prospects of the International Bill of Rights' and Glenn Mitoma, 'Mode d'assujettissement: Charles Malik, Carlos Romulo, and the emergence of the United Nations Human Rights regime', in Barreto (ed.), *Human Rights*, pp. 388–439; Jan Eckel, *Die Ambivalenz des Guten: Menschenrechte in der internationalen Politik seit den 1940ern* (Göttingen, 2013), pp. 260–339; Mary Anne Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York, 2001), pp. 221–34; Hans Joas, *Sind die Menschenrechte westlich?* (Munich, 2015), pp. 71–9; Lauren, *Evolution*, pp. 225–32; Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia, PA, 2000), pp. xii–xiii, 27–39; John S. Nurser, *For All Peoples and All Nations: The Ecumenical Church and Human Rights* (Washington DC, 2005); Glenda Sluga, 'René Cassin, Les Droits de l'Homme and the universality of human rights, 1945–1966', in Hoffmann (ed.), *Human Rights*, pp. 107–24; Susan Waltz, 'Reclaiming and rebuilding the history of the Universal Declaration of Human Rights', *Third World Quarterly*, 23 (2002), pp. 437–48; idem, 'Universalizing human rights: the role of small states in the construction of the Universal Declaration of Human Rights', *Human Rights Quarterly*, 23/1 (2001), pp. 44–72; Jay Winter, *René Cassin and Human Rights: From the Great War to the Universal Declaration* (Cambridge, 2013).

increasingly representatives of formerly colonized countries), but also between the ‘liberal’ or ‘capitalist’ West and the ‘communist’ East and between what soon became known as the First World and the Third World, still later called the ‘Global South’.

The genesis of the ECHR is generally framed as a major step in a European project taking a new start after the Second World War and the atrocities of Nazism and Fascism, as well as a means for the emerging West to distance itself from communism. Its international character made it a powerful instrument not only to achieve its goal of providing ‘the legal and political means for deterring the future rise of any sort of fascism in Europe’ (including a communist one) and establishing a safe democratic society, but also, as the Danish political scientist Mikael Rask Madsen commented, for avoiding ‘the kind of Cold War sabotage that was to hamper the U.N. human rights system for decades’.¹³ In this respect it foresaw the creation of a European Commission of Human Rights to monitor its implementation and even the creation of a supranational European Court of Human Rights (ECtHR), established in 1959. This is usually represented as a ‘quasi-revolutionary idea’ as, in contrast to the UDHR, it implied that the Convention was binding after ratification. In addition, the ECHR recognized the right of petition, empowering the individual against the state, in contrast to the UDHR, which did not retain the right of petition initially foreseen in Cassin’s draft. Incidentally, respect for ‘individual freedom, political liberty and the rule of law’ – one may note the absence of the term ‘human rights’ though – became membership conditions of the Treaty of Brussels in 1948 and of the Council of Europe (CoE).

Some scholars, however, interpret the significance of the ECHR differently. In a ground-breaking new book historian Marco Duranti notes that in some respects the ECHR restricted human rights, as it limited their validity in times of war and crisis – international law provisions, reinforced with the Geneva Conventions of 1949, in contrast foresaw protections especially in such times of war and crisis.¹⁴ More importantly,

¹³ Mikael Rask Madsen, ‘From Cold War instrument to Supreme European Court: the European Court of Human Rights at the crossroads of international and national law and politics’, *Law & Social Inquiry*, 32/1 (2007), pp. 137–59, at p. 140; idem, ‘International human rights and the transformation of European society: from “Free Europe” to the Europe of human rights’, in Mikael Rask Madsen and Chris Thornhill (eds), *Law and the Formation of Modern Europe: Perspectives from the Historical Sociology of Law* (Cambridge, 2014), pp. 245–74; Susan Marks, ‘The European Convention on Human Rights and its democratic society’, *The British Yearbook of International Law*, 66/1 (1996), pp. 209–38; Helle Porsdam, ‘Human rights and European identity since World War II: *Vergangenheitsbewältigung* through law’, in Menno Spiering and Michael Wintle (eds), *European Identity and the Second World War* (Basingstoke, 2011), pp. 21–36; Hagen Schulz-Forberg, ‘Before integration: human rights and post-war Europe’, *ibid.*, pp. 37–54; Jay Winter, ‘From war talk to rights talk: exile politics, human rights and the two World Wars’, *ibid.*, pp. 55–74; Buchanan, ‘Human rights’; Eckel, *Die Ambivalenz*, pp. 154–206; Valentina Vardabasso, ‘La Convention européenne des droits de l’homme (Rome, le 4 novembre 1950)’, *Relations internationales*, 3/131 (2007), pp. 73–90.

¹⁴ Duranti, *Conservative*, pp. 209–10. On the Geneva Conventions and human rights see William I. Hitchcock, ‘Human rights and the laws of war: the Geneva conventions of 1949’, in Iriye *et al.* (eds), *Human Rights Revolution*, pp. 93–112.

there was a substantial difference between the UDHR and the ECHR: the UDHR was truly universal – proclaiming no discriminations based upon categories ‘such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’, specifying that ‘no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty’ (art. 2). The ECHR, in contrast, restricted the applicability ‘to everyone within their jurisdiction’, and only referred to ‘certain of the rights stated in the Universal Declaration’. It also explicitly limited its coverage to ‘the territories for whose international relations it is responsible’ – ‘lawspeech’ for colonies and mandates – after a formal declaration, i.e. not automatically. The same applied to the right of petition.¹⁵ Needless to say, the ECHR did not recognize self-determination as a human right either, while Article 1 of the UN Charter (1945) includes the ‘respect for the principle of equal rights and self-determination of peoples’ and from the early 1950s onward, every resolution, declaration, and covenant on human rights by the UN actually affirmed this right of all peoples to self-determination.¹⁶ The so-called ‘colonial clauses’ of the ECHR actually largely annihilated its universality (in other words, it considered human rights not universally applicable). Paraphrasing Léopold Senghor, one can conclude that the ECHR was actually not a human rights text at all, but rather a convention on the rights of *Europeans*, or, as George Orwell commented with regard to a pre-war grand scheme for a ‘free West’, ‘not counting niggers’.¹⁷

It is customary to situate the ECHR in a Cold War context. To be sure, the Convention was not signed by any of the Eastern European countries under the Soviet yoke. The Soviet Union opposed it because of its unilateral focus on political rights, excluding social rights – in Duranti’s view basically a different view on the meaning of democracy. But it is easily overlooked that many West European countries also were less than lukewarm. The jurisdiction of the Court was not accepted by

¹⁵ On these ‘colonial clauses’ see esp. Duranti, *Conservative*, pp. 197–212; Syméon Karagiannis, ‘L’aménagement des droits de l’homme outre-mer: la clause des nécessités locales de la Convention européenne’, *Revue Belge de Droit International*, 1 (1995), pp. 224–305; Fabian Klose, ‘“Source of embarrassment” – human rights, state of emergency, and the wars of decolonization’, in Hoffmann (ed.), *Human Rights*, pp. 237–57; idem, ‘Europe as a colonial project: a critique of its anti-liberalism’, in Dieter Gosewinckel (ed.), *Anti-liberal Europe: A Neglected Story of Europeanization* (Oxford, 2014), pp. 50–71; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law Principles and Policy* (Oxford, 2011); William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford, 2015), p. 926.

¹⁶ See especially Jörg Fisch, *The Right of Self-Determination of Peoples: The Domestication of an Illusion* (Cambridge, 2015); Eric D. Weitz, ‘From the Vienna to the Paris system: international politics and the entangled histories of human rights, forced deportations, and civilizing missions’, *The American Historical Review*, 113/5 (2008), pp. 1313–43; and idem, ‘Self-determination: how a German Enlightenment idea became the slogan of national liberation and a human right’, *The American Historical Review*, 120/2 (2015), pp. 462–96.

¹⁷ George Orwell, ‘Not counting niggers’, *The Adelphi*, July 1939, <<https://ebooks.adelaide.edu.au/orwell/george/not-counting-niggers/>> [accessed 22 Feb. 2016].

major states, including Italy, the UK and France. Although presenting itself as human rights champion, the latter only ratified the Convention in 1974. Only in 1959, almost a decade after its signature, had enough CoE member states signed it to install the ECtHR. They proved very reluctant to give up national sovereignty, but not just as a principle. European states basically continued to view international law 'as being an issue subject to diplomatic calculations'.¹⁸ While readily willing to judge others, they simply refused to be judged themselves: France, for example, while not having ratified the Convention, did sit in the ECtHR and even provided its president. As Belgium particularly emphasized, before granting rights, colonized people should first attain a certain level of 'civilization' (needless to say that Belgian colonization after the Second World War was also not particularly 'civilizing' or 'civilized').¹⁹ In the French case, the constitution of the French Union, which granted 'equal rights' but not equal representation, presented a particular obstacle. Some even argued that the French constitution offered more protection than the ECHR. The UK, the other main colonial empire, did ratify the Convention in 1952 and even extended it, 'generously' in its own understanding, to the overseas territories (albeit with exceptions), but it did not accept the clause on individual petition, hoping that this would save it from being accused. Alas, the very first case submitted to the ECtHR was filed by the state of Greece against the UK for human rights abuses in Cyprus, and demonstrated the problem. It only stimulated the colonial powers to join forces and resist, in order to safeguard their interests and limit the impact of human rights on their colonial affairs.²⁰

Human rights history is usually presented as a secular story of progress. Moyn, however, emphasizes the impact of the Catholic Church as a source of inspiration for human rights thinking, presenting the Catholic discourse on human dignity as a 'progressive' movement away from totalitarianism.²¹ Duranti equally recognizes the impact of Christianity but reconstructs the contemporary human rights history basically as a 'conservative' revolution, a belated expression of the European imperial discourse, in which the concept of civilization under circumstances of

¹⁸ Madsen, 'Cold War instrument', p. 145.

¹⁹ On the importance of the concept of civilizational threshold in international (human rights) law see Antony Anghie, 'Colonialism and the birth of international institutions', *New York University Journal of International Law and Politics*, 34 (2002), pp. 513–633; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge, 2001).

²⁰ See esp. Louise Moor and A. W. Brian Simpson, 'Ghosts of colonialism in the European Convention on Human Rights', *British Year Book of International Law*, 76 (2005), pp. 121–93; Duranti, *Conservative*, pp. 201–5; Vardabasso, 'La Convention européenne'.

²¹ Moyn, *The Last Utopia*; idem, *Christian Human Rights* (Philadelphia, PA, 2015). See also Hans Joas, *The Sacredness of the Person: A New Genealogy of Human Rights* (Washington DC, 2013). For a trenchant critique on this representation, based on the work of Paul Hanebrink and Pjotr Kosicki on interwar Catholicism, see James G. Chappel, 'All churches have heretics: Catholicism, human rights, and the uses of history for life', *The Immanent Frame* (5 June 2015), <<https://tif.ssrc.org/2015/06/05/all-churches-have-heretics-on-catholicism-human-rights-and-the-advantages-of-history-for-life/>> [accessed 1 Jan. 2018].

Nazism and then the Cold War was increasingly narrowed down from an equation of civilization with ‘Europe’ to a (albeit vaguely) ‘Christian’ western Europe. In this respect Duranti, in contrast to both studies of the ECHR and recent histories of European integration, emphasizes the role of individuals and transnational political movements, including in particular (Christian) conservatives such as Winston Churchill besides the European federalists operating from the margins of political decision-making. He highlights the latter’s impact on the drafting of the ECHR, also in opposition to the UDHR. The latter was largely the product of international (intergovernmental) negotiation, whereby the drafters operated under the supervision and guidance of the main national protagonists.²² More fundamentally perhaps, Duranti shows that invoking human dignity and human rights was imagined by the conservative right as an effective strategy against the expansion of state power under the influence of the political left, be it either communist or socialist. It was hence no oversight that the ECHR initially did not include the right to free elections or universal suffrage, secret ballot or political opposition. If conservatives demanded a supranational legal authority referring to human dignity, it was because it offered an effective elitist bulwark against the ambitions of ‘totalitarian’ states; also in this respect, the ECHR constituted almost a negation of the UDHR, which largely shared the New Deal ideology of increased state intervention. The European ‘conception of man and society’, ‘our own way of dealing with the relations between citizens and the state’ in the words of the French conservative historian Etienne Gilson, implied an outright *rejection* of the universalist principles of the UDHR, the restriction of human rights to Europe, and an emphasis on a balance between rights and duties. The absence of references to gender equality in the first drafts, and indeed the initial text of the ECHR, was illustrative of their mindset.²³ What these conservatives then imagined was a ‘restoration’ of Christendom. For an influential minority, mainly of reactionary Christian personalists such as Louis Salleron and especially Alexandre Marc, this implied the introduction of international law based on natural rights to counter the sacralization of the nation-state. This perspective furthermore demanded that international law avoid the ‘whims of the masses’, which also haunted Pius XII.²⁴ The reference to Pius XII, whose role during the war remains controversial, points to another, by far the most provocative of

²² Duranti, *Conservative*, esp. 335ff. – a summary can be found in Marco Duranti, ‘European integration, human rights and romantic internationalism’, in Nicholas Doumanis (ed.), *The Oxford Handbook of European History, 1914–1945* (Oxford, 2016). Compare Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford, 2001); Andrew Moravcsik, ‘The origins of international human rights regimes: democratic delegation in postwar Europe’, *International Organization*, 54/2 (2000), pp. 217–52. In Patrick Pasture, *Imagining European Unity since 1000 AD* (Basingstoke, 2015), I seriously question the impact of European federalists on post-war European integration. Duranti’s argumentation here is convincing.

²³ The same issue played it the UN as well. See Sluga, ‘René Cassin’.

²⁴ See e.g. the Pope’s 1944 Christmas Message on ‘the Subject of Democracy and a Lasting Peace’, <<http://www.ewtn.com/library/papaldoc/pl2xmas.htm>> [accessed 1 Jan. 2018].

Duranti's claims, that human rights were also advanced by conservatives and reactionaries to avoid post-war repression of collaborators and, in France, *Vichistes*.²⁵

Initially, the Christian-conservative view on human rights included the protection of minorities, though not viewed from the prism of self-determination nor individual rights, but wholly in line with the post-1918 ideal of the homogeneous state with minority protection in certain cases.²⁶ Churchill, for example, in 1945 still favoured forced deportations in order to avoid 'mixing of populations to cause endless trouble'.²⁷ The focus on individual rights emerged only gradually and mainly during the Second World War. The statelessness of displaced persons may have contributed to the nascence of human rights as individual, opposing the interwar collective minority regimes, as many in the wake of Hannah Arendt have argued.²⁸ In Sam Moyn's interpretation, human rights then became understood solely in individual terms. Collective rights and self-determination – defined as a right of peoples, not individuals – in his assessment are not properly speaking human rights.

Moyn's 'individualization' of human rights, however, ignores the fact that self-determination and collective social rights were also on the rise, although largely in different settings and institutions. A more comprehensive analysis may perhaps also nuance Duranti's prominent role of conservatives in the emerging European human rights order, although his assessment is quite comprehensive and convincing. That social rights had not made it into the ECHR had to do with their contentious character, while one was aware that respecting social rights implied a far more active role of the state, something that conservatives wanted to avoid. However, the CoE decided to develop a separate document on social rights, although the boundaries of what would be included – social rights, or also cultural rights, for example – remained the subject of debate.²⁹ In 1961, it led to the establishment of the Social Charter protecting, *inter alia*, the right to work, the right to organize, the right to bargain collectively, the right to social security, the right to social and medical assistance, the right to the social, legal and economic protection of the family, and the right to protection and assistance for migrant workers and their families. It also set up an international system of supervision, however, without the means to impose its conclusions

²⁵ Duranti, *Conservative*, pp. 282–9.

²⁶ Weitz, 'Vienna'.

²⁷ Quoted in Philipp Ther, *Die dunkle Seite der Nationalstaaten: 'Ethnische Säuberungen' im modernen Europa* (Göttingen, 2011), p. 144.

²⁸ Carole Fink, *Defending the Rights of Others: The Great Powers, the Jews, and International Minority Protection, 1878–1938* (Cambridge, 2004), pp. 353–8; G. Daniel Cohen, 'The "human rights revolution" at work: displaced persons in postwar Europe', in Hoffmann (ed.), *Human Rights*, pp. 43–61; See Mark Mazower, 'The strange triumph of human rights, 1933–1950', *The Historical Journal*, 47/2 (2004), pp. 379–98; Simpson, *Human Rights*, pp. 327–34; Weitz, 'Vienna'.

²⁹ Birte Wassenberg, *Histoire du Conseil de l'Europe (1949–2009)* (Brussels, 2012), pp. 146–55. Duranti, *Conservative*, pp. 328–31, offers some guiding thoughts on why social rights were not included in the ECHR.

upon the member states. It became effective in 1965, but remained for the time being separate from the EC.

The focus on individual rights constituted part of the Cold War litigation, which seems perpetuated in the historiographical debate. The Cold War dichotomy, however, simplifies positions, and by so doing sometimes forgets that social rights were also promoted by western countries (Scandinavia especially) and Australia (although also partly in a Cold War perspective to counteract Soviet propaganda), while individual, or political, rights fitted into the Soviet agenda as well, if only to expose racism in the US and in European colonies.³⁰ It isolates human rights discourse from other collective issues, such as the legalization of collective crimes, including genocide. While it is legitimate to redefine human rights in individual terms, it becomes glaucomic if it leads to systematic exclusion of demands for either self-determination or collective social (and economic and cultural) rights. Hoffmann even contends that the ‘individualization’ of human rights served a political agenda and actually opened the door to the Allies for massive deportations and displacements. There is, however, an alternative interpretation possible, according to which (as Eric Weitz argued) the ‘Paris system’ of national homogenization was actually continued after 1945 *alongside* the individualization of rights.³¹

In this respect, one should point out that the importance of the nation-state only increased as a dominant political form after the Second World War. Devin Pendas contends that the ‘legalist paradigm change’ after 1945 was actually characterized by a ‘persistent dualism’ that held both individuals and states responsible for international law.³² Hence the principle of national sovereignty was quickly revived, obliterating efforts both on a world and a European scale to create a mandatory international legal system. In this respect, it is worth noting that one of the ‘new’ human rights was the right to change nationality – thus confirming the nation-state’s centrality. Also displaced persons were categorized according to nationality – the Jews given a new ‘Jewish’ nationality.³³ Still, the history of human rights puts Millward’s classic argument that the post-war European institutions somehow ‘rescued’ the nation-state (or at least strengthened it rather than undermining it) somewhat in perspective, as the result certainly was a supranational institution that aimed at curtailing the power of the post-war state.³⁴

³⁰ Jennifer Amos, ‘Embracing and contesting: the Soviet Union and the Universal Declaration of Human Rights, 1948–1978’, in Hoffmann (ed.), *Human Rights*, pp. 147–65; Benjamin Nathans, ‘Soviet rights-talk in the post-Stalin era’, *ibid.*, pp. 166–90.

³¹ Hoffmann, ‘Genealogies’, p. 15; Weitz, ‘Vienna’, pp. 1342–3; Cohen, ‘Human rights revolution’.

³² Devin O. Pendas, ‘Toward world law? Human rights and the failure of the legalist paradigm of war’, in Hoffmann (ed.), *Human Rights*, pp. 215–36.

³³ Cohen, ‘Human rights revolution’, pp. 43–61.

³⁴ e.g. Alan Steele Milward, *The Reconstruction of Western Europe, 1945–51* (London, 1984/1987); *idem*, *The European Rescue of the Nation-State* (Abingdon, 1992); *idem et al.*, *The Frontier of National Sovereignty: History and Theory, 1945–92* (London, 1994).

Still, individual human rights were hardly understood initially as universal in Europe and emerged merely in opposition to Nazi racist policies first and the emerging communist threat afterwards. The latter encouraged an association with liberal democracy, which was also absent in the early post-war drafts.³⁵

II

‘European human rights’ remained prominent in European discourse until the early 1950s. The draft Treaty for the European Defence Community (EDC, 1952) foresaw that the organization would accomplish its mission ‘with due respect to public liberties and the fundamental rights of the individual’ (art. 3). More important is the draft that the European Movement, through its Study Committee for the European Constitution (Comité d’études pour la constitution européenne, CECE) composed in 1952, which radicalized the propositions of the ECHR. Harvard legal scholar Gráinne de Búrca emphasizes several important features of the document:

First, the CECE unequivocally assumed ... that the Community should play a central role in protecting and preserving human rights within member states, even though the member states themselves were expected to take primary responsibility for this task. Secondly, for the purpose of protecting human rights, the objects of suspicion were the member states rather than the Community since, apart from the Community’s general role in protecting fundamental freedoms, only member states and not the Community institutions were to be specifically placed under an obligation to respect human rights. Third, the source of the rights that the member states were expected to observe was the ECHR; there was no express reference to member state constitutions. Fourth, the Community’s role was envisaged as a kind of strong-armed backstop in the event that a member state seriously failed to protect human rights and fundamental freedoms.³⁶

Duranti (who incidentally ignores de Búrca’s assessment) offers a radically new, thought-provoking explanation for the logic behind this far-reaching interventionist proposal, giving a supranational political authority the right to intervene within the member states and individuals the right to bring cases to the court. This went further than previous provisions. The only similarity was with the ‘Minorities Protection’ system that the League of Nations had set up after the First World War,³⁷ but it is hard to imagine how this policy could have inspired the CECE, except in a negative way.³⁸

³⁵ The relationship between democracy and human rights is in itself a fascinating topic, which I cannot explore in this essay.

³⁶ Gráinne de Búrca, ‘The road not taken: the EU as a global human rights actor’, *American Journal of International Law*, 105 (2011), pp. 649–93.

³⁷ On the transformations of the minorities protection system from a historical perspective see (the slightly conflicting views of) Carole Fink, *Writing 20th Century International History: Explorations and Examples* (Göttingen, 2017), pp. 53–81; Weitz, ‘Vienna’.

³⁸ René Cassin’s insistence on recognizing individual, not collective, rights was largely inspired by his aversion to the failed minority regime. Glenda Sluga, ‘René Cassin, Les Droits de l’Homme and the

To be sure, ‘fear of totalitarianism or similar abuses by or within European states’ was the prime motive behind these radical proposals, although it was not just the fear of a fascist re-emergence but also of socialism and communism.³⁹ The Holocaust incidentally played a role in the drafting of the UCHR, although it was much less central than has been imagined since the 1990s. It was, however, not a significant factor in the case of the ECHR.⁴⁰

The actual preparation of the European Political Community (EPC) was entrusted to an Ad Hoc Assembly within the CoE, composed by the governments of the six ECSC states. The draft treaty foresaw that the EPC would recognize the ECHR and guarantee the application of its clauses in the member states. However, it also – in contrast to the CECE – considered possible infringements of the EPC itself, expressing a novel distrust for supranational institutions. The draft EPC treaty stipulated that ‘natural or legal persons’ could appeal to the new Community Court in case of dispute including against Community institutions for violating the ECHR. It also maintained the right to intervene, though more curtailed as it was restricted requiring a ‘request’ of a member state and bound to unanimity. The 1953 Intergovernmental Conference, which demanded a revision of the social and economic paragraphs, further strengthened the human rights propositions by foreseeing an expulsion clause for member states whose internal systems had ‘fundamentally altered’.⁴¹

The EPC project, however, collapsed, and with it apparently also the interest in human rights evaporated. As conservative governments dominated, there was less need for ‘protection’ from a statist interventionist state. Initially the European Court of Justice (ECJ) – established in 1952 to ensure that European law is applied in the same way in all ECSC (later EC/EU) countries – also did not consider human rights a crucial dimension of the European legal order, as it rejected the idea both that national human rights laws constrained Community authority and that ‘general principles of European law include human rights principles that should guide and shape the interpretation of the EEC Treaty’.⁴² Politically, in a context of anticolonial agitation, human rights increasingly appeared as an ‘embarrassment’ (Fabian Klose).⁴³

universality of human rights, 1945–1966’, in Hoffmann (ed.), *Human Rights*, pp. 107–24; Jay Winter and Antoine Prost, *René Cassin and Human Rights: From the Great War to the Universal Declaration* (Cambridge, 2013).

³⁹ De Búrca, ‘The road not taken’, p. 657.

⁴⁰ G. Daniel Cohen, ‘The Holocaust and the “human rights revolution”: a reassessment’, in Iriye *et al.* (eds), *Human Rights Revolution*, pp. 53–71; Marco Duranti, ‘Holocaust memory and the silences of the human rights revolution’, in Aleida Assmann and Jan Assmann (eds), *Schweigen: Archäologie der literarischen Kommunikation XI* (Munich, 2013), pp. 89–100; idem, ‘The Holocaust, the legacy of 1789 and the birth of international human rights law: revisiting the foundation myth’, *Journal of Genocide Research*, 14/2 (2012), pp. 159–86.

⁴¹ De Búrca, ‘The road not taken’, pp. 659–64 (quotation p. 663).

⁴² *Ibid.*, p. 667.

⁴³ Klose, ‘Source of embarrassment’.

Human rights all but disappeared from the European negotiations in the later 1950s, which focused on economic issues as an extension of the ECSC, although Germany with regard to the EEC actually proposed a ‘reservation clause’ (*Verfassungsvorbehalt*) similar to the one in the draft EDC treaty quoted above (art. 3). But it was rejected out of fear that the Community would be subordinated to national laws and that the clause would be used to undermine Community actions.⁴⁴ It was no accident that it was Germany that made this proposal, not only because it attached much importance to human rights, but also because it was not a colonial power.

The latter issue incidentally raises the question whether human rights played a role in decolonization. Moyn notoriously argued that anti-colonialists hardly referred to human rights – in his narrow definition, excluding the right of self-determination – at all, while the German historian Jan Eckel emphasizes their instrumental use to advance a particular anti-colonial agenda but not for advocating true ‘universal’ human rights (which could be used against their own policies).⁴⁵ Here the issue is rather whether the debate motivated the European empires to give up their colonial territories. I already referred to Fabian Klose’s argument that human rights increasingly became viewed as an embarrassment. He, and others, also demonstrate that human rights figured prominently (contra Moyn) in the anticolonial agitation which was also taking place in Europe. However, in the late 1950s the decolonization of Asia was all but completed – one could argue that Africa would follow anyway. The British embarked on a process of decolonization in which human rights did not really play a role. All empires actually tried to preserve their colonies – neither Belgium nor France were ready to abandon their colonial possessions until forced to by anticolonial opposition. As regards the Eurafrika project, they even used the establishment of the Common Market to continue the imperial exploitation of Africa.⁴⁶ Human rights

⁴⁴ De Búrca, ‘The road not taken’.

⁴⁵ Moyn, *The Last Utopia*; idem, ‘Imperialism, self-determination, and the rise of human rights’, in Iriye et al. (eds), *Human Rights Revolution*, pp. 159–78. For the colonial critique see Roland Burke, *Decolonization and the Evolution of Human Rights* (Cambridge, 2010); S. L. B. Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (Cambridge, 2016); Fabian Klose, *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria* (Philadelphia, PA, 2013); idem, ‘Human rights for and against empire – legal and public discourses in the age of decolonisation’, *Journal of the History of International Law*, 18 (2016), pp. 317–38. This view is contested, *inter alia* by Eckel, *Die Ambivalenz*, pp. 260–339, and idem, ‘Human rights and decolonization: new perspectives and open questions’, *Humanity Journal* (10 June 2014), <<http://www.humanityjournal.org/issue-1/human-rights-and-decolonization-new-perspectives-and-open-questions/>> [accessed 1 Jan. 2018] (which give extensive reviews of the literature). Cmiel, ‘The recent history’, however, shows how human rights terms used in different settings need to be contextualized, a dimension largely missing in the debate.

⁴⁶ On the Eurafrika dimension see Peo Hansen and Stefan Jonsson, *Eurafrika: The Untold History of European Integration and Colonialism* (London, 2014). See also Laura Kottos, *Europe between Imperial Decline and Quest for Integration: Pro-European Groups and the French, Belgian and British Empires (1947–1957)* (Brussels, 2016).

rhetoric may have contributed to the erosion of international legitimacy and domestic support for empire, but if so it was only one factor among others. As human rights did not have the exposure they have had since the 1970s or 1990s, one should not overestimate their impact.⁴⁷

Gradually in the 1960s human rights made their way onto the international political agenda. In this context, it was important that the ECs could distance themselves from the colonial enterprise, notwithstanding the reservations and ambiguities presented above.⁴⁸ Human rights were not contested as a cornerstone of European civilization and corresponded to a recurrent and lasting discourse in European self-perception, which was reinforced after the Second World War. Once the colonial era was over, the EC could focus relatively easily on a discourse of values which would become the cornerstone of EU self-perception and its foreign policy – values that were viewed since 1945 as ‘at once universal and distinctly European’ and that could ‘be invoked as Europe’s unique inheritance as well as its greatest gift to the world’, as Marco Duranti aptly (but not without irony) summarizes.⁴⁹

Some changes in the Cold War also played a role, though it is perhaps rather the increased opposition against the political stalemate that changed the climate. Europeans certainly played a prime role in the change – one should think of the British lawyer Peter Benenson, who in 1961 took the initiative of founding what became one of the main NGOs promoting human rights, Amnesty International.⁵⁰ Typically these movements targeted human rights violations from all sides of the Cold War dichotomy. That human rights had already become an issue came to the fore in 1962 when Franco’s Spain applied for EC membership and with the Greek colonels’ putsch in 1967, which provoked the withdrawal of Greece from the CoE in 1969. France finally signed the ECHR in 1974, although it still refused to recognize the universality of human rights or to be subjected in any way to a supranational authority supervising human rights. It only accepted the right of individual petition in 1981.

In the early 1970s, the EC especially targeted relations with countries such as Portugal, Chile and South Africa – significant choices, as they allowed it to distance itself even more from its colonial past. As Lorenzo Ferrari has observed, they aimed at presenting the EC ‘as a supporter of the independence of the African peoples and of racial equality’.⁵¹ That détente, somewhat paradoxically (as human rights functioned as a

⁴⁷ My assessment hence largely corroborates with Jan Eckel’s in n. 45.

⁴⁸ Patrick Pasture, ‘The EC/EU between the art of forgetting and the palimpsest of empire – Part 2: the post-colonial metamorphosis of the EC and the after-image of empire’, *European Review*, 26/4 (2018 forthcoming); Andrew Williams, *EU Human Rights Policies: A Study in Irony* (Oxford, 2004); Kalypso Nicolaïdis, ‘Southern barbarians? A Post-colonial critique of EUniversalism’, in Kalypso Nicolaïdis, Bernhard Sèbe and Gabrielle Maas (eds), *Echoes of Empire: Memory, Identity and Colonial Legacies* (New York, 2015), pp. 283–303.

⁴⁹ Duranti, *Conservative*, p. 350.

⁵⁰ Buchanan, ‘Human rights’.

⁵¹ Lorenzo Ferrari, ‘The European Community as a promoter of human rights in Africa and Latin America, 1970–80’, *Journal of European Integration History*, 21/2 (2015), pp. 217–30, at p. 222; idem,

western argument against the Soviet Union), opened space for human rights politics became clear during the Conferences on Security and Co-operation in Europe (CSCE) in Helsinki in 1973 and 1975, where the EC incidentally presented a strong human rights front. Although the Helsinki process also confirmed the East–West division of Europe, it invigorated interest in human rights throughout the world, including ‘behind the iron curtain’. The conferences gave way to the creation of an association called Helsinki Watch, later Human Rights Watch, to monitor the implementation of the Helsinki Accords and human rights abuses, first particularly in eastern Europe, but also elsewhere.⁵² During the negotiations leading to the Lomé Convention (1975) the EC for the first time showed teeth in associating aid with respect for human rights.⁵³ The association of human rights and development remained a contentious issue though, as African leaders vehemently opposed it.⁵⁴

The more active role of the ECs was paralleled by a change in the judicial context. Firstly, the European Court of Justice (ECJ), reversing its earlier reticence in the 1950s and early 1960s, engaged in promoting human rights as part of its policy of furthering European integration, using human rights as a major instrument to extend its authority in the emerging institutional framework from 1969 onwards.⁵⁵ Then the ECtHR also started to become more solicited. ‘In a series of landmark decisions, the Court fundamentally transformed European human rights from a project mainly linked to Cold War objectives to both an independent mission of setting common standards across Europe and a quest for a real protection of human rights under the ECHR’, Madsen concludes. In the process, the ECtHR actually acted as ‘the de facto Supreme Court of human rights in Europe’.⁵⁶ This, however, created a tension between

Sometimes Speaking with a Single Voice: The European Community as an International Actor, 1969–1979 (Brussels 2016).

⁵² Buchanan, ‘Human rights’; Richard Davy, ‘Helsinki myths: setting the record straight on the Final Act of the CSCE, 1975’, *Cold War History*, 9/1 (2009), pp. 1–22; N. Piers Ludlow, *European Integration and the Cold War: Ostpolitik–Westpolitik, 1965–1973* (London, 2007); Mark Mazower, *Governing the World: The History of an Idea* (New York, 2012), pp. 320ff.; Daniel Möckli, *European Foreign Policy during the Cold War: Heath, Brandt, Pompidou and the Dream of Political Unity* (London, 2008), ch. 3; Moyn, *The Last Utopia*, pp. 172ff.; Angela Romano, ‘Untying Cold War knots: the EEC and eastern Europe in the long 1970s’, *Cold War History*, 14/2 (2014), pp. 153–73; idem, *From Détente in Europe to European Détente: How the West Shaped the Helsinki CSCE* (Brussels, 2009); Sarah B. Syder, ‘Principles overwhelming tanks: human rights and the end of the Cold War’, in Iriye *et al.* (eds), *Human Rights Revolution*, pp. 265–83.

⁵³ De Búrca, ‘The road not taken’, pp. 668ff.

⁵⁴ Williams, *EU Human Rights*, pp. 25–34ff.; Pasture, ‘The post-colonial metamorphosis’.

⁵⁵ Obviously the policy of the ECJ provoked a lot of reaction. See as main references De Búrca, ‘The road not taken’, pp. 668ff.; Mikael Rask Madsen, ‘Human rights and European integration: from institutional divide to convergent practice’, in Niilo Kauppi (ed.), *A Political Sociology of Transnational Europe* (Colchester, 2013), pp. 147–65; Joseph H. H. Weiler, ‘Eurocracy and distrust: some questions concerning the role of the European Court of Justice in the protection of fundamental rights in the legal order of the communities’, *Washington Law Review*, 61 (1986), pp. 1103–42.

⁵⁶ Mikael Rask Madsen, ‘The challenging authority of the European Court of Human Rights: from Cold War legal diplomacy to the Brighton Declaration and backlash’, *Law and Contemporary Problems*, 79/1 (2016), pp. 141–78, at pp. 152, 143; Madsen, ‘Cold War instrument’; Mikael

different institutions, which initially mainly preoccupied legal scholars but which had important political implications.⁵⁷

The European institutions slowly adapted to the new realities. The Davignon Report of 1970, which inspired the European Political Cooperation (EPC), stated that a ‘united Europe should be based on a common heritage of respect for the liberty and rights of man and bring together democratic States with freely elected parliaments’.⁵⁸ The Copenhagen Declaration on European Identity of December 1973 confirmed this orientation, declaring its ambition ‘to safeguard the principles of representative democracy, of the rule of law, of social justice and of respect for human rights’ – including thus a reference to ‘social justice’, which had been dropped in the previous Declaration.⁵⁹ The Tindemans Report of 1975, drafted with a view on the renewal of the European institutions after enlargement, also suggested an important role for human rights.⁶⁰ In the same year, Rudolf Bernhardt of the Max Planck Institute in Heidelberg in a report for the EC suggested the issuing of a common declaration to make human rights, though still restricted to civil liberties, binding in the ECs.⁶¹ This effectively happened with the Joint Declaration on Human Rights of the European Parliament, the Council and the Commission in April 1977. In the process, the ECs legitimized the bold move of the ECJ and positioned themselves as the trustees of human rights in Europe at the expense of the CoE and the ECtHR.⁶² It did not solve the problem though. Moreover, although they liked to present themselves as a forerunner with regard to human rights, the ECs had to step up a gear, pressed mainly by the Americans and the international NGOs. The United States indeed had also grasped the opportunity to reposition themselves and regain moral ground in the

Rask Madsen and Antoine Vauchez, ‘European constitutionalism at the cradle: law and lawyers in the construction of European political orders (1920–1960)’, in Alex Jettinghoff and Harm Schepel (eds), *Lawyers’ Circles: Lawyers and European Legal Integration: Special Issue of Recht der Werkelijkheid* (The Hague, 2004), pp. 15–36; Weiler, ‘Eurocracy and distrust’, pp. 1103–42.

⁵⁷ For an elaboration of the relationship between the ECJ and the ECtHR see Leonard F.M. Besselink, ‘Should the European Union ratify the European Convention for Human Rights? Some remarks on the relations between the European Court of Human Rights and the European Court of Justice’, in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge, 2013), pp. 301–33. See also the previous notes.

⁵⁸ ‘Davignon Report’, *Bulletin of the European Communities*, 11 (Nov. 1970), <https://www.cvce.eu/content/publication/1999/4/22/4176efc3-c734-41e5-bb90-d34c4d17bbb5/publishable_en.pdf> [accessed 1 Jan. 2018], pp. 9–14.

⁵⁹ <https://www.cvce.eu/content/publication/1999/1/1/02798dc9-9c69-4b7d-b2c9-f03a8db7da32/publishable_en.pdf> [accessed 1 Jan. 2018].

⁶⁰ ‘European Union: Report by Mr. Leo Tindemans, Prime Minister of Belgium, to the European Council’, *Bulletin of the European Communities*, Supplement 1/76 (1976), <<http://aei.pitt.edu/942/>> [accessed 1 Jan. 2018].

⁶¹ Rudolf Bernhardt, ‘The problems of drawing up a catalogue of fundamental rights for the European Communities’, *Bulletin of the European Communities*, 9/5 (1976), Supplement: *The Protection of Fundamental Rights in the European Community*.

⁶² <http://www.europarl.europa.eu/charter/docs/pdf/jointdecl_04_77_en_en.pdf> [accessed 1 Jan. 2018]. See nn. 51 and 52.

1970s – particularly Jimmy Carter, who elevated human rights to a key element in his international politics.

The Single European Act of 1986 answered this challenge and included social rights as well, as it referred not only to the ECHR but also to the European Social Charter, advocating freedom, equality and social justice.⁶³ Though under-researched, social rights appear to have been a means through which the ECs/EU distinguished themselves from the United States. The EU would define itself referring to ‘the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law’.⁶⁴ It declared human rights a condition for membership and developed instruments to promote them. This focus received further impetus after the integration of former communist countries which were once part of the Soviet bloc and the main target of European (western) Cold War human rights rhetoric.⁶⁵ At the same time, the number of ECtHR cases multiplied substantially.⁶⁶ Stefan-Ludwig Hoffmann speaks of a ‘real’ ‘ethical turn’ towards the defence of human rights in political philosophy and sociology, international law and politics in the 1990s, which he mainly interprets as the last resort against the neo-liberal onslaught on traditional institutions of solidarity.⁶⁷ In this respect, the inclusion of social rights in the European human rights framework, breaking with the old Cold War dichotomies, may be significant.

Hoffmann has described the Rwandan genocide (1994) as the turning point when the memory of the Holocaust finally translated into a political call for ‘no more genocide’. The Kosovo War (1998-9) then appeared, in the words of the Czech president and former dissident Vaclav Havel, as ‘probably the first war that has not been waged in the name of “national interest” but rather in the name of principles and values This war places human rights above the rights of the state.’⁶⁸ Whether the Kosovo War can figure as illustration of the EU’s interest and efficiency with regard to human rights in international politics may be subject to debate. But referring to the Holocaust as vehicle for promoting a common European identity and associating it with human rights was questionable too, as it became entangled with the European ‘memory wars’ between

⁶³ An overview in Elizabeth F. Defeis, ‘Human rights, the European Union, and the treaty route: from Maastricht to Lisbon’, *Fordham International Law Journal*, 35 (2012), pp. 1207–30.

⁶⁴ Treaty on European Union, Maastricht, 7 Feb. 1992 (Preamble), <http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf> [accessed 1 Jan. 2018].

⁶⁵ Stephan Keukeleire and Tom Delreux, *The Foreign Policy of the European Union* (Basingstoke, 2014), pp. 135–43.

⁶⁶ Madsen, ‘Challenging authority’, provides a quantitative analysis.

⁶⁷ Stefan-Ludwig Hoffmann, ‘Human rights and history’, *Past and Present*, 232/1 (2016), pp. 279–310. Moyn’s reply, ‘The end of human rights history’, *Past and Present*, 233/1 (2016), pp. 307–32. For a poignant critique on human rights as utopia see Chiara Bottici, ‘Imagining human rights: utopia or ideology’, *Law Critique*, 21 (2010), pp. 111–30.

⁶⁸ Václav Havel, ‘Kosovo and the end of the nation-state’, *New York Review of Books*, 10 June 1999, quoted in Hoffmann, ‘Human rights and history’, pp. 297–8.

eastern and western Europe of the late twentieth and early twenty-first centuries.⁶⁹

Indeed, the process did not go as smoothly. Jurists have frequently argued that the EU, and its predecessor the EC, ‘lacks a comprehensive or coherent policy’, both (and particularly) with regard to its foreign and its internal policy.⁷⁰ A historical context offers some additional perspectives. In 2011, Gráinne de Búrca critically observed that the EU’s human rights instruments remained meagre compared to the far-reaching intervention competences foreseen in the plans for an EPC in the early 1950s. In addition, a rift occurred between the CoE and the EU, and between the ECtHR and the ECJ. For example, despite their increased power, neither the ECJ nor the ECtHR can count on a European executive force to impose their rulings. Moreover, EU human rights policies appear more oriented towards external rather than internal policies. Perhaps this is less a question of window dressing, as De Búrca seems to suggest, and more a reflection of different contexts. As Duranto argued, the internal interventionist policies originated from distrust towards national states. Since these early days, however, this perspective has shifted to one of distrust of international institutions – no doubt today the original motivation again gains importance. Furthermore, in the 1950s the international policy constituted the Achilles heel of European human rights policy: while the context of the emerging Cold War suggested their use in countering communism, European empires’ colonial policies made them particularly vulnerable, a major reason why political human rights largely disappeared from the European agenda in the 1950s. To be sure, that situation has fundamentally changed. Human rights became a key dimension of European self-representation and judicial culture: in 2000, the EU adopted the Charter of Fundamental Rights of the European Union, including certain political, social and economic rights. Although initially not binding, it was referred to by the ECJ, and was included, though indirectly, in the Treaty of Lisbon (2007). In addition the ECtHR also imposed itself as an important actor. Its far-reaching judgments led to bitter reactions and provoked a backlash challenging the court’s authority.⁷¹

In the meantime, the emphasis on human rights and the narrative of successfully overcoming the whims of the past considerably contributed to the development of a complacent ‘civilizing mission’ attitude in EU foreign policy: as Europe managed to overcome its ‘bitter past’, it viewed

⁶⁹ The issue is especially developed by Leggewie, *Kampf*. See also Chiara Bottici and Benoit Challand, *Imagining Europe: Myth, Memory, and Identity* (Cambridge, 2013), pp. 71, 73–6.

⁷⁰ The classic statement in Philip Alston and Joseph H. H. Weiler, ‘An “ever closer union” in need of a human rights policy’, *European Journal of International Law*, 9/4 (1998), pp. 658–723 (quote on p. 661) and Williams, *EU Human Rights Policies*.

⁷¹ Madsen, ‘The challenging authority’; Defeis, ‘Human rights’.

itself as uniquely situated to ‘teach’ or lecture others.⁷² This of course can only be done by ignoring its colonial past – hence human rights became, in the words of Hans Magnus Enzensberger, ‘the last refuge of Eurocentrism’ (1993).⁷³

III

Globalization challenges this Eurocentric position in several ways. Firstly, and most obviously, the ‘provincializing’ of Europe, and the EU’s position in the world, weakens its ability to impose its views on values almost as much as to defend its interests. The changed power balance has also led to further exposure of Europe’s ‘hypocrisy’ – the observation that ‘tragically, the idea that the West [which for him certainly includes Europe] is inherently a benevolent force on the world stage is a deeply embedded myth’ by the Singaporean academic and former diplomat Kishore Mahbubani illustrates a widely held position among postcolonial intellectuals as well as politicians (but largely ignored in European circles).⁷⁴

A particular human rights issue that recently came to the fore as a result of globalization concerns religion. Freedom of religion constituted an important part of the Cold War rhetoric, and was one that right-wing Europeans emphasized, certainly after the communists in Hungary tortured and incarcerated Cardinal József Mindszenty in 1948. In the 1970s, some Christian churches, the Catholic Church in Poland being the most outspoken, supported the struggle for freedom in eastern Europe explicitly with reference to human rights. Although it is not the subject of this essay (and it is a topic which would need far more elaboration), religious freedom largely dissipated as an issue of contention within western Europe, as is shown by the lack of cases brought to the ECtHR.⁷⁵ The EU also embraced ‘diversity’ as a core value, breaking with the age-old European focus on homogeneity and fear of diversity.⁷⁶ But things started to change, especially after the fall of the Berlin Wall. At first, the ethno-religious conflicts that ripped former Yugoslavia apart brought back ancient demons and raised awareness of a possible renewed need for the (collective) protection of minorities and collective ‘minority rights’, largely following the same principles as in the 1920s.⁷⁷ But the question

⁷² Bernhard Forchtner and Christoffer Kølvrå, ‘Narrating a “new Europe”: from “bitter past” to self-righteousness?’, *Discourse & Society*, 23/4 (2012), pp. 377–400, at p. 398. See also Ulrich Beck and Edgar Grande, *Cosmopolitan Europe* (Cambridge 2005), pp. 258–60.

⁷³ Hans Magnus Enzensberger, *Aussichten auf den Bürgerkrieg* (Frankfurt, 1993), p. 77, quoted in Hoffmann, ‘Human rights and history’, p. 306.

⁷⁴ Kishore Mahbubani, *The Great Convergence: Asia, the West, and the Logic of One World* (New York, 2013), p. 195.

⁷⁵ Lorenzo Zucca, ‘A comment on Moyn’s *Christian Human Rights*, ch. 4: “From communist to Muslim: religious freedom and Christian legacies”’, *King’s Law Journal*, 28/1 (2017), pp. 21–6.

⁷⁶ Pasture, *Imagining*.

⁷⁷ Fink, *Writing*, pp. 74–8. Fink also highlights the role of the CSCE/OSCE in this context.

became most acute after the 9/11 Islamist terrorist attacks on the Twin Towers and the later assaults in European capitals.

The rise of this aggressive, sometimes violent, Islamist movement aroused suspicion towards the relatively large and often only weakly integrated groups of Muslim migrants in lands that considered themselves largely secular or vaguely Christian. A broad de facto alliance emerged between conservatives who referred to Europe's Christian heritage to argue that Islam is somehow irreconcilable with European culture, and increasingly militant secularists who believed that European 'secular', emancipatory values were being threatened and claimed that religion is (at best) a private affair and the 'public space' – ever more broadly interpreted – should be 'neutral'.⁷⁸ Such positions have become mainstream in many former communist countries, which never embraced the alleged 'multicultural' turn of the ECs in the 1960s and 1970s, but they are also important for the new extreme or 'alternative' right (Wilders, the Front National, Vlaams Belang and NVA in Flanders) in the rest of Europe, spilling over to traditional parties. Illustrative of the latter is the proposal by a Flemish Christian Democratic (!) MP Hendrik Bogaert to prohibit the wearing of 'ostensibly' religious signs in public – what would amount to a prohibition of the public exercise of religion.⁷⁹ Such ideas raise huge questions as regards religious freedom.⁸⁰ But perhaps the most surprising is that similar views are also supported by the ECtHR in a series of rulings that have raised eyebrows worldwide among legal scholars for clearly distinguishing – or discriminating – between public expressions of Christianity and (mainly) Islam. They show less a commitment to some sort of secular ideal pertaining to 'the separation between Church and State', let alone a multicultural pluralistic ideal, as they reflect the origins of the ECtHR as an expression of conservative Christianity.⁸¹ Although the issue is contested, in the light of its history one might conclude that the ECtHR mainly protects the liberty of Christians, or largely white

⁷⁸ Patrick Pasture, 'Religion in contemporary Europe: contrasting perceptions and dynamics', *Archiv für Sozialgeschichte*, 49 (2009), pp. 319–50.

⁷⁹ <<http://www.hendrikbogaert.be/nl/vrijheid-samenleven>>, 23 Dec. 2017 [accessed 13 March 2018] (the actual text of the essay is nowhere to be found, not even via Bogaert's personal website – where Bogaert defends his views nevertheless – after the party's main protagonists, including Chairmain Wouter Beke and former EU Council President Herman Van Rompuy disqualified it as nonsense and in contradiction with the party's programme).

⁸⁰ Lorenzo Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape* (Oxford, 2012); idem (ed.), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge 2012).

⁸¹ e.g. Samuel Moyn, 'From communist to Muslim: European human rights, the Cold War, and religious liberty', *South Atlantic Quarterly*, 113/1 (2014), pp. 63–86 (see the special issue Saba Mahmood and Peter G. Danchin (eds), *Politics of Religious Freedom: Contested Genealogies* (Chicago, 2015)) (also in *Christian Human Rights*, ch. 4); Nehal Bhuta, 'Two concepts of religious freedom in the European Court of Human Rights', *South Atlantic Quarterly*, 113/1 (2014), pp. 10–36. See also Javier Martínez-Torrón, 'Religious pluralism: the case of the European Court of Justice', in Ferran Requejo and Camil Ungureanu (eds), *Democracy, Law and Religious Pluralism in Europe: Secularism and Post-Secularism* (London, 2016), pp. 123–46, and different contributions in Effie Fokas and James T. Richardson (eds), *European Court of Human Rights and Minority Religions*, the special issue of *Religion, State and Society*, 45/3–4 (2017).

Europeans. One may see here a return to Europe's curse: the fear of diversity.⁸²

Irrespective of the latter issue, the assessment presented here suggests that the writing of human rights history should return to more inclusive approaches, referring to multiple and changing meanings of terms and concepts, connecting human rights history with that of humanitarianism and self-determination, transcending issues of individual/civilian rights and collective and social rights. It should also rethink the relationship between universality, regionalism and the meaning of citizenship, and re-open the Eurocentric focus to dialogue with others. In fact, this perspective is still almost entirely missing from the literature (historical, political, or legal) six years after *The Human Rights Revolution* came out and almost two decades after Dipesh Chakrabarty's iconic *Provincializing Europe* (2000) was published.⁸³

⁸² Following the interpretation of Moyn and Bhuta in the previous note. Cf. Pasture, *Imagining* for the broader argument.

⁸³ Iriye *et al.* (eds), *Human Rights Revolution*; Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton, NJ, 2000).