

The Truth of Human Rights

A Mortal Daughter of Time?

It was against my wish that prisoner came to me at night, being a slave, I was afraid.

Yahling Dahbo, Court testimony, Gambia, August 2, 1893

two white men came running torge the women and baby, they stabled the women and the baby and, and threw both of them over the bank in to the water. she said she heard the woman say, O my baby; she said when they [the survivors] gathered the dead, they found all the little ones were killed by being stabled, and many of the women were also killed [by] stabbing . . . They called it the siland creek.

Report on a massacre against the Pomo, California, 1850

Darkness was here yesterday.

Joseph Conrad, *Heart of Darkness*

2.1 APOLOGIZING FOR GENOCIDE

In October 2007, an interesting meeting took place in the town of Omaruru in central Namibia. The heads of six Herero royal houses met members of the German von Trotha family, who had come to Namibia on a rather unusual mission. Their aim was to apologize for what is widely regarded and, since 2021, has been officially accepted by Germany¹ as the first modern genocide in the technical legal sense of a mass killing with the specific intent to exterminate an ethnically or religiously defined group:² “We, the von Trotha family, are deeply ashamed of the terrible

¹ Federal Foreign Office, “Foreign Minister Maas on the conclusion of negotiations with Namibia,” Press Release, May 28, 2021.

² Cf. on the discussion on the law, ethics and politics of the fight against genocide and the role of the genocidal campaign against the Herero and Nama, Ben Kieran, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (New Haven, CT: Yale University Press, 2007), 381 ff.; Eric Weitz, *A Century of Genocide* (Princeton, NJ: Princeton

events that took place 100 years ago. Human rights were grossly abused that time,” Wolf-Thilo von Trotha said in this honorable attempt to give an honest account of a major crime.³ Von Trotha is descended from the military commander of the German expedition forces that brutally subdued the 1904 Herero and Nama revolt against German colonial rule, carrying out mass shootings and driving the surviving members of the Herero into the desert with the explicit intent of exterminating them as an entire ethnic group. This campaign spearheaded other means of extermination, including concentration camps and inhumane practices such as medical experimentation, which later were brought to lethal perfection by the Nazis. Some 50,000–80,000 people were killed in this campaign. Notably, a Herero leader called for restraint during the revolt, asking that German women, children and missionaries not be killed, whereas General von Trotha explicitly told his troops to kill every Herero they could find.

Wolf-Thilo von Trotha’s statement about his ancestor’s deeds appears the obvious thing to say at such an occasion. And in moral terms, it clearly is. Yet it still invites us to engage in a moment of reflection. The German troops had come from the country of Kant well over 100 years after the *Virginia Bill of Rights*, the *Declaration of Independence* and the *Déclaration du Droits de l’Homme et du Citoyen* had made the idea of human rights explicit. Nevertheless, they clearly were thinking within the framework of what has been referred to in the Introduction as *colonial relativism*: Ethical concerns, including rights that applied to Europeans (or Germans), did not also apply to indigenous people in Africa. The Herero had no developed concept of human rights either. They had warred with neighboring peoples for dominance in the region for decades, engaging (like every other group) in other practices that today would be rightly criticized on ethical grounds. There is no reason to romanticize indigenous people or other collectives of human beings, and this goes for the Herero, too. Nevertheless, von Trotha’s statement seems to imply that the Herero had, for example, a right to life, irrespective of what the Germans assumed and of how the Herero themselves articulated the normative position they believed themselves in. It presupposes, too, that the Germans were the addressees of these rights and had duties stemming from this normative position. Von Trotha’s statement clearly posits that the Herero had these rights and the Germans these obligations, irrespective of the historic period and the framework of thought prevalent at the time. This statement understands human rights as a

University Press, 2003), 12, 46, 240; generally on the law, ethics and politics of genocide, Timothy Snyder, *Bloodlands* (New York: Basic Books, 2010); Samantha Power, “A Problem from Hell”: *America and the Age of Genocide* (New York: Harper Collins, 2007); Tzvetan Todorov, *Face à l’Extrême* (Paris: Seuil, 1991), 296 with pessimistic conclusions as to the lessons learned; Jonathan Glover, *Humanity: A Moral History of the Twentieth Century* (London: Jonathan Cape, 1999).

³ Cf., “German family’s Namibia apology,” *BBC News*, accessed November 29, 2021, <http://news.bbc.co.uk/2/hi/africa/7033042.stm>.

time-independent truth about a specific normative status of human beings – humans as the holders or addressees of rights – even if the rights-holders and addressees themselves have no or only a vague concept of it.

Such a statement, indisputable as it appears on first sight, is not easily reconcilable with certain tenets of contemporary theoretical and historical debates, according to which human rights are culturally relative, historically contingent and dependent upon a certain epistemic framework that itself has no claim to universality but is relative to a specific society at a given time. From this point of view, von Trotha's statement and others like it are anachronistic and epistemologically naive.

This example already shows quite clearly that we need to ask what lessons the historical trajectory of the idea of human rights teaches about their origin and claims to justification. "How did the idea of human rights evolve?" is a central question for any inquiry into human rights.

There are two dimensions to this question: The first concerns the evolution of the principles of human rights, the normative propositions that posit their content and justification; the second concerns the faculty of human beings to conceive of these normative principles, to have epistemic access to them. In both cases, the problem of historical contingency arises. What steps were necessary to develop an explicit concept of human rights in ethics and law? What are the insights that are the preconditions for and what are the obstacles to conceiving of something such as human rights? What does history tell us about the modes of human understanding – prominently including the idea of *reason* – the exercise of which is supposed to lead to the conclusion that human rights are justified normative principles? Most importantly perhaps: How time- and culture-dependent is the *ability* to form the idea of human rights? Bacon famously held that truth is the daughter of time.⁴ Does this mean that reason is historically indexed? Is the truth about human rights a daughter of time in this sense, too – more precisely, the daughter of our time, destined to fade away as new historical circumstances arise? Could a humanity legitimately stripped of rights be the truth of tomorrow? Or is there such a thing as an exercise of human understanding that is a child of but not bound entirely to the epistemic framework created by a particular epoch and therefore transcends it? Is this conceivable, or is it a naive illusion of the past, untenable after the many historicizations of human insights?⁵ Bacon himself understood the ancient saying about the pedigree of truth as identifying time as a precondition of scientific

⁴ Francis Bacon, *Novum Organum*, Vol. I, ed. Wolfgang Krohn (Hamburg: Felix Meiner Verlag, 1999), LXXXIV.

⁵ Theories arguing for the historical relativity of human insights come in many forms. Cf. for some influential examples Herder's theory of cultures (which has a universalist core, however), Johann Gottfried Herder, "Ideen zur Philosophie der Geschichte der Menschheit," in *Johann Gottfried Herder: Werke*, Vol. 6, ed. Martin Bollacher (Frankfurt am Main: Deutscher Klassiker Verlag, 1989), 1784 ff., 336 ff.; Hegel's assumptions about the unfolding of Spirit in history, through a "gallery of pictures" of historically embodied forms of the Spirit, Georg Wilhelm Friedrich Hegel, "Phänomenologie des Geistes," in *Werke*, Vol. 3, eds. Eva Moldenhauer and

progress: Sufficient time spent in scientific work would ultimately yield new forms of genuine understanding.⁶ Has the long reflection on the justified claims of human beings provided us with such insights? Or, to put it in more specific terms: Was Wolf-Thilo von Trotha mistaken in his evaluation of what his ancestor had done to the Herero, or was he right to claim that at that time the Herero already had rights and the German troops duties that they violated, even though neither perpetrators nor victims probably had any conscious concept of such a normative status, let alone a status rendered explicit *in human rights terms*? Did Germany acknowledge its guilt for the genocide unnecessarily? Furthermore, did the Herero and the German soldiers possess the cognitive ability to understand the nature of the crime committed? Was it, at least potentially, within the reach of their understanding? Or were the soldiers and their genocidal commanders excused because they simply were unable to get the idea of the human rights of the Herero, given how history and society had shaped their moral thought?

This brings us to further important questions. In particular, what was the Herero's subjective experience of their own situation? Was their ordeal limited to physical suffering in the desert, or did they also consider the actions of the German troops to be unjust, a moral outrage? Did they perhaps feel that they had a *claim* – conceived of in whatever form – not to be starved to death in the desert and that the Germans had a correlating *duty* to let them live? Were traces of the idea of rights (though not of human rights in current terms) thus present in their thought, or would it be an ahistorical anachronism to even consider this possible? Do we have to assume that the Herero were a blank slate in ethical terms because they had not partaken in the cultural development of European civilization, which would have provided them – for instance – with a concept of individuality and certain emotional capacities

Karl Markus Michel (Frankfurt am Main: Suhrkamp, 1986), 590; Kuhn's theory of the role of paradigms in scientific research, Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago, IL: University of Chicago Press, 1970), and Foucault's "archeology" of knowledge, Michel Foucault, *Les mots et les choses: Une archéologie des sciences humaines* (Paris: Gallimard, 1966), 13: "*Une telle analyse, on le voit, ne relève pas de l'histoire des idées ou des sciences: c'est plutôt une étude qui s'efforce de retrouver à partir de quoi connaissances et théories ont été possible; selon quel espace d'ordre s'est constitué le savoir; sur fond de quel a priori historique et dans l'élément de quelle positivité des idées ont pu apparaître, des sciences se constituer, des expériences se réfléchir dans des philosophies, des rationalités se former, pour, peut-être, se dénouer et s'évanouir bientôt.*" Evidently, every theory is embedded in the scientific insights and cultural background of its given time. If the idea of a *causa finalis* is constitutive of theory building, scientific theories will be formed accordingly. If you do not have access to the mathematical tool of calculus, certain scientific theories are not available to you. The question is only – is this all there is to say about human understanding?

⁶ Bacon, *Novum Organum*, Vol. I, LXXXIV, 180 writes: "*Authores vero quod attinet, summae pusillanimitatis est authoribus infinita tribuere, auctori autem auctorum atque adeo omnium auctoritatis, Tempori, jus suum denegare. Recte enim Veritas Temporis filia dicitur, non Auctoritatis*": "It forms an example of small mindedness, to attribute all desert to the [ancient] authors and thereby to deny the author of all authors, Time, all authority. It is namely true, that Truth is the daughter of Time, not of Authority."

formed not least while reading novels, as some historians have argued?⁷ But why did the German expeditionary forces (like other Europeans) behave so much worse than the Herero, despite coming from the country of Goethe and Beethoven?

This case is of additional interest because from a certain perspective it implies an encounter of different ages: The German troops came from one of the scientifically and culturally most advanced countries in Europe (well on its way, however, to barbarous wars and further genocides), while the Herero lived the life of a nomadic tribe. It is a common methodological assumption that we can learn something about the more remote human past from those groups whose current forms of life remain in certain respects similar to some of those of a bygone age even if one avoids the assumption that such groups are simply “contemporary ancestors,” without a complex history of their own, providing “direct windows on the past.”⁸ Thus, Herero ethical thought is of substantial interest from a historical perspective, as it may help us to understand the basis from which the historical trajectory that led to the fully developed idea of human rights began.

Moreover, the Herero example is helpful in illustrating that these questions are of deep moral concern. In the end, the answers determine how the death of the Herero in the desert should be evaluated, particularly as to whether it was already wrong to kill people in such imperial enterprises at *that* time under *those* circumstances within *those* cultural frameworks of perpetrators and victims with *those* cognitive abilities. These questions are decisive, too, in determining whether it will continue to be wrong to commit such atrocities in the epochs to come, because they would violate human rights, regardless of what people in the future, who may be living under new forms of barbarism, may think. This future-oriented dimension of the problem – the question of whether human rights are valid only relative to the contingent belief system of a certain epoch – is not treated with much care in current debates.⁹ However, the question of whether the historicization of human rights extends into the future or not is a very serious matter. Torture is prohibited in many constitutions and in *ius cogens*, as a peremptory norm of international law. Could this (legitimately) be different 100 years from now?

Understanding the historical emergence of human rights is a first decisive problem for the cognitive interests governing our inquiry. We need to address this problem if we are to avoid the fundamental fallacy of seeing the contingent products of historical processes as related to structures of the human mind. History may be the

⁷ Cf. Lynn Hunt, *Inventing Human Rights: A History* (New York: W. W. Norton & Company, 2007), 29 ff., 33: “My argument depends on the notion that reading accounts of torture or epistolary novels had physical effects that translated into brain changes and came back out as new concepts about the organization of social and political life.”

⁸ On the concept and problem of theories about “contemporary ancestors”, cf. Graeber and Wengrow, *Dawn*, 15, 103, 121.

⁹ But cf. the thoughts (at least partly hopeful) that “human rights ideology” will become a matter of the past in Onara O’Neill, “The Dark Side of Human Rights,” *International Affairs* 81, no. 2 (2005): 439.

key to understanding human rights, not anything that has to do with the nature of human thinking, as influential contemporary theory maintains. If this is so, the historical inquiry already answers the question of the relation between mind and rights: History is all you need to know. Studies in moral epistemology, psychology and cognitive science that jump directly to assumptions about the natural properties of the human mind and their relation to human rights may thus be missing their target entirely because of the mind's protean quality, the simple truth being that ideas of human rights are as historically relative as the forms of human understanding employed to gain normative insights. Both have taken as many shapes as Homer's "Old Man of the Sea"¹⁰ and will continue to do so in future.

What seems clear is that human rights are not simply a given of all normative human cultures. On the contrary, very many things that make up the idea of human rights and their practice are the products of very complex historical developments. We will return to the question of what we know about the normative evaluations of people such as the Herero when confronted with European savagery, but they certainly did not employ twenty-first-century human rights language to describe what was going on. There are complex early legal codes – such as the *Code of Ur-Nammu* or the *Code of Hammurabi* – that merit closer investigation to see what moral and legal ideas we can unearth in them.¹¹ But the search for a cuneiform inscription of a Sumerian *Universal Declaration of Human Rights* will – as already indicated – be a vain one.¹² These concrete rights evidently are the product of human beings' long intellectual and practical quest for justice. This is true for the normative principles finally proclaimed and fought for as explicit political and legal demands in the revolutions of eighteenth-century America and France, and it is true for their evolving content. To take a very simple example: Freedom of the press is a bedrock human right, but it assumes that a press (and its contemporary digital equivalents) exist – a precondition that is hardly trivial in historical terms, presupposing not only technological innovations but also cultural developments such as the growth of a politically relevant public sphere.¹³

What is more, the discovery that certain normative ideas or the social institutions that embody them are historically contingent is without doubt a central

¹⁰ Homer, *Odyssey*, Vol. I: Books 1–12, trans. Augustus T. Murray, rev. George E. Dimock, Loeb Classical Library 104 (Cambridge, MA: Harvard University Press, 1919), Book 4, 349–570.

¹¹ Consider, for instance, the following passage from the prologue to the *Laws of Ur-Nammu* (ca. 2100 BCE) that praises the deeds of the king: "I did not deliver the orphan to the rich. I did not deliver the widow to the mighty. I did not deliver the man with but one shekel to the man with one mina (i.e., 60 shekels). I did not deliver the man with but one sheep to the man with one ox." What concept of justice is implied in this passage? Why are these deeds praiseworthy?

¹² But cf. on the controversial claim that the Charter of Cyrus, inscribed on the Cyrus Cylinder from the mid-sixth century BCE, is the first human rights charter or that the *Code of Hammurabi* contains such rights, Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 2011).

¹³ Cf. Jürgen Habermas, *Strukturwandel der Öffentlichkeit: Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft* (Darmstadt: Luchterhand, 1979).

driving force of human liberation. Many repressive ideas and social arrangements have appeared in the guise of timeless truth or have been presented as derived from indubitable human nature, even though they represented nothing but the prejudice of their times – from the inferiority of persons of a certain skin color to the subjugation of women. Historical analysis is a central precondition for liberating human beings from such chains of the past.

The question to be answered is thus not whether the history of human rights matters for their theory, but whether these rights are *nothing but* a product of history – whether historical analysis is not only a necessary but also a sufficient condition to explain their current reality and influence and perhaps even to justify them, as some maintain.¹⁴

This necessary inquiry into the history of human rights only appears an easy and straightforward task on the surface, however, and not merely because the historical development of human rights as such is far from comprehensively researched. This is one problem, to be sure. In addition, however, the very object of analysis poses substantial difficulties and is a source of potential misunderstanding. What is this thing whose history we seek to scrutinize? Is it an idea – if so, what kind of idea? Is it a social fact in a sociological sense? Is it a moral concept, a legal institution or both? Are only human rights in the sense of mandatory public international law of interest, or are other legal forms, too, such as constitutional rights? What does legal pluralism tell us about the nature of human rights? What social norms of societies' "living law" should be included? To what entity does the term "moral human right" refer? As the conceptual clarifications of the Introduction and Chapter 1 have shown, there are substantial problems to be solved here. Our results will help prevent us from becoming lost in the maze that these questions form.

Another important concern is: Are there predecessors to human rights in the (itself controversial) contemporary sense that are *not* human rights but that still need to be considered in the history of human rights, and, if so, what criteria mark them as relevant? What is the threshold for including a normative phenomenon in the history of human rights?

As will become clear over the course of the following remarks, all of these questions and their different possible answers have substantial impacts on the kind of human rights history told and therefore require critical reflection. Furthermore, the details of the method of historical investigation are important, too, and they are rife with problems that also demand scrutiny, not least because some of the theories and findings advanced in recent work in this field are profoundly influenced by certain background assumptions on how to study human rights history. Method determines content, and not always fruitfully so. It is thus unfortunate that these issues are not always discussed with sufficient care. Consequently, we need to pay significant attention to these questions first.

¹⁴ For instance with the means of an "affirmative genealogy," Hans Joas, *Die Sakralität der Person: Eine neue Genealogie der Menschenrechte* (Frankfurt am Main: Suhrkamp, 2012).

Our methodological reflection will form the basis for some exemplary discussions of relevant elements of the history of human rights that will pave the way to the central conclusion of this part of the book: History is key to the study of human rights but necessarily leads beyond its own confines to the theory of justification and the structural (not just historical) analysis of the faculties of human understanding that open the epistemic door to the cognition of human rights.

2.2 HOW TO DECIPHER THE HISTORY OF HUMAN RIGHTS?

2.2.1 *History and Human Rights Revisionism*

Clarifying standards for the proper study of human rights history is particularly relevant to current debate. This is because the history of human rights has become a significant battleground in the political, ethical and philosophical war being waged around human rights in general – a war that has shaken the normative edifice established after the World War II to its foundations. In this conflict, the historical origins of human rights are used to question the very legitimacy of these rights and their normative *raison d'être*.

One central feature of these ongoing debates about the history of human rights is the use of historical analysis with the critical intention of unveiling the dark history of rights. Human rights are taken not to be universal aspirations of humankind, “opening the door to closed societies,”¹⁵ challenging illegitimate authority and empowering the weak, but instead as shrewd plots of partisan politics and politicized religion.¹⁶ This is the challenge posed by the *historical, genealogical human rights*

¹⁵ Lutz Wingert, “Türöffner zu geschlossenen Gesellschaften: Bemerkungen zum Begriff der Menschenrechte,” in *Ethik, Politik, Kulturen im Globalisierungsprozess: Eine interdisziplinäre Zusammenführung*, ed. Ralf Elm (Bochum: Projektverlag, 2003), 392 ff. This function as a “door opener” is not only political, but – as Wingert rightly argues – has an epistemic dimension as well: The idea of human rights helps to identify violations of basic normative positions. This is an important claim: Understood in this sense, human rights are a heuristic tool for the discovery of injustice. On the rights revolution and the decline of violence, Steven Pinker, *The Better Angels of Our Nature: A History of Violence and Humanity* (London: Penguin Books, 2012), 456.

¹⁶ Cf. Samuel Moyn, “Personalism, Community, and the Origins of Human Rights,” in *Human Rights in the Twentieth Century*, ed. Stefan-Ludwig Hoffmann (Cambridge: Cambridge University Press, 2011), 85 ff., 87; “[H]uman rights need to be closely linked, in their beginnings, to an epoch-making reinvention of conservatism,” Moyn, *The Last Utopia*, 47; “After a few years had passed, the meanings the idea of human rights had accreted were so geographically specific and ideologically partisan – and, most often, linked so inseparably to Christian, Cold War identity – as to make the fact that they could return later in some different guise a deep puzzle,” Moyn, *The Last Utopia*, 54, 74 ff. See Philip Alston, “Does the Past Matter? On the Origins of Human Rights,” *Harvard Law Review* 126 (2013): 2077 on human rights history as a proxy for underlying normative debates. See for a methodological critique of historical findings in legal arguments Anne Orford, *International Law and the Politics of History* (Cambridge: Cambridge University Press, 2021). She convincingly argues that historical studies

revisionism mentioned above. In this view, the contingent origin of human rights is not just an unsurprising historical fact, given that everything has to originate in a particular point in space and time, but the key to a dark heritage showing that they are not a “last utopia.” On the contrary, human rights ultimately are delegitimized by their reactionary, religiously and culturally biased origin in Christian doctrine or in neoliberal ideology, despite their various transformations, which, so the argument goes, ultimately are of doubtful effect.¹⁷

This perspective may appear surprising, because a historical development as such cannot justify or delegitimize a normative institution. After all, the facticity of a historical trajectory provides no normative reason to accept or reject its results. The course of history is one thing, the justification of the products of history quite another, not least in the case of human rights. In addition, the widespread perception is that human rights have ecumenical features – they transcend the boundaries of philosophical confessions and express a common normative perspective for human beings that seems to be founded on something deeper than the false beliefs of a few contingent actors.

Moreover, not many social institutions, in particular those of the law, have sources that are entirely above moral doubt (to put it mildly). If we look at issues directly linked to human rights history, not least constitution making, examples readily present themselves. Nobody who has studied such processes will claim that central norms, including rights catalogues, were the products of pure, benevolent, justice-oriented practical thought. Germany’s *Basic Law* is widely hailed as a particularly well-drafted constitutional instrument that has become one of the most influential constitutions in the international context. Many admirable actors had a role in the drafting process. But other motives were at play, too, particularly the desire to make it possible for Germany to reenter the international community after the fall of the Third Reich. Some of those involved may have regarded a democratic, rights-bound, dignity-based form of government as nothing more than the price to pay for this end, a high price perhaps, but – given the total military, political and moral defeat of the German Reich – one to which there was no alternative.

cannot secure legal arguments. Less compelling is her view that an undefined concept of contextual usefulness is the ultimate yardstick for legal arguments, *ibid.* 316.

¹⁷ Cf. Moyn, *The Last Utopia*, 225 ff. on the intrinsic limits and burdens of the human rights idea. On the case study of human dignity and a critique on similar grounds, with the conclusion that the concept is useless, Samuel Moyn, “The Secret History of Constitutional Dignity,” in *Understanding Human Dignity*, ed. Christopher McCrudden (Oxford: Oxford University Press, 2013), 95, 111; cf. for a detailed assessment and different view Christopher McCrudden, “Where Did ‘Human Dignity’ Come from? Drafting the Preamble to the Irish Constitution,” *American Journal of Legal History* 60 (2020): 485–535; Samuel Moyn, “The Continuing Perplexities of Human Rights,” *Qui Parle* 22, no. 1 (2013): 107 ff. underlines his skepticism, albeit with some qualifications, given that so far no better alternative exists. On a somewhat more positive note, Samuel Moyn, *Human Rights and the Uses of History* (New York: Verso Books, 2014), 135 ff. On religious bias cf. Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015).

Knowledge of these influences certainly is important. But do they delegitimize the human rights-based democratic order of the *Basic Law*? What about the drafters of the US Constitution? Do the questionable political intentions of some, which partly shaped the Constitution's content, permanently delegitimize the result, irrespective of the further development of the understanding of this remarkable document?

Are not similar conclusions justified in the case of the drafting of other legal instruments important for the history of human rights? Did the role of the racist South African politician Smuts in the drafting process of the preamble of the UN Charter irredeemably contaminate the concepts of human dignity and human rights that were its products? Are not other factors far more important? Were these concepts ultimately wrested from the hands of racist imperialists like Smuts who tried to abuse them?¹⁸ Is this the reason why the South African delegation ultimately opposed (unsuccessfully) the inclusion of a reference to the equality of human dignity and of all human rights in the *Universal Declaration* in an attempt to justify lesser rights for some groups of persons?¹⁹

The United Nations (UN) with its veto system of the Security Council's permanent members and accommodation of colonial empires was not designed with the single purpose of promoting the egalitarian good of the world community of human beings,²⁰ nor were the Council of Europe or the ECHR crafted as pure embodiments of the human rights idea, as the latter instrument's colonial exemption clause illustrates.²¹ What is more, nation states, international organizations and the law they create continue to be formed by asymmetrical power relations, narrowly defined interests, politics at the expense of (weaker) others and repressive ideologies without there being any prospect of these influences losing any of their force in the years to come. Does this mean that nothing good came out of the national and international

¹⁸ Cf. on Smuts' ideology, Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton, NJ: Princeton University Press, 2009), 28 ff.; on the inclusion of dignity in the preamble of the UN Charter, Charles R. Beitz, "Human Dignity in the Theory of Human Rights: Nothing but a Phrase?" *Philosophy & Public Affairs* 41, no. 3 (2013): 259, 261 ff. The reference to dignity stems not from Smuts but Virginia Gildersleeve, Beitz, "Human Dignity," 266.

¹⁹ Cf. 95th meeting of the Third Committee, October 6, 1948, and the ensuing debate, in Schabas, *The Universal Declaration*, 2137. The concrete examples used by delegate Charles Theodore Te Water to buttress his general attack on equal human rights were the widely accepted and, in his view, justified unequal rights of men and women.

²⁰ Mazower, *No Enchanted Palace*, 151 sums up: "Whatever the rhetoric, . . . , this was an international organization designed – much as its predecessor had been – for interstate cooperation and stability in a world of empires and great powers"; Mark Mazower, *Governing the World: The History of an Idea* (London: Penguin Press, 2012), 213: "The Big Three had ended up creating an organization that combined the scientific technocracy of the New Deal with the flexibility and power-political reach of the nineteenth-century European alliance system." Cf. on retrospective narrative constructions about this matter Oliver Diggelmann, "The Creation of the United Nations: Break with the Past or Continuation of Wartime Power Politics?" *Journal for International Peace and Organization* 93 (2020): 371–89.

²¹ Cf. Simpson, *Human Rights*, 288 ff., 597 ff.

human rights systems? Most importantly: Does this show that there is no way for critical thought and legal and political work to develop what exists into a meaningful system of human rights protection, a system with an effect that sometimes runs counter to the intentions of some contributors to the making of legal human rights orders and their institutional framework?²²

The strong arguments not to confuse genealogy and justification notwithstanding, in light of these questions it nevertheless is necessary to ask: Do these critical voices perhaps still have a point? Does the idea of human rights have doubtful roots? Is there a skeleton in the closet we must learn to face? If so – what are the consequences for the justification of human rights? Are human rights indeed delegitimized by their dark origins, which show that they are just a piece of harmful ideology? This would have important consequences for the research object of interest here, because it makes a difference whether we are studying a piece of political ideology or ideas with a justified claim to moral rightness – and the latter claim is what forms the very foundation upon which human rights stand.

2.2.2 Concepts and Methods of Inquiry

A first problem for historical inquiry already has been addressed: the concept of human rights, a key element in determining the object whose history is to be investigated. To reiterate our conceptual conclusions: Human rights are most plausibly understood as an intricate web of normative incidents, the ensemble of which determines in important respects the normative positions all human beings enjoy. Through *claims* and related *duties* that obligate everyone at least as moral rights, through *privileges* and through *no-rights*, or, in other words, the *absence of duties* towards others curtailing the exercise of these privileges, human rights establish a normatively protected space for the autonomous existence and action of the individuals whose goods they safeguard.²³ Powers and immunities can form

²² As many have observed, the development of the UN itself shows how quickly institutions can change – “it turned astonishingly quickly into a key forum for anticolonialism,” Mazower, *No Enchanted Palace*, 152. In this forum, in the context of India’s famous 1946 initiative against the discrimination of Indians in South Africa, Smuts experienced that he “had defeated himself” by the principles of “human rights and moral anger” he himself had invoked during the drafting of the UN Charter, Mazower, *No Enchanted Palace*, 179. For background, Lorna Lloyd, “‘A Most Auspicious Beginning’: The 1946 United Nations General Assembly and the Question of the Treatment of Indians in South Africa,” *Review of International Studies* 16, no. 2 (1990): 131 ff.

²³ This definition is consistent with but more precise than alternatives used in studies on the history of rights, cf. e.g. Gregory Vlastos, “The Rights of Persons in Plato’s Conception of the Foundation of Justice,” in *Studies in Greek Philosophy, Vol. 2: Socrates, Plato, and Their Tradition*, ed. Daniel W. Graham (Princeton, NJ: Princeton University Press, 1995), 124, who formulates: “A substitution-instance of the sentence form ‘A has the right to X against B’ will be true for persons bound by a given moral or legal code if and only if B is required by the norms of that code to engage in X-supporting conduct (action or forbearance) demandable of B by A and/or others acting on A’s behalf.”

the content of such normative positions. With these normative means, rights secure substantial values such as human dignity, life, integrity, freedom, equality and subsistence in morality and in law for all human beings. They create for all the equally shared opportunity to lead an autonomous human life. The assumption that forms the foundation of their legitimacy is that humans count – that they are not just beings of little worth or even of no concern at all.

The rights through which these normative principles are protected are secured as moral claims and legal norms and institutions that are deeply justified. This claim to deep justification is a central element of the human rights idea: Human rights bind their addressees and thus create legitimate normative burdens for third parties, namely human beings and other normatively accountable entities, most importantly legal subjects, including but not limited to states. The burdens human rights impose are of a particular nature, as they originate in the autonomous critical reflection of the agents themselves as a moral category that is then enforced by law. They create a burden on their addressees but only in a very specific sense, as this burden ultimately is imposed not by others, but by the moral understanding of human beings themselves: It is the offspring of reflective self-rule, not of forced submission to the command of others; the fruit of autonomy, not heteronomy, and thus a burden only in the sense of an obligation to be wholeheartedly embraced.

These findings represent useful tools for historical research. This means that a history of human rights needs to concern itself with three issues in particular: first, the concept of a *right* as foundational normative category; second, the *idea of legitimately protected human liberty, equality, solidarity and worth* as something ‘right’ in an objective sense; and third, the idea that liberty, equality, solidarity and worth should be spelled out by normative positions of *rights* that apply universally to all humans, and not only by some other political (or normative) means.

This concept of human rights forms an ideal-typical kind of instrument for historical analysis. It is a tool that can aid in the decision as to whether to include a normative phenomenon in the history of human rights or not.²⁴

A fully-fledged analytical theory of rights (not just human rights) is the product of twentieth-century thinking and – in one of its constitutive contributions, as we have seen – is motivated by the desire to clarify the ambiguous use of the concept of a subjective right in law, which presupposes that at least some issues were not fully understood beforehand. This does not mean, however, that this kind of analysis has no clearly identifiable predecessors. As noted above, the Natural Law tradition notably captured central aspects of this idea, sometimes with admirable precision, although it failed to make entirely clear what the idea of rights is about – much as we

²⁴ In light of these clarifications, it is useful to reconsider the heterogeneous normative phenomena in religions and philosophy that Lauren, *Evolution*, 5 ff. lists to decide which of them ought properly to be included in a history of human rights.

today may still appear entangled in misunderstandings from the perspective of future, better analyses of the matter.

Fully explicit *human rights* as moral ideas and – even more so – as legal concepts, practices and institutions are equally recent in nature. Nevertheless, there is much to discover in the more distant past that belongs in a properly complex history of rights in general and human rights in particular. The discussion that follows will illustrate this observation in some detail.

Another relevant point concerns what we might call the difference between the *justification of human rights by the humanity of their bearers* on the one hand and the *inclusion of all beings belonging to the human species in the set of rights-holders* on the other. This distinction is useful as it helps to clarify two separate steps of central importance in the process of the development and realization of these rights. The first step justifies human rights with reference to the normative relevance of something specific about human beings, “human nature” or the “human condition,” for instance. The second step determines who qualifies as fully human. Taking the first step does not necessarily mean that the second step also will be taken in a justifiable fashion. Very many human beings were consequently excluded from holding human rights not because there was no concept of human rights as rights of all humans, but because the respective group did not qualify as fully human – women, slaves and religious minorities are classic examples of this. In addition, another relevant issue is frequently neglected when attention focuses first and foremost on classic cases of the unjustified *exclusion* of certain groups of people: There is also the recurring question of whether human rights have now not become *over-inclusive*. After all, some argue, not all human beings legitimately enjoy human rights. Influential voices doubt, for example, that infants, people in a permanent coma and humans with certain disabilities or of a certain age justifiably can be regarded as holders of human rights, as many legal systems posit.²⁵ The debate about the status of embryos or fetuses is another illustration of the abidingly controversial question of the inclusion or exclusion of potential rights-holders in a human rights regime. These arguments for the exclusion of certain groups of people from protection by human rights do not necessarily doubt that the humanity of humans is a central argument for the justification of human rights. They may even emphasize this point with verve and passion. However, they argue that these groups lack certain properties that are constitutive of full humanity, such as normative agency.²⁶

A history of human rights has to account for these complexities. Differentiating between these two steps of justification thus serves as a central tool for producing a fine-grained historical analysis. A thinker, a practice, an institution may be very important for the development of rights based on the humanity of human beings but

²⁵ Cf. Griffin, *On Human Rights*, 83 ff.

²⁶ Cf. Griffin, *On Human Rights*, 94 f. If not humanity but some other criterion is taken to be decisive – sentience, for instance – the same problem arises: One has to determine which beings are actually sentient beings.

may have failed dramatically to include all beings that manifestly are fully human. Otherwise we would even have to exclude the classical human rights documents of the eighteenth century from the history of human rights because they disregarded a great many people, and entirely implausibly so. A history of human rights that limits itself to fully inclusive but simultaneously not over-inclusive human rights (assuming that we already know what that means) would be a deficient history of human rights.

The incremental nature of the development of human rights (incremental not implying direction, continuousness or irreversibility) encourages us to ask further questions – for example, about rights that were not justified simply by the bearer’s humanity, but because of some other status, such as by being a “free man” of a kingdom, as in the *Magna Carta*. How did such instruments – although evidently not about human rights as understood here – contribute to the history of human rights? Not at all? Or did they pave the way for rights with a more inclusive personal scope by establishing claims for some kinds of people and thereby giving rise to a question with considerable political and historical impact – why only for them and not for others as well? Why not these rights for all? Once again, this question has its modern equivalents. For instance, one major issue of current human rights law is the question of the extraterritorial application of human rights. This issue concerns a state’s interference with rights with a cross-border effect. The killing of civilians in the Iraq War by British troops is an important example of this problem from the case law of the ECtHR.²⁷ Were the soldiers bound by the ECHR, even though they were acting in Iraq and not in Europe? Were the civilians in Iraq as protected as they would have been in Britain? Here, too, the question – why rights for some (the Europeans) but not for others (the Iraqis)? – demands an answer that propels the inclusiveness of human rights forward.

Much current history of human rights is concerned with the (post–World War II) institutionalization of international human rights. This is an important subject. But the history of the institutionalization of international human rights is not the history of human rights. It is just one subchapter in a grander epic. First, in the legal sphere, there is the history of the institutionalization of human rights on the level of national constitutions. As already indicated, at the core of the current international architecture of human rights lies a two-tier system of protection on the national level and of complementary protection on the international level. A history of human rights that fails to pay attention to the primary tier of the system could hardly be assumed to exhaust the subject’s history. Second, the history of human rights is not limited to the history of the process of making them a political and – most difficult of all – a legal reality. This history is intriguing and rightly forms the object of profound and

²⁷ European Court of Human Rights (ECtHR), *Al-Skeini and Others v The United Kingdom*, Judgement of July 7, 2011, Application No. 55721/07. Cf. for an excellent discussion Angela Müller, *States, Human Rights, and Distant Strangers: The Normative Justification of Extraterritorial Obligations in Human Rights Law* (Abingdon/New York: Routledge, forthcoming 2023).

innovative research. Unsurprisingly, it is influenced by a plethora of factors such as power, ideology, interests both material and nonmaterial, outstanding personalities and their sometimes-remarkable impact, the tides of social passions and beliefs and the like. But the processes through which human rights become a political and legal reality are likewise only one part of the history of human rights. They presuppose an *idea*, one so compelling that people have tried to make its vision politically relevant and even legally binding, first on the national, then on the international level, sometimes at the cost of their lives.

How to trace such a remarkable and powerful idea in history? When and where were the seeds of the empire of rights sown in people's minds? How many times did its harvests wither in the fields of human folly, lust for power and greed? Why did this idea finally develop into a rich crop? Why did it conquer the Earth more fully than virtually any other moral and legal idea in human history? What does this remarkable element of human history tell us about the mind of the creature that developed this idea?

An important step in any inquiry into this matter is not to commit the methodological fallacy of looking for *words* or *terms* such as *rights*, *droits*, *Rechte*, *ius* and so forth, but to search for the meaning of these historical and current terms. We have outlined the central dimensions of the idea of human rights above. A proper history of human and fundamental rights needs to look at all of these dimensions and see whether, how and when they overlap. The moral and legal manifestations of the category of rights therefore form part of this history. The history of freedom as a value is another part, as is the history of the idea that human beings enjoy intrinsic worth and thus dignity, as is the history of equality and solidarity. How did these values become central for human beings' normative aspirations? What suggestions are there that these values were thought of as related to rights? What clues are there that these rights were ascribed to beings with certain well-qualified properties, a thought that finally turned out to be important for the fully developed idea of human rights, namely that all humans enjoy these rights by virtue of their humanity, irrespective of the differences that may exist between them? As highlighted, the latter can only be achieved by processes that include unjustifiably excluded groups of beings, such as women and slaves, among those who are acknowledged to be fully endowed with these properties – for example, with the capacity for autonomous self-determination.

Consequently, when thinking about the history of ideas of human rights, we have to search for both explicit and (the deeper we dig) implicit expressions of these ideas.

These implicit expressions may take the form of normative propositions other than rights, most importantly normative commands. It is rash to assume that an ethical or legal code containing only commands has nothing to say about rights. The command "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" is, for instance, self-evidently understood as the legal positivizing of the separation of religion and state (no establishment clause)

and a (constitutionally key) subjective right. The question arises for other archetypal commands, too. For example, in the case of the Decalogue, the question is: Do its prescriptions obligate its addressees only in relation to God?²⁸ Or do they entail a normative claim of those who would suffer from the violation of the commandments, as others have argued?²⁹ Take, for instance, “You shall not steal.” What is the normative position of the potential victims of stealing? Is there none? Or are normative incidents applicable to them? Do they perhaps even have a claim that nothing be stolen from them? There is certainly a very strong argument for the latter. It seems hard to conceptualize that somebody is under a duty not to steal something while at the same time the owner has no correlative claim that this not happen because there is only an obligation to God.

Unsurprisingly, this possibility not only has been observed by historical studies, but also has been debated specifically in the context of the role of subjective rights in Law, prominently, for instance, in Jewish Law.³⁰ Similar arguments can be advanced for other normative systems formulated in terms of commands.³¹ Some examples of this will cross our path over the course of this inquiry.

To imply a right through other normative propositions is but one way to refer to the incidents making up a right, however. We need to broaden our perspective further to become sensitive to implicit expressions of normative ideas, whatever form they may take. This move is crucial not least to avoid another fallacy: the fallacy of intellectual and cultural – more precisely, Western – elitism. Even today, there are people who lack words for human rights but do not lack the central idea, both as regards the normative form and as regards their essential content. An illiterate woman – like the Herero of 1904 – who is mistreated and perhaps raped by military forces may not be able to express the normative claims she thinks she justifiably has in Hohfeldian terms, nor their content with the technical language of Kantian conceptions of dignity, but she may, quite rightly, have the idea, in whatever obscure form, that what is happening to her is not right, that she should be free to be left alone, to not have her body and inner self harmed by such acts, that she, as a human being, can rightly demand not to be treated like this, neither by state forces nor by private parties, and that everybody is obliged to abstain from hurting her in these pernicious ways. It would be a gross and indeed appalling failure of any theory of human rights to not take note of this possibility and account for it.

The same is evidently true of historical perspectives. It is important to ask what human beings thought, felt and experienced during the “Scramble for Africa,” when they were attacked, subjugated or enslaved. There are some intriguing sources, including oral history, that give a glimpse of the injustice felt and that should not

²⁸ This is asserted by Herbert Lionel Adolphus Hart, “Are There Any Natural Rights?” *The Philosophical Review* 64, no. 2 (1955): 175, 182.

²⁹ Vlastos, “Rights of Persons in Plato’s Conception,” 128.

³⁰ Haim Cohn, *Human Rights in the Bible and the Talmud* (Tel Aviv: MOD Books, 1989), 9.

³¹ Cf. Lauren, *Evolution*, 11.

be ignored just because they are not formulated in the technical language of an Amnesty International report.

History is fragmented in more than one sense. We reconstruct both history in general and intellectual history on the basis of the shards left by the destructive forces of the past, such as war, ignorance, superstition and accidents. Moreover, many voices in this history of ideas have been silenced. We know what Aristotle and Locke thought about slavery, but not whether the slaves of their time agreed with their stance. The disenfranchisement of women means that half of the human population is excluded almost totally from this history. To conclude from the absence of voices advocating the rights of women at a given time that there is no interesting history of this idea before these rights were explicitly demanded during the eighteenth century may lead to a very selective account of this crucial dimension of the development of human rights.

It is thus not sufficient (though useful) to enter terms into search engines, to search digitized historical texts for occurrences of terms such as *rights*, *Rechte*, *ius*, *droit* and so on if we aspire to write an intellectual history of the idea of fundamental and human rights.³² We need to look for this idea, or at least for central elements of it, and not only in the canonical texts of high culture, but also in the social practices and not least the struggles of ordinary human beings who over the course of history on many occasions have manifested their belief that they enjoy a particular normative position, a justifiably claimable permission to do or not do something and to have the central goods of their life protected while others were under a duty to act accordingly.

The aesthetic self-representation and self-appropriation of human existence in art is another source of insight. A history of human rights without at least a sense of what has been expressed (e.g. about human dignity in the aesthetic sphere) will miss a crucial aspect of the development of such ideas and some of their intriguing expressions. Odysseus' encounter with the ephemeral shade of his mother in the underworld and what it tells us about the meaning of mortality, the suffering of Euripides' *Women of Troy*, the mourning of the seated, medieval terracotta figures of the Niger delta, Scheherazade's songs against death, Bashō's farewell note³³ or the rebellious defiance of the upright figure with stigmata in front of the firing squad in

³² As Hunt, *Inventing Human Rights*, 230, n. 5 reports to have done. There is nothing wrong with such research; on the contrary, it may be very illuminating as long as it is not mistaken for a comprehensive search for what a human rights history should be interested in. This is not a new observation. Cf. e.g. Hersch Lauterpacht, *An International Bill of the Rights of Man* (New York: Columbia University Press, 1945), 17 on the history of natural rights: "[I]n order to judge the antiquity of the idea of the natural rights of man we must look to their substance rather than to their designation." On the problem of a "search engine mentality," Alston, "Does the Past Matter," 2049; on the "polycentricity of the human rights enterprise," *ibid.* 2077.

³³ Bashō writes: "Ailing on my travels/yet my dream wandering/over withered moors," in *The Penguin Book of Japanese Verse*, eds. Geoffrey Bownas and Anthony Thwaite (London: Penguin Books, 2009), 106.

Goya's *El 3 de mayo de 1808 en Madrid* are not entirely irrelevant to the question of whether dignity is a property of the human condition. Giacometti's later sculptures are equally important for this kind of self-reflection, his aesthetic vision decisively shaped by the catastrophes of the first half of the twentieth century.³⁴ The same holds true – to cite a last example – of Camus' tender description of the world of the illiterate, violent, deprived and desperate poor of colonial Algiers (his family) and their experience of life.³⁵

The full meaning of human dignity is not something we learn in philosophical seminars and courses at law faculties about human rights law, important as these are to clarify ethical and legal thought and cultivate certain important moral feelings. Our understanding of human worth is something that grows as part of a lived life and our experience of what this entails. Something similar is true of the growth of the idea of human rights. This idea is no minor thing, and many sources – systematic thought, social struggles, artistic expression – have contributed to it. A history of this idea and its political and legal manifestations needs to remain mindful of this fact.

In recent times, increasing effort has been made to examine critically the biases and limitations of classical elements of legal thought and to do justice to other traditions of practical philosophy outside the so-called Western tradition. This well-justified endeavor adds yet another dimension of complexity to the scope of the history of human rights.

These observations mean that deciding whether or not to include a normative idea or institution in a history of human rights requires us to answer difficult questions. Not all of these answers will be indisputable, and there will be borderline cases. However, broadening the inquiry to ask such questions is a key task of a differentiated history of human rights that hopes to do justice to the richness of its subject.

2.2.3 Conceptions of History

There is yet another issue to be addressed: the concept and conception of history that guide historical research, which turn out to be of significant importance for the inquiry into rights and human thought.

This is by no means straightforward. What human history is and how it can be reconstructed form the subject of profound debate. For the purpose of a history of

³⁴ Matthias Mahlmann, "Le Chariot – Bemerkungen zu den Grundlagen des Rechts," *Zeitschrift für Schweizerisches Recht* 131 (2012): 123 ff. Cf. for some more exploration, concretely of Velázquez's *Las Meninas* and the concept of dignity, Christopher McCrudden, "On Portraying Human Dignity," in *Human Dignity in Context*, eds. Dieter Grimm, Alexandra Kemmerer and Christoph Möllers (Baden-Baden: Nomos, 2018), 23–54.

³⁵ Albert Camus, "Le Premier Homme," in Albert Camus, (*Œuvres complètes Vol. IV: 1957–1959*, ed. Raymond Gay-Crosier (Paris: Gallimard, 2008); for comments, Matthias Mahlmann, "Menschenwürde in Politik, Ethik und Recht – universelle Fassade, kulturelle Relativität?" in *Rechtsstaatliches Strafrecht: Festschrift für Ulfrid Neumann zum 70. Geburtstag*, ed. Frank Saliger (Heidelberg: C.F. Müller, 2017), 267 ff.

human rights conceptualized in sufficiently differentiated terms, the following remarks may be helpful to illuminate some often-tacit background assumptions of the current historical analysis of human rights.

The first problem is whether history is a gradual, continuous evolution. Within this conception of history, an idea such as human rights is invented at a certain determinable moment in time and then becomes a possible foundation of or influence on further cultural developments, which in turn shape its future content. One important element of this perspective is often (though not necessarily) the assumption that there are no *a priori* foundations of human cultural processes; human existence is a blank slate, determined by its protean nature,³⁶ the capacity to form any kind of culture, to mold human existence in any form, whatever it may be.³⁷ Humans are their own continuous creation through and through, so to speak, which implies that the current conception of being human may disappear as it was created at some point in time, like a face drawn in the sand and washed away by the sea.³⁸

Anything that now is regarded as foundational for human existence and culture has thus been invented at some point in history. To use an example relevant for the history of human rights: Human beings have no natural sense of individuality. Individuality originated in medieval thought,³⁹ as some have argued, or in the Renaissance, as others think,⁴⁰ but is in any case highly culture specific, not a universal feature of humanity. From this point of view, the Herero dying in the desert possibly had no sense of individuality because they had not benefited from European cultural development.

Some versions of this conception of history may be teleological, but today the emphasis usually will lie on the importance of structure, path-dependent development and contingencies. Conceptions of something unchangeable, something eternal, are, in Walter Benjamin's expression, merely a "ruffle on a dress" of thought, not an idea relevant for conceptions of history.⁴¹

³⁶ Cf. Rorty, "Human Rights, Rationality and Sentimentality," 115.

³⁷ On the existentialist idea that existence precedes human essence, cf. Jean-Paul Sartre, *L'existentialisme est un humanisme* (Paris: Nagel, 1946).

³⁸ Foucault, *Les mots et les choses*, 398: "L'homme est une invention dont l'archéologie de notre pensée montre aisément la date récente. Et peut-être la fin prochaine. Si ces dispositions venaient à disparaître comme elles sont apparues, si par quelque événement dont nous pouvons tout au plus pressentir la possibilité, mais dont nous ne connaissons pour l'instant encore ni la forme ni la promesse, elles basculaient, comme le fit au tourmant du XVIII^e siècle le sol de la pensée classique, – alors on peut bien parier, que l'homme s'effacerait, comme à la limite de la mer un visage de sable."

³⁹ Larry Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (Cambridge, MA: Harvard University Press, 2017).

⁴⁰ Jacob Burckhardt, *Die Kultur der Renaissance in Italien* (Stuttgart: Alfred Kröner Verlag, 2009).

⁴¹ Walter Benjamin, "Das Passagen-Werk," in Walter Benjamin, *Gesammelte Schriften*, Vol. V-1, ed. Rolf Tiedemann (Frankfurt am Main, Suhrkamp, 1982), 578: "Entschiedne Abkehr vom Begriffe der ‚zeitlosen Wahrheit‘ ist am Platz. Doch Wahrheit ist nicht – wie der Marxismus es behauptet – nur eine zeitliche Funktion des Erkennens, sondern an einen Zeitkern, welcher im Erkannten und Erkennenden zugleich steckt, gebunden. Das ist so wahr, daß das Ewige

An alternative view emphasizes the element of discontinuity in history. This model treats skeptically the idea of lines of development that run through centuries, let alone through all of human history. There are no overarching developments connecting different ages and historical cultural formations. The people of the past and their lifeworlds are understood as radically different from others, including our own (whoever “we” may be). To think otherwise means to fall prey to naive anachronisms. The concept of justice found in antiquity, for instance, is thus not something that could inform us today. It is born of its time, and any possibility of understanding it ended with the passing of that epoch. Attempts to connect the lifeworld of the past with current forms of existence lead to distortions of both – of the past because it is reconstructed wrongly using the conceptual means of the present, and of the present because its meaning is established in the light of incongruous concepts of the past. Adherents of this conception of history also mostly understand the infinite malleability of human beings as their defining property.

Yet another approach holds that ideas, institutions, entire forms of life can develop, flourish for a while and then be lost again. From this point of view, it is implausible to assume that good ideas, promising forms of life and useful institutions necessarily become a historical reality and remain so forever having once established themselves. They can simply be suppressed by force, possibly for a long period of time, or subdued by other powers – for example, by the victory of the ignorance, superstition or the partisan interests of powerful groups, individuals or political mass movements. They can also simply be forgotten. But they can be rediscovered as well and reasserted under new historical circumstances. They may have lain dormant, remembered only by a few if not lost in oblivion, not waking to full life until their day finally dawned. Similar ideas, institutions and forms of life can be developed independently at different times and places. Therefore, a time can speak a language that a later time is able to understand quite well, despite there not necessarily being an unbroken link of continuous development between the two.

These competing pictures of history lead to the question of what exactly makes this course of events a *human* history. Is there something species-specific about this history? This question is not particularly far-fetched, for of the many other species that have populated and continue to populate this Earth, no other has undergone any development remotely like the history of human beings. Bonobos or dolphins are admirably complex creatures, with the ability to learn and astonishing acquired skills, some of which are even handed down to new generations (think, for instance, of the hunting techniques of orcas), but none is a historical creature in the way that human beings are. It is safe to guess that bonobos live much the same as they lived a

jedenfalls eher eine Rüsche am Kleid ist als eine Idee.” English translation of Benjamin available at Walter Benjamin, *The Arcades Project*, trans. Howard Eiland and Kevin McLaughlin (Cambridge, MA: Harvard University Press, 2002), 463, https://monoskop.org/images/e/ea/Benjamin_Walter_The_Arcades_Project.pdf.

million years ago, whereas human forms of life in comparison have changed quite radically in the 100,000 years that human beings have been shaping their life on Earth. Consequently, there must be something about human beings that is at the core of this very particular history. But what is it? Is this human history best explained by relying solely on the culture-building faculty of human beings? This faculty certainly exists. Nobody doubts that one of the striking qualities of human beings is their creativity, the ability to transcend – unlike other organisms – instinct-driven ways of behavior and to constantly transform their ways of life. That is why any form of biological, genetic determinism and reductionism is so way off the mark. But what is the foundation for this creativity and the specific characteristics of human existence in which this creativity unfolds? Does a richer concept of human nature, in particular a thicker theory of the higher mental faculties of human beings, help to explain some of these characteristics and thus contribute to the understanding of particular properties of human history?

Note that this latter conception is the conception of a radical epistemic egalitarianism. It takes as a heuristic starting point the assumption that human beings share exactly the same creative intellectual and emotional wealth wherever they are born, in whatever cultural circumstances they are brought up and live, whatever skin color, sex, sexual orientation or other surface characteristic they may have and in what particular time they live. From this perspective, a person with the specific culture of a tribe in the Congo Basin in 1900 or the pastoral lifestyle of the Herero enjoys substantially the same set of properties, in particular mental faculties, as Albert Einstein, working on relativity at that time, or an illiterate female bricklayer in today's Delhi. To be sure, there are individual variations – for example, sadly, between Albert Einstein and the author of this text. But these are not differences that transcend the common bond of a shared set of properties that make all humans human, whether they are hunter-gatherers, scientists, bricklayers or confused theoreticians of human rights.

It is important to underline that this is not equally so for anthropological assumptions that take the total malleability of human beings for granted. From this point of view, persons of different times and cultures will not necessarily have the same mental capacities, because certain elements of the human mental world are the product of cultural constructions. People with a certain cultural background (e.g. European) may have certain concepts that others (say, people of the Congo Basin, or the Herero) lack. These questions are particularly relevant for the history of human rights. If one assumes, for example, that human beings have no concept of their individual selves or of separate bodies apart from certain cultural developments,⁴² that even “translated into brain changes,”⁴³ there is basically no point in searching

⁴² This seems to be the point of view on the development of cognition adopted by Hunt, *Inventing Human Rights*, 29 ff.

⁴³ Hunt, *Inventing Human Rights*, 33.

for rights that protect individuality before cultural developments actually define individuality as such. The justification at least of certain rights designed to protect individuality, such as privacy rights, depends upon individuality being a meaningful concept. Accordingly, some histories make the development of individuality a precondition for the conceptualization of the idea of human rights.⁴⁴ Even one of the intellectually and morally most impressive accounts of the evils of totalitarianism reveals more than mere traces of this approach. Hannah Arendt condemns unambiguously “the senseless massacre of native tribes” in Africa and other crimes of colonialism and imperialism.⁴⁵ The indigenous people of Africa, however, are depicted as beings without culture and without a human world (*Weltlosigkeit*) and thus devoid of full humanity: “They were, as it were, ‘natural’ human beings who lacked the specifically human character, the specifically human reality, so that when European men massacred them they somehow were not aware that they had committed murder. . . . The great horror which had seized European men at their first confrontation with native life was stimulated by precisely this touch of inhumanity among human beings who apparently were as much a part of nature as wild animals.”⁴⁶

If culture is all there is in a human being, and the only truly humanizing culture is a culture similar to that which developed in Europe, a human being without such a culture is nothing at all – this is the dangerous conclusion looming in the background.

If we are open to the possibility that something like a concept of selfhood develops naturally in all human beings, the picture looks quite different, not only for the theory of the justification of human rights, but also for the conceptualization of their history, including the sense of tragedy with which we learn about this history. If there is a case for the individuality of hunter-gatherers in the Congo Basin or of nomadic herdsmen in Namibia, their suffering under Belgian rule or death in the desert at the hands of the German colonial forces gains only more significance. The obvious danger of cultural bias and perhaps even of worth ideologies looms large in the denial of full humanity to people without a specific cultural past, as the history

⁴⁴ Cf. Hunt, *Inventing Human Rights*, 27 ff.

⁴⁵ Hannah Arendt, *The Origins of Totalitarianism* (London: Penguin Books, 2017), 251.

⁴⁶ Arendt, *Origins of Totalitarianism*, 250 ff. The expanded German second edition contains even more explicit passages, among them a longer version of the English passage just quoted, cf. Hannah Arendt, *Elemente und Ursprünge totaler Herrschaft* (Munich: Piper, 2005), 425, where Arendt writes about the Boers: “In ihnen lebt vermutlich heute noch der erste grauenhafte Schrecken vor den Menschen Afrikas – die tiefe Angst vor einem fast ins Tierhafte, nämlich wirklich ins Rassische degenerierten Volk, das doch trotz seiner absoluten Fremdheit zweifellos eine Spezies des homo sapiens war. Denn was auch immer die Menschheit an Schrecken vor wilden barbarischen Stämmen gekannt hat, das grundsätzliche Entsetzen, das den europäischen Menschen befiel, als er Neger – nicht in einzelnen exponierten Exemplaren – sondern als Bevölkerung eines ganzen Kontinents – kennenlernte, hat nirgends seinesgleichen. Es ist das Grauen vor der Tatsache, daß dies auch noch Menschen sind, und die diesem Grauen unmittelbar folgende Entscheidung, daß solche ‘Menschen’ keinesfalls unseresgleichen sein durften.”

that is supposed to constitute humanity or to have produced such concepts as individuality is the history of Europe or the West, thus excluding other cultural trajectories, importantly those of the victims of European cruelty and greed.

Are these conceptions of history fictions or straw men? It does not seem so. There are various examples of historical accounts of human rights or human history in general that imply important features of these different approaches, some of which have already been mentioned and some of which will still cross our path. When engaging with any particular account of human rights, it consequently is useful to ask which background assumptions guide the research in question and how they may color the analysis.

How to decide between these conceptions of history? The question of what history is like cannot be answered on *a priori* grounds. We cannot know how history unfolded before we have studied it – advisably without an *a priori* conception that is immune against falsification.

This open-mindedness should apply likewise to the sketched anthropological assumptions underlying the writing of history. Perhaps human beings of other epochs or from certain contemporary cultures were or are completely different from us (the question of course being – who is “us”?) – with no comparable modes of thought and underlying mental faculties formed by history. Perhaps they had and have no conception of a self, of individuality, of the separateness of one’s own body or any other such feature relevant for the idea of human rights. Perhaps, however, quite to the contrary, human beings from other epochs or cultures were or are very much like us in important respects (in this case – irrespective of who is “us”). Possibly humans share certain modes of thought and naturally and inevitably develop a concept of individuality as they develop an upright posture or (it seems) a concept of three-dimensional space as a framework of spatial orientation.

Again, neither of these theories is an *a priori* truth. Both form a hypothesis about human nature that is perhaps right, perhaps wrong. It is particularly important to underline that the assumption of the infinite malleability of human beings implies as many substantial hypotheses about human nature as any other theory. These are assumptions about universal properties of human beings, of all cultures and all times: From this point of view, all human beings share the property of malleability, a protean nature. This is a proposition about a substantial character of the species. The malleability thesis is not anthropologically neutral or “thin” in any kind of relevant sense, as it posits well-defined, rich, natural cognitive properties of human beings, such as a general ability to learn. There is thus no theory or history of human rights without a theory of human nature. The only question is what *kind* of theory of human nature one defends or implies and how well-grounded it is. This point is of some importance and will concern us throughout this study.

It follows that there is nothing outlandish about asking whether a different concept of human nature than the one that the infinite malleability thesis implies

may help to formulate interesting research questions for the inquiry into the history of human rights. We might wonder, for instance, whether there are no indications in history that *human beings have always been reasoning, moral, sentient, self-conscious, autonomous and liberty-seeking beings yearning for justice, respect and recognition*. There is some evidence that speaks for seriously considering this hypothesis, such as the testimony of art and not least the social struggles in human history. The search for justice and freedom is not a prerogative of European modernity. In concrete terms, this would mean, for example, that torture hurt as much and was just as humiliating in 2022 as in 1786 or in 500 BCE, that liberty meant something to human beings throughout time (at least after they had experienced it) and that slavery was never a form of life merrily and justifiably accepted by human beings. From this perspective, the mourning of the *Women of Troy* and the real experience it stands for is not incomprehensible noise but resonates in an uncannily familiar manner with the later history of the subjugation of women.

The history of human rights is important for the relation of mind and rights, because, as explained above, we cannot study this topic with historical naivety about the genesis of the ideas and institutions of human rights. But not only that: Conversely, clarifying the relation of mind and rights is in turn highly relevant for the history of human rights itself, because it contributes to strengthening the foundations of the anthropological assumptions that guide this research. Perhaps the theory arguing for the total malleability of human nature is on the wrong track, and consequently the historical account based on this assumption is, too. Historiography and substantial theories of the human mind are of mutual importance for one another: The former casts light upon the historical making of human rights, the latter upon the anthropological foundations of this process.

A final remark about problems of the method of inquiry: The history of human rights is the history of a moral idea and the legal institutions that limit power and privilege and therefore challenge many actors in a given society, including world society. It is thus a history not of benign reflection and good deeds but of often-dirty struggles for social might and material goods that lurk in the background, and sometimes advance into the foreground, too. Furthermore, it is the project of humans and thus of beings who are fallible and often fall prey to error and actions that, even if well-intended, may entangle the actors in guilt and crime.

The history of human rights consequently must be the history of often very mixed achievements, of slow and discontinuous developments, of dead-end roads and noble ideas buried in tragedy. It must be a history of ideas, actions and institutions as imperfect as the beings who drove this project forward through time. The fact that there are many unsavory chapters in the history of human rights thus comes as no surprise. The significant good that this history contains should astonish us more than the bad that marked its path – and we should seek to tell honestly the grand story of both.

2.3 RIGHTS ON THE BARRICADES

2.3.1 *Where to Begin?*

Given these complexities, writing a history of human rights clearly is no easy task. Self-confident assertions about the idea's birth in Stoic thought, in the canonistic reinterpretation of Roman law, in the modern Natural Law tradition, in the Enlightenment, in Christian personalism or even in the policies of Jimmy Carter⁴⁷ underestimate the difficulty of the task. This underestimation is even more evident in assertions that the idea of human rights, or normative concepts that reasonably can be taken as related to the history of human rights, are not present in certain periods or cultures. It is far from clear, for instance, that merely because the Herero have not bequeathed to posterity a set of treatises on rights, including normative positions relevant for the idea of human rights, their culture contains nothing of interest to this history – or at least it should be clear if we put aside racist assumptions about the intrinsic inferiority of certain groups of people, in particular due to their cognitive abilities. Given historic events such as the “Scramble for Africa” and what it meant for very many human beings, we should be reluctant to exclude certain cultures from the history of rights from the outset – any intimation of the moral superiority of European or “Western” culture is all too evidently irreconcilable with its (horrific) historic record.

The question of where to start already has no obvious answer. Even if we leave aside implicit (though potentially highly relevant) manifestations of the idea of human rights, ignoring social norms and cultural practices, and instead search only for explicit moral or legal statements of the idea of human rights, we will still find multiple contenders. As explained above, history comes in many shades of gray and thus any such identification of the “beginning” of human rights will (justifiably) remain contentious.

What is clear, however, is that the idea of human rights entered the stage of world history as a major political factor during the American and French Revolutions. This idea had germinated for a long time, becoming increasingly prominent in the political and practical philosophy of the seventeenth and eighteenth centuries and finally turning into a revolutionary force: “The idea moved out of the library on to the barricades.”⁴⁸

⁴⁷ Cf. S. Moyn, *The Last Utopia*, 217. Moyn, *The Last Utopia*, 6, rightly criticizes human rights historians who approach their subject “the way church historians once approached theirs,” without offering a sufficiently complex picture himself, however. See Alston, “Does the Past Matter,” 2063 on the problems of “progress narratives” that “leap from one historical moment to another with little if any attempt to demonstrate causality, probe lines of transmission, or explain the political economy involved. They overstate coherence and continuity, marginalize competing understandings, and can be used to delegitimize alternative visions.”

⁴⁸ Griffin, *On Human Rights*, 1.

The American and French Revolutions were complex historical events in which very different aspirations played important roles. This is also true for the implied politics of human rights. In both revolutionary contexts, however, the idea of human rights had an important part among other, sometimes competing aims, and this makes these events a natural starting point for historical reflection. Subsequently, a wider perspective can be adopted to include other, more remote historical periods.

The history of human rights from the eighteenth-century revolutions to the present is well-charted territory. Nevertheless, it is necessary to highlight some crucial elements of this history in order to make some points that are important for our further inquiry. The discussion will lead to the following conclusion, which will be tested and enlarged upon in Chapter 3: Human rights history since the eighteenth century shows, we will argue, that human rights are a political project based on a particular ethical outlook born from the reflection of historically embedded but autonomously thinking human subjects, a project that is turned into but not limited to positive law and its institutions. To explain human rights history primarily by some often vaguely defined cultural or religious source, as some forms of cultural or religious reductionism do, runs the danger of depoliticizing the profoundly political human rights project, of missing its ethical core and impoverishing significantly the depth and explanatory power of the historical analysis. As we have already seen, in this analysis, human rights as ethical ideas have to be clearly distinguished from their legal and institutional implementation, which can take many forms. The current two-tier system of legal international human rights protection is not the only system in which human rights can play a meaningful role and that needs to be studied to gain a deeper understanding of them.

2.3.2 *From Politics to Law*

The role of human rights at the time of the American and French Revolutions was political, often rhetorical and only legal in a more limited sense. Documents like the *Virginia Bill of Rights* as the first concrete list of such rights and the *Declaration of Independence* gave human rights pride of place. The legal order established by the Constitution of the United States was much more hesitant and took significantly less ambitious steps to follow up these bold statements. In France, the *Déclaration* did not lead to enduring enforceable human rights law either. On the contrary, the French Revolution took the path to *la Terreur* and Napoleonic rule, and the principles of 1789 only bloomed very slowly.

Prominent conceptions of human rights underpinning these developments shared an important feature of the human rights project that has taken shape over the last two centuries, a feature we have already identified: The rights of human beings were to be protected in concrete limited political communities but as part of cosmopolitan normative perspectives. The protection afforded in the context of the

nation state from this point of view had a universal aspiration. A kind of stewardship concept was implied: Human rights were to be realized in the available political space, which was the nation state. However, the nation state was acting as a steward of the rights of humanity, which were not limited to any particular political community. Burke identified the problem quite correctly: The *Déclaration* did not secure the rights of Frenchmen; it attempted to secure the rights of human beings in France.⁴⁹

It is hardly surprising that the idea of an international protection of human rights beyond this focus on concrete political communities played no role in this period. To begin with, the idea was violently opposed by various secular and religious powers – including the mightiest that existed. The enemies of human rights had armies, their defenders not necessarily so.

Furthermore, it was not only the forces defending authoritarian regimes and orders based on the perceived unequal worth of human beings, like champions of the *ancien régime*, who opposed human rights. Right from the very inception of these rights, there were movements committed to what they perceived as social progress but on the ground of politics that denied and violated human rights. After all, *la Terreur* followed the *Déclaration de Droits de l'Homme et du Citoyen* after only four years, with long-lasting consequences for the perceived legitimacy of the ideas of the French Revolution.

For a long time, there were other rather substantial impediments to formulating anything remotely resembling a concrete idea of international human rights protection: First of all, at this point in time there was only a vague sense of what humanity actually meant in real terms, given the limited mutual contact and genuine familiarity with the diverse human cultures of that time. Moreover, contact with a given region of the world and knowing something about it does not necessarily lead to the inclusion of that region's inhabitants among humanity, as the colonial practices of the European states vividly illustrate. Finally, it is worth mentioning that there was simply no organizational and institutional space in which such cosmopolitan visions could have been pursued in the revolutionary period.⁵⁰ Inevitably, attempts thus concentrated on securing rights for the concrete political entity those involved belonged to; that is, for nation states or other entities, such as the German states or the cantons of the Swiss Confederacy.

Given this state of affairs, other aspirations for a legal world order of human rights were clearly out of reach, if they were developed at all. Establishing rights on the limited national level already required not only revolutionary action, but generations of political struggles that continue to this day. Starting with political action for a

⁴⁹ Burke, *Reflections*, 118 ff., though the “rights of man” in comparison to the “rights of Englishmen,” a “patrimony derived from their forefathers,” for him were chimerical and the root of revolutionary violence.

⁵⁰ Cf. Mazower, *Governing the World* for an overview about the development of global governance.

world community of rights would not have been a very promising action plan in 1776 or 1789.

The idea of cosmopolitan perspectives realized in particular political communities, however, found powerful expression, albeit in political practice only as one among other, quite different political aspirations. Moreover, this conception of human rights was often limited in many crucial aspects. The exclusions of women, of slaves and more generally of people of certain imagined races or from particular social classes or religious communities are the most obvious ones. This notwithstanding, this conception of human rights proved to be a central element of the future protection of human rights once these patterns of exclusion were overcome.

2.3.3 *Civil Rights and Human Rights*

Another pertinent issue that came to the fore during this formative constitutionalist period was the relation and sometimes tension between human rights as the rights of all humans and civil rights or the rights of citizens, in the sense that these rights are guaranteed but reserved only to the citizens of a specific community and not extended to all persons resident or temporarily staying in a country. The history of rights in the nineteenth century to a large degree was written in the language of constitutional civil rights, and not only in the USA and Europe. As indicated above, in principle there are legitimate functional reasons for this differentiation that are entirely in harmony with the idea of human rights. In the history of constitutionalism, however, the restriction of rights to citizens was not limited to such functionally legitimate constraints but extended to other and sometimes to all guaranteed rights. This limitation can be understood as a partial realization of universal human rights or can be justified on more narrow grounds – for example, as the traditional rights of members belonging to a particular community or even as a nationalistic conception of rights entitlements.⁵¹

Despite these limitations and ambiguities, these catalogues of civil rights (understood in this restricted sense as to their personal scope) are relevant for the history of human rights. The content of key rights such as freedom of expression or due process was shaped and developed further within this framework. They are thus examples of how rights that are limited in their personal scope can be relevant for the development of more inclusive human rights. Only one more step needed to be taken – a step of great importance for the history of human rights: the universalization of rights granted to particular individuals, extending the personal scope of these

⁵¹ Cf. the eloquent defense of such a traditionalist account of rights wedded to the specific history of a nation, Burke, *Reflections*, 150: “If civil society be the offspring of convention, that convention must be its law. That convention must limit and modify all the descriptions of constitution which are formed under it. Every sort of legislative judicial, or executory power are its creatures. They can have no being in any other state of things; and how can any man claim, under the conventions of civil society, rights which do not so much as suppose its existence?”

rights to all human beings. Here, too, this one step was a major one, full of preconditions, but one that very much forms part of the history of rights as human rights.

The idea of human rights in the narrow sense, however, continued to play a variety of important roles in nineteenth-century thought. It remained not only the object of legal inquiry and its ambivalent conceptions of human rights' origin and content,⁵² but also served as a rallying cry for revolutionary grassroots action struggling to overcome the monarchical order reinstated after the Napoleonic Wars. To take one particularly interesting example, in one of the most famous revolutionary pamphlets in German history, *Der Hessische Landbote* (1834), one of the greatest playwrights in the German language, Georg Büchner, wrote of human rights as the normative anchor of his demands for freedom and equality – demands that drove him into exile in Zurich and landed many of his associates in prison – yet another example of the struggles for human rights from below.⁵³

Büchner's courageous actions illustrate that achieving guarantees of these rights after their revolutionary declaration continued to be an arduous political project involving major historical tragedies. One example with particularly far-reaching consequences for world history is Germany, of whose political development Büchner's fate is in many ways a paradigmatic case: The suppression of the democratic revolution in the German states after years of political unrest and its remarkable constitution of 1848, the subsequent rise of German authoritarianism, the admirable constitutional attempt of the Weimar Republic after World War I, its collapse, the rise of Nazism, the catastrophe of World War II and the mass murder taking place in its shadow and the resurrection of German constitutional democracy based on human rights in 1948 in the form of the *Basic Law* in one part of the country, divided until its reunification in 1990, illustrate what kind of historical forces have to be mastered before a constitutional order based on human rights can become a reality. The fascinating history of constitutionalism in the nineteenth and

⁵² Cf. for instance Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt*, 2nd edition (Nördlingen: Beck, 1872), 64 on human rights binding states and demanding the abolition of slavery; Pasquale Fiore, *Le droit international codifié et sa sanction juridique* (Paris: Librairie Mareseq Ainé, 1890), 14 ff., 164 ff., 164: "*Les droits de l'homme au point de vue international sont ceux que lui confère sa personnalité, au regard de tous les États, de tous ses semblables et de toutes les autres personnes formant la Magna civitas. Ce sont, à proprement parler, les droits de la personnalité humaine, appartenant à chacun, à raison même de son existence, et indépendamment du lien de nationalité qui l'unit à un État déterminé.*" For critical comments, for instance, on elements of racism and antisemitism in Bluntschli's work, Marcel Senn, "Rassistische und antisemitische Elemente im Rechtsdenken von Johann Caspar Bluntschli," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 110 (1993): 376–405; on both, Koskeniemi, *The Gentle Civilisers*, 42 ff.; 54 ff.

⁵³ Cf. Georg Büchner, "Der Hessische Landbote," in Georg Büchner, *Werke und Briefe*, Münchner Ausgabe, eds. Karl Pömbacher et al. (Munich: Deutscher Taschenbuch Verlag, 2001), 39 ff., 44, 52, 56, 58. The secret society Büchner founded was called *Gesellschaft für Menschenrechte*, "Society for Human Rights," following a French example.

twentieth centuries unfolding on all continents⁵⁴ provides many other examples of how the development of rights proceeded, halted, regressed and had to give way to authoritarian regimes until new developments opened the door to the pursuit of rights once more.

There is a further important point. In addition to their role in the ethics and law of eighteenth-century declarations of rights and of nineteenth-century constitutionalism, human rights also contributed to important ethical and political movements that led to far-reaching change in social, political and legal terms. Important examples are the antislavery movement, including as one of its most dramatic and increasingly less neglected expressions, the 1791 Revolution in Haiti and the campaign against torture that had originated before the great declarations of rights. The women's liberation movement is another crucial example. The rights of women were claimed eloquently during the French Revolution, albeit with limited concrete success.⁵⁵ These rights continued to be the object of struggles that concerned not only women's right to vote, but other issues as well, such as property, contract and family law, challenging the many restrictions women faced.⁵⁶ One last example is the labor movement, important parts of which had an explicit fundamental rights agenda, despite Marx's skepticism about rights.⁵⁷

These movements developed heterogeneous political views, some of them becoming increasing hostile to the idea of human rights. But even where this was not the case, human rights were not their only concern. Nevertheless, these efforts

⁵⁴ An interesting example is South American constitutionalism since its beginnings in the nineteenth century. Here as elsewhere the question of the concrete meaning of fundamental rights was intertwined with different visions of social organization, giving more or less weight to traditional social and religious forces, social and economic oligarchies, individual autonomy or social welfare, cf. for an overview Roberto Gargarella, *Latin American Constitutionalism, 1810–2010: The Engine Room of the Constitution* (Oxford: Oxford University Press, 2013), 6 ff. on conservative, republican and liberal visions of constitutions and rights.

⁵⁵ Olympe de Gouges, *Déclaration des droits de la femme et de la citoyenne: Suivi de préface pour les Dames ou le portrait des femmes* (Paris: Mille et une nuits, 2003); Wollstonecraft, *Vindication*.

⁵⁶ Harriet Taylor Mill, "Enfranchisement of Women," in *The Complete Works of Harriet Taylor Mill*, eds. Jo Ellen Jacobs and Paula Harms Payne (Bloomington: Indiana University Press, 1998), 72: "What is wanted is equal rights, equal admission to all social privileges; not a position apart, a sort of sentimental priesthood."

⁵⁷ Cf. for an example of nineteenth-century social democracy, Gothaer Programm, *Protokoll des Vereinigungs-Kongresses der Sozialdemokraten Deutschlands, abgehalten zu Gotha vom 22. bis 27. Mai 1875*. Leipzig, 1875, 78–9 (equal rights to socially created wealth, freedom of opinion, thought and research, electoral rights, right to form unions) and Karl Marx, "Kritik des Gothaer Programms," in *Marx-Engels-Werke*, Vol. 19, ed. Ludwig Arnold (Berlin: Dietz Verlag, 1987), 13–32. For many decades, the anthem *The Internationale* was sung by members of the labor movement. Its original version by Eugène Pottier, an activist of the Paris Commune, written in 1871 after the subjection of the Paris Commune, contains the verse: "*Le droit du pauvre est un mot creux/C'est assez, languir en tutelle/L'égalité veut d'autres lois/Pas de droits sans devoirs dit-elle/Égoux, pas de devoirs sans droits.*" In the most popular German 1910 version by Emil Luckhart, the chorus explicitly refers to "*Menschenrecht*," the right of humans as a central aspiration of the labor movement.

had some ideas in common: Slaves and workers rebelled against being reduced to beasts of burden, claiming the right to different treatment as humans. Women resisted repressive patriarchal structures and demanded freedoms as beings endowed with as much reason, morality, sentiment and capacity for self-determination as men. The movement for the abolition of torture and more generally for penal reform highlighted the humanity of the tortured persons that seemed to forbid such treatment. The demands of these movements may not have been couched in the words of twenty-first-century human rights terminology, but their more profound normative structure was very much about the legitimate claims of slaves, workers, women or convicts *as humans* and therefore belong in any history of human rights. Mary Wollstonecraft's thoughts about women's rights, recalled above, are just one example, as are W. E. B. Du Bois' demands for human rights as a crucial element of post-slavery emancipation.⁵⁸ Accordingly, various provisions of modern human rights law finally embodied these demands.

The protection of human rights in specific political communities, a protection with universalist aspirations despite the limited and exclusionary form in which these rights initially were conceptualized, forms the first key step in the development of the contemporary architecture of human rights. This idea was audacious despite its limitations, as its history shows. The concrete history of legal developments saw substantial human rights realized predominantly in the personally limited form of civil (constitutional) rights. The revival of the full idea of human rights and the project of their international protection beyond the means of the state form the second step of this development. This step led to the highly imperfect and even in its most solid parts constantly threatened order of human rights in which we live today: their primary protection by national means and a supplementary, subsidiary protection through the international systems of rights, both regional and universal. How did this come about?

2.4 THE GROWTH OF THE MULTILAYERED PROTECTION OF HUMAN RIGHTS

2.4.1 *Contours of the Project*

The concrete project of an enlarged protection of human rights through the means of international law emerged more concretely in the twentieth century. From at least the 1920s onwards, the idea of the international protection of human rights became an explicit ethical, political and legal project.

The protection of human rights developed not as a natural outcome of the long-standing humanitarian traditions of the major powers. Traditionally, the political

⁵⁸ Cf. for instance the reference to the "manhood rights of the Negro," William Edward Burghard Du Bois, *The Souls of Black Folk* (W. W. Norton: New York, London, 1999), 13, 32, 40 ff., 45, quote at 39, in the framework of universalist perspectives, *ibid.* 16, 39, 136.

praxis of the world powers of the Global North had nothing to do with human rights: The European powers – despite the constitutional and democratic movements of the nineteenth century – in the time between the American and French Revolutions and the creation of the UN Charter and the *Universal Declaration* in many cases were authoritarian orders with little or no effective protection of fundamental rights, some even in newly established forms such as the fascist dictatorships in Italy and Spain and the Nazi dictatorship in Germany, leading the way to the ultimate negation of human rights. Catastrophic wars were conducted without much consideration for things such as ethical principles. Beyond Europe’s boundaries, colonialism continued to inflict great suffering on people around the world, demanding a staggering death toll and including actions that even in the later, narrow, technical legal sense were genocidal, both in colonized Africa – for example, in the case of the Herero – and in other parts of the world, including North America.⁵⁹

These practices were deeply ingrained in the culture and political thinking of the times.⁶⁰ It was no coincidence that Joseph Conrad’s *Heart of Darkness*, published at the beginning of the twentieth century, became a key aesthetical reflection of the historical forces at play: The real heart of darkness beat in the chest of European culture. Conrad’s wandering protagonist Marlow thus notes plausibly that “all of Europe contributed to the making” of the mass murderer Kurtz.⁶¹ Kurtz himself concisely summarizes the maxim guiding his own actions on the margin of his edifying pamphlet about Europe’s civilizing mission, revealing the real truth behind the lofty humanitarian rhetoric, drenched with the cynicism, hypocrisy and self-delusion of the colonial empires: “Exterminate all the brutes!”⁶²

A sober summary of the situation at the time of the slow inception of the international protection of human rights therefore cannot be a narrative about the triumphant, long-standing ethical tradition of Europe or the Global North, but rather must echo Marlow’s self-reflective observation at the beginning of his narrative on the cruising yawl *Nelly*, anchored at the mouth of the Thames: “Darkness was here yesterday.”⁶³

The idea of taking a step forward, of improving the protection of human rights was thus an element of the *ethical counterculture* to the imperial Global North: the attempt to keep alive some of humanity’s more worthy aspirations against powerful and unquestioned political traditions of the time.

As indicated above, the international protection of human rights is very much dependent on some kind of constant and stable organization of the international

⁵⁹ Cf. e.g. Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe, 1846–1873* (New Haven, CT: Yale University Press, 2016).

⁶⁰ Cf. on the sometimes so-called Columbian Epoch and some of its main characteristics, Noam Chomsky, *Year 501: The Conquest Continues* (Boston, MA: South End Press, 1993), 1.

⁶¹ Joseph Conrad, *Heart of Darkness* (London: Penguin Books, 2000), 83.

⁶² Conrad, *Heart of Darkness*, 83.

⁶³ Conrad, *Heart of Darkness*, 19.

community. The first major step was undertaken after World War I. The *Covenant of the League of Nations*,⁶⁴ however, did not contain any reference to human rights. The USA and the UK had proposed clauses protecting religious freedom. Japan attempted to include a provision against discrimination on the grounds of race and religion but was unsuccessful because of the opposition of the USA and the UK, who withdrew their proposal after Japan's broader initiative⁶⁵ – unsurprisingly, given the racial segregation in the USA and the UK's colonial empire. Proposals for other human rights issues suffered the same fate, including the rights of women.⁶⁶

Human rights played a role in the instruments creating the system of minority protection in the aftermath of World War I. This system contained, first, guarantees of life and liberty to all inhabitants of the respective country or region, without distinction of birth, nationality, language, race or religion. Second, it provided for equality before the law for all nationals and guaranteed their equal civil and political rights, without distinction as to race, language and religion. Third, it protected some cultural assets of minorities – for example, with regard to language or the right to establish social and religious institutions.

This system was limited to certain countries.⁶⁷ Proposals to extend the established duties to all League members were repeatedly rejected.⁶⁸ However, on September 21, 1922, the League of Nations passed a resolution that voiced the hope that all League Members would abide at least by these standards.

This system was limited in many ways, not least because it established obligations of the states towards other states and not subjective rights of the individual persons under international law. However, the treaties were “still of historical significance as unprecedented limitations on national sovereignty under international law.”⁶⁹

⁶⁴ League of Nations, *Covenant of the League of Nations*, April 28, 1919.

⁶⁵ André Mandelstam, *La Protection Internationale des Droits de l'Homme* (The Hague: Academie de droit international de La Haye, Recueil des cours, 1931), 133 ff.; Jan Herman Burgers, “The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century,” *Human Rights Quarterly* 14, no. 4 (1992): 447, 449.

⁶⁶ Woodrow Wilson commented that this “was only because the League could not begin by arranging all the affairs of mankind,” not because of any disagreement with the cause, cf. David Hunter Miller, *The Drafting of the Covenant*, Vol. 2 (New York: G.P. Putnam's Sons, 1928), 362, referring to such basic demands as universal women's suffrage or the abolition of trafficking with women and children, presented by the International Council of Women and the Suffragist Conference of the Allied Countries and the United States.

⁶⁷ Clauses were included in the peace treaties with Austria, Bulgaria, Hungary and Turkey; special treaties were concluded with Czechoslovakia, Greece, Poland, Rumania and Yugoslavia; declarations were made by Albania, Estonia, Finland, Latvia and Lithuania as a condition for their admission to the League of Nations; bilateral treaties were concluded between Poland and Germany and between Lithuania and Germany; cf. Burgers, “Road to San Francisco,” 449 f.

⁶⁸ Burgers, “Road to San Francisco,” 450.

⁶⁹ Burgers, “Road to San Francisco,” 450. On the political meaning of the minority rights system in comparison to later international policies, in particular population transferal, Mazower, *No Enchanted Palace*, 104 ff.

The substance of the human rights idea was influential in other areas, too. The Constitution of the International Labour Organization (ILO), created at the Paris Peace Conference, is a good example, as it established a framework for the protection of workers inspired by the idea of their human rights.⁷⁰

The efforts of legal scholars from a range of backgrounds to develop the idea of the international protection of human rights form an important chapter in these rights' history. These scholars' concrete reflections and proposals tried to flesh out the possible makeup of such an international order of human rights. The prominent players included the cofounder of the American Institute of International Law and later judge of the International Court of Justice, Alejandro Álvarez of Chile, who as early as 1917 presented a list of individual liberties that ought to be protected for everybody on the territory of any state.⁷¹ Among the other major actors were A. N. Mandelstam, a Russian émigré who moved to Paris after the Bolshevik Revolution, and A. F. Frangulis, a Greek likewise living in Paris because of his opposition to the rule of Venizelos in Greece. Both were involved in the International Diplomatic Academy set up by Frangulis and Álvarez among others, and in this context they played a central role in formulating a 1928 resolution generalizing the rights provided for by the minority system and thus guaranteeing life, liberty and equality before the law and protecting against discrimination on the grounds of race, language and religion.⁷² Mandelstam had drafted a text on human rights for the *Institut de Droit International*, which led to the *Declaration of the International Rights of Man* of October 12, 1929, which contained rights of every individual residing in the territory of a state and rights of the nationals of a state. It explicitly stated that the rights guaranteed in national constitutions needed to be extended to everyone and guaranteed by every state.⁷³ This declaration was endorsed by various associations concerned with human rights and complemented with further and alternative demands.⁷⁴ Its aim was to define on the international level a set of rights

⁷⁰ Cf. Art. 1 in conjunction with the Preamble, International Labour Organization (ILO), *Constitution of the International Labour Organization (ILO)*, April 1, 1919, though not referring explicitly to human rights.

⁷¹ As part of a larger project on the future principles of international law, cf. Burgers, "Road to San Francisco," 451.

⁷² Mandelstam, *La Protection*, 218; Burgers, "Road to San Francisco," 452.

⁷³ As an inspiration, the Fourteenth Amendment to the US Constitution is quoted. Cf. for the text Mandelstam, *La Protection*, 205 f.; George A. Finch, "The International Rights of Man," *The American Journal of International Law* 35, no. 4 (1941): 662 f.; Burgers, "Road to San Francisco," 452. An earlier editorial comment had underlined that it "repudiates the classic doctrine that states alone are subjects of international law," "Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War," *The American Journal of International Law* 33 (1939): 182.

⁷⁴ Burgers, "Road to San Francisco," 453 f. For an interesting list, drafted by the *Ligue des droits de l'homme* with some influence on the French postwar discussion and *Universal Declaration*, cf. "1936: The Complement to the Declaration of the Rights of Man and of the Citizen by the French League of Human Rights," www.ldh-france.org/1936-COMPLEMENT-DE-LA-LDH-A-LA, *Ligue des droits de l'Homme*, accessed August 13, 2021. It underlines the equality of rights

that states had to guarantee to all human beings residing on their territory and subject to their jurisdiction. This was nothing less than – in a nutshell – the core of the international human rights protection of the post-1945 period.⁷⁵

Comparative studies about human rights protection in the constitutions of various countries⁷⁶ formed an important part of these efforts to flesh out the possible content of human rights. These studies were the forerunners of the background research preparatory to the drafting of the *Universal Declaration*. Note that this technique yet again illustrates the percolation of human rights from the national to the international level, which makes it pointless to study the development of the one without the other. This method was put to use on many occasions in the decades to come, as we will see.

These efforts were not entirely theoretical. In 1933, Frangulis, then a delegate of Haiti, introduced a draft resolution to the Assembly of the League of Nations that was identical to the resolution of the Diplomatic Academy of 1928. Its aim was not only to generalize the minority rights protection system, but also to establish a genuine protection of human rights by international law. This initiative was unsuccessful, however. The apparent reasons for its failure are recurrent themes along the path to the international protection of human rights: The guarantee of universal human rights evidently challenged colonial practices as well as racial segregation in the USA. Furthermore, the German Reich was still a member of the League at this point and attempts to appease it continued.⁷⁷

Later endeavors met with equally little success, indicating that the international protection of human rights was not (yet) a matter of sufficient public concern.⁷⁸ However, by now the idea had taken on a quite concrete shape and continued to linger in the *ante-chambres* of history until its moment finally came.

and the prohibition of discrimination, Art. 1, contains a right to an amount of work that leaves some time for leisure, similarly to Art. 24 *Universal Declaration of Human Rights*, and derives from human rights an imperative against colonization, Art. 10, referring to the dignity of the human person (*dignité personnelle*) as a yardstick for international collaboration. It underlines the familiar point that human rights have to be protected nationally and internationally, Art. 1.

⁷⁵ Mandelstam's arguments are interesting examples of the blind spots and ambiguities of historical conceptions of the human rights idea. Cf. for instance his view that the colonialism of his time is reconcilable with human rights, Mandelstam, *La Protection*, 170, while at the same time defending the general applicability of human rights in all states, criticizing the idea of backward states ("*civilisation arrière*") and discussing the danger of a new tyranny of great powers that might abuse the idea of human rights for their political purposes, *ibid.* 197 ff., 215 ff. Cf. for comments Helmut Philipp Aust, "From Diplomat to Academic Activist: André Mandelstam and the History of Human Rights," *The European Journal of International Law* 25 (2015): 1105–21.

⁷⁶ Cf. the collection by Alphonse Aulard and Boris Mirkine-Guetzévitch, *Les déclarations des droits de l'homme: Textes constitutionnels concernant les droits de l'homme et les garanties des libertés individuelles dans tous les pays* (Paris: Payot, 1929).

⁷⁷ Burgers, "Road to San Francisco," 458.

⁷⁸ Burgers, "Road to San Francisco," 459.

In the same year of Frangulis' failed attempt at the League of Nations, the International Union of the Associations for the League of Nations passed a resolution endorsing the idea of the generalization of the protection of human rights, to be enforced, if needed, by humanitarian intervention.⁷⁹

A range of important voices continued to contribute to the idea's promotion. One of the best known of these was H. G. Wells, who, with his writings and other activities, endorsed the idea of an international declaration of rights as a statement of the "broad principles on which our public and social life is based."⁸⁰ The final product of these efforts, his treatise *The Rights of Man*, was published in 1940 and gained international traction,⁸¹ succeeding in attracting the attention of President Roosevelt.⁸²

2.4.2 Constructing the Postwar World

Roosevelt's famous State of the Union address on January 6, 1941, was crucial in bringing human rights back to the center of international politics. In this address, he proclaimed the "supremacy of human rights everywhere," spelled out in the four freedoms – freedom of speech and expression, freedom of worship, freedom from want and freedom from fear – summing up and drawing on several decades of debate on the topic.⁸³

The *Atlantic Charter* of the USA and UK of August 14, 1941, referred to the protection of certain rights, including self-government, improved labor standards, economic advancement, social security and freedom from want and fear. These statements were echoed by the *Declaration by United Nations* of January 1, 1942, underlining that "complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands."

⁷⁹ Burgers, "Road to San Francisco," 454.

⁸⁰ Herbert George Wells, "War Aims: The Rights of Man," *The Times*, October 25, 1939, The Times Digital Archive, link.gale.com/apps/doc/CS100873561/GDCS?u=unizur&sid=bookmark-GDCS&xid=31252630.

⁸¹ Herbert George Wells, *The Rights of Man; or, What Are We Fighting For?* (Harmondsworth: Penguin Books, 1940), explicitly evoking the tradition of bills of rights since the *Magna Carta*, *ibid.* 29. It is useful to compare Wells' bill of rights with the *Universal Declaration* to appreciate the latter's normative qualities. Cf. also Burgers, "Road to San Francisco," 464.

⁸² Burgers, "Road to San Francisco," 470.

⁸³ Samuel L. Rosenmann, ed., *The Public Papers and Addresses of Franklin D. Roosevelt: Vol. IX: War and Aid to Democracies 1940* (New York: Harper & Brothers, 1950), 672. Roosevelt may have been motivated by the desire to mobilize public opinion in the USA in favor of American involvement in the war by convincing the public of a worthy cause, Burgers, "Road to San Francisco," 469. He knew Wells and was an early member of the Diplomatic Academy. It is thus conceivable that he was acquainted with the resolution of 1928, Burgers, "Road to San Francisco," 470 n. 55. Cf. *ibid.* on similar formulations used by Frangulis and Roosevelt.

It is, however, not the case that the international protection of human rights from this point onwards became a cornerstone of the concrete political activities of the US Government and the UK that aimed at defining the architecture of the new world order that would emerge after the defeat of the German Reich and the Axis powers.⁸⁴ While an international bill of rights played a role in some concrete activities within the US State Department concerning the postwar international order, these did not determine policy in any crucial respects.⁸⁵ There was a significant discrepancy between Roosevelt's famous stance and the small print (and sometimes large print) of the USA's foreign policy up to the founding of the UN, including, together with the other Great Powers, opposition to the incorporation of meaningful provisions on human rights in the Dumbarton Oaks proposals on the new world order.⁸⁶ Importantly, human rights continued to be violated domestically through the mechanisms of racial segregation, as powerful voices such as W. E. B. Du Bois had underlined for many years.⁸⁷ The UK policy was guided by the determination not to apply human rights to the colonies.⁸⁸ This set the stage – together with the repressive policies and lethal terror of the Stalinist system – for the problem of double standards in the human rights policies of the major powers, of a “divided world” of human rights protection⁸⁹ and the instrumentalization of human rights for political purposes that has haunted the human rights project ever since.

An increasing number of wartime activities by civil society actors were inspired by the idea that one element of the order at stake was human rights. Given the war, these activities to a large extent took place in the USA.⁹⁰ Some of the associations involved produced recommendations that closely prefigured the postwar development, including the subsidiarity of international human rights, implying the necessity of human rights protection and enforcement mechanisms on the state level.⁹¹

⁸⁴ Cf. Mark Mazower, “The Strange Triumph of Human Rights 1933 – 1950,” *The Historic Journal* 47, no. 2 (2004): 379–398.

⁸⁵ Burgers, “Road to San Francisco,” 472.

⁸⁶ Cf. Lauren, *Evolution*, 160.

⁸⁷ Cf. Du Bois, *The Soul of Black Folk*, 13, 32, 39 ff., 45.

⁸⁸ Cf. Fabian Klose, *Human Rights in the Shadow of Colonial Violence* (Philadelphia: University of Pennsylvania Press, 2013), 12 on Churchill's will not to apply the Atlantic Charter to the colonies. This was not a secret, as the statement of the African National Congress illustrates, African National Congress, *Africans' Claims in South Africa*, December 16, 1943, Congress Series No. II.

⁸⁹ Cf. Klose, *Human Rights*, 5, 16 ff., 39; Mazower, “The Strange Triumph of Human Rights,” 397: “So far as the Superpowers were concerned, human rights were strictly for export.”

⁹⁰ Burgers, “Road to San Francisco,” 471 ff.

⁹¹ Cf. e.g. the activities of the American League of Nations Association, which included work on human rights, cf. Quincy Wright, “Human Rights and the World Order,” in Commission to Study the Organization of Peace, *Third Report* (1943); Commission to Study the Organization of Peace, *International Safeguard of Human Rights* (1944), 552–75, 574, proposing “that measures be taken to safeguard throughout the world by (1) convening without delay a United Nations Conference on Human Rights to examine the problem, (2) promulgating as a result of this conference an international bill of rights, (3) establishing at the conference a

Major intellectual contributions were published by J. Maritain⁹² and H. Lauterpacht⁹³ among others. R. Lemkin had meanwhile started his campaign for an international instrument against genocide.⁹⁴ The ILO passed its *Declaration of Philadelphia* on May 10, 1944, which was annexed to the ILO Constitution in 1946, affirming that “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity,” and that “the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy.”

The American Law Institute appointed a committee of twenty-five experts “representing principal cultures of the world” that carried out substantial work on the content of an international bill of rights, including a survey of the protection of human rights in national constitutions and a “statement of essential human rights” comprising liberal and substantial social rights because “Hitler’s extermination of

permanent United Nations Commission on Human Rights for the purpose of further developing the standards of human rights and the methods for their protection, (4) seeking the incorporation of major civil rights in national constitutions and promoting effective means of enforcement in each nation, (5) recognizing the right of individuals or groups, under prescribed limitations, to petition the Human Rights Commission, after exhausting local remedies, in order to call attention to violations.”

⁹² Jacques Maritain, *Les Droits de l’Homme et la Loi Naturelle* (New York: Édition de la Maison Française, 1942), 84 ff. The rights he discusses are in line with other rights catalogues of this time and include substantial social rights, in particular for workers, *ibid.* 93 ff., 114 ff. He criticizes a secular justification of human rights as insufficient, however, *ibid.* 86 ff., 101 ff. Unlike the French *Déclaration* of 1789, the American rights conception is close to the “*caractère originellement chrétien des droits humains*,” he argues, *ibid.* 102, without making quite clear why.

⁹³ Hersch Lauterpacht gave a lecture in Cambridge in 1943 expounding a differentiated draft of an international bill of rights. Cf. Lauterpacht, *International Bill*, which is of substantial interest for the history of the codification of fundamental rights as one of the “transformative legal works of the twentieth century,” Phillippe Sands, “Introduction,” in Hersch Lauterpacht, *An International Bill of the Rights of Man* (Oxford: Oxford University Press, 2013), vii. The preamble highlights that the protection of human rights formed a central aim of the war, Lauterpacht, *International Bill*, 69. He underlines the importance of a substantial normative background theory of rights to defend the individual against tyranny and abuse, *ibid.* 3, 52. This is the core heritage of the tradition of Natural Law and Natural Rights, purged of their reactionary interpretation and “clericalism,” *ibid.* 35 ff., 120. International law is necessary for the protection of human rights, *ibid.* 27 ff., 50; Hersch Lauterpacht, *International Law and Human Rights* (London: Stevens & Sons, 1950), 79, 313 ff. Lauterpacht’s draft, like other such examples, exemplifies the need to criticize and improve any such concretization of rights, cf. for instance the lack of a prohibition of the discrimination of women or his struggle with the question: “How far can the Bill of Rights leave full scope to ‘the law of the State’ and permit disenfranchisement on account of colour, race, and religion?” His answer was that the egalitarian principles of human rights needed time to overcome the political obstacles blocking the way to their realization.

⁹⁴ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress (Foundations of the Laws of War)* (Clark, NJ: Lawbook Exchange Ltd, 2008); Mazower, *No Enchanted Palace*, 124 ff.

peoples has demonstrated to all who can read that a world society with so much power as ours must be organized to serve the dignity and welfare of the individual being or it will destroy itself.”⁹⁵ It provided key material for the *Universal Declaration*.⁹⁶ This is yet another example confirming that these national constitutional rights are not alien to international human rights, but rather are their fertile breeding ground.

All of this notwithstanding, the reluctance to make human rights a real policy issue persisted. The proposals put forward by the USA, the UK, the Soviet Union and China at the conference of Dumbarton Oaks in 1944 referred ultimately only to a new world organization to “promote respect for human rights and fundamental freedoms” in the context of “arrangements for international economic and social cooperation,” but not in any more ambitious sense.⁹⁷ A US proposal for a mainly rhetorical statement of principle about respecting human rights found no support by the UK and the USSR.⁹⁸ China’s idea to include a provision on the equality of all races in the Charter (not a minor point for the protection of human rights) was opposed by the USA, the UK and the Soviet Union.⁹⁹

The Charter of the United Nations, signed at the United Nations Conference on International Organization held in San Francisco in 1945, marked a more substantial step forward. This was due not to the policy aims of the great powers, which continued to be in line with the restrictive Dumbarton Oaks proposals, but to the substantial influence of other states and of nongovernmental organizations (NGOs) on the outcome.¹⁰⁰ The Latin American states had decisively influenced the outcome of a conference already held from February 21 to March 8, 1945, in Chapultepec Castle, Mexico. The Chapultepec Conference passed a resolution calling for an international declaration of human rights as well as instruments to implement these rights. It instructed the Inter-American Juridical Committee to prepare such a draft declaration.¹⁰¹ The Latin American states were active forces for the promotion of human rights at the San Francisco Conference, forming the largest regional group of states, many at that time with democratic political

⁹⁵ “Statement of Essential Human Rights,” drafted by a Committee representing principal cultures of the world, appointed by the American Law Institute, distributed by Americans United for World Organizations 1945, accessed August 13, 2021, www.ali.org/media/filer_public/fc/ea/fcea8b14-8d49-4263-8cd9-e0133751ff64/statement-of-essential-human-rights.pdf.

⁹⁶ John P. Humphrey, *Human Rights & the United Nations: A Great Adventure* (New York: Transnational Publishers, 1984), 32.

⁹⁷ United Nations, *The United Nations Dumbarton Oaks Proposals for a General International Organization*, October 9, 1944, ch. IX, Section A 1.

⁹⁸ Lauren, *Evolution*, 161 f.

⁹⁹ Lauren, *Evolution*, 161.

¹⁰⁰ Lauren, *Evolution*, 165 ff.

¹⁰¹ Lauren, *Evolution*, 168 ff.; Burgers, “Road to San Francisco,” 475; Kathryn Sikkink, *Evidence for Hope: Making Human Rights Work in the 21st Century* (Princeton, NJ: Princeton University Press, 2017), 68 f.

systems.¹⁰² Other smaller countries played a significant role, too, including Lebanon and the Philippines.¹⁰³

NGOs also contributed to the process.¹⁰⁴ Forty-two NGOs were invited to join the US delegation as consultants, with a view to securing public support for the new world organization.¹⁰⁵ The US Senate had not ratified the Covenant of the League of Nations, and one of the aims for the UN Charter in the making was to ensure that this did not happen again. The NGOs promoting human rights were politically and culturally heterogeneous and represented voices from various religious perspectives.¹⁰⁶ Their representatives had a decisive influence on the US delegation, which in turn convinced the delegations of the UK, the USSR and China to include references to human rights in the Charter¹⁰⁷ – albeit to an admittedly limited degree. Importantly, human rights became part of the purpose of the UN, which was mandated to establish a commission for human rights under the Economic and Social Council. The Charter was certainly no glorious dawn of the age of human rights, not least because it accommodated the colonial aspirations of Britain, France, Portugal, Spain, the Netherlands, Belgium and the USA. But some seeds were sown that had the potential to grow into something different. In particular, the Charter's provisions provided tools for the next major step in the development of human rights, namely the drafting of the *Universal Declaration*, proclaimed by the UN General Assembly in Paris on December 10, 1948.¹⁰⁸

It should be noted that the demands for the more forthright language used by the Charter were articulated not least by the Global South.¹⁰⁹ This does not come as a surprise, because one major driving force of the history of human rights was the prohibition of racial discrimination and decolonization, which had a decisive influence on the establishment of the human rights regime as we know it, as will be discussed in more detail below.

¹⁰² Morsink, *Origins*, 130 ff.; Paolo G. Carozza, "From Conquest to Constitution, Retrieving a Latin American Tradition of the Idea of Human Rights," *Human Rights Quarterly* 25, no. 2 (2003): 284; Sikkink, *Evidence*, 70.

¹⁰³ Lauren, *Evolution*, 178 ff.

¹⁰⁴ Lauren, *Evolution*, 178 ff.

¹⁰⁵ Lauren, *Evolution*, 179.

¹⁰⁶ The organizations included the Committee on Religious Liberty, created in 1943 by the Federal Council of Churches, the American Jewish Congress and the Synagogue Council of America. Important voices of the human rights movement included Judge Proskauer of the American Jewish Committee, Frederick Nolde of the Joint Committee on Religious Liberty and James Shotwell, cf. Lauren, *Evolution*, 171; Burgers, "Road to San Francisco," 476.

¹⁰⁷ Lauren, *Evolution*, 182; Burgers, "Road to San Francisco," 476; Sikkink, *Evidence*, 70.

¹⁰⁸ The Charter of the United Nations refers to human rights in United Nations, *Charter of the United Nations* (UN Charter), 1 UNTS 1 (XVI), October 24, 1945, preamble, Art. 1, Art. 13, Art. 55, Art. 56, Art. 62, Art. 68, Art. 76 lit. c.

¹⁰⁹ Sikkink, *Evidence*, 72 f.; Klose, *Human Rights*, 36: Fifth Pan-American Congress, October 1945, endorsing the demand for human rights and declaring the readiness to resort to resistance by force.

The question of whether human rights could limit sovereignty (as secured by Art. 2 Sec. 7 UN Charter) cast the universal aspirations of some actors into sharp relief. Art. 2 Sec. 7 UN Charter was widely held as safeguard against any intervention in the internal affairs of states, including those based on the protection of human rights. A fundamental problem lurks here that has continued to trouble the international human rights systems ever since: The protection of human rights was created by those agents – the states – that human rights are designed to protect against. States have therefore a strong incentive to make any international human rights obligation as little burdensome as possible. The tension between international human rights protection and sovereignty was not merely a theoretical issue. For instance, on the initiative of India, the UN General Assembly had already voted in 1946 that the UN had the competence and the duty to investigate the discriminatory treatment of Indians in South Africa.¹¹⁰

2.4.3 *Pushing the Agenda from the Periphery of Power*

One major step in the development of the international protection of human rights was the drafting and passing of the *American Declaration of the Rights and Duties of Man*. The Inter-American Juridical Committee worked out a complete draft by December 31, 1947. This draft was amended, in particular with regard to the duties of human beings, and adopted at the Ninth International Conference of American States in Bogotá, Colombia, in April 1948 as the first international general human rights instrument. There were discussions about institutions of enforcement, most importantly an Inter-American Court of Human Rights.¹¹¹ The *Declaration's* content was shaped by different political forces. Social democratic, liberal and Catholic traditions contributed to the set of rights protected, which encompassed classic liberal rights, social and economic rights and – a distinguishing feature – a number of concrete duties.¹¹² Some voices called for the *Declaration* to be binding and included in the Charter of the Organization of American States, demanding an effective system of enforcement, while other voices opposed this. One reason for this opposition was authoritarian regimes' fear of being bound by human rights.¹¹³ On the other hand, the fear of intervention, which loomed large given Latin America's experiences with US policy, motivated some actors to endorse a declaration of human rights, arguing that it would prevent such intervention as it would

¹¹⁰ Cf. n. 22.

¹¹¹ Sikkink, *Evidence*, 99.

¹¹² On the background, Carozza, "Conquest to Constitution," 281, arguing for a specific Latin American tradition of human rights, growing out of Las Casas' neo-Thomism, Latin America's nineteenth-century constitutional thinking and the Mexican constitution of 1917, blending individual rights, freedom and social concern in a form of "social liberalism," *ibid.* 311. Sikkink, *Evidence*, 75.

¹¹³ Sikkink, *Evidence*, 76.

protect the rights of persons.¹¹⁴ Others feared that such a declaration on the contrary would increase the danger of intervention on the grounds (or pretense) of rights protection.¹¹⁵ These arguments illustrate the complex matrix of reasoning – principles, political expediency and tactics, interests in maintaining or limiting power, different political visions, contextual factors of power relations – that fed into the making of a particular human rights instrument, shaping the actions of those involved in this process, with opposing positions sometimes pursued by different governments of the very same country.¹¹⁶ The internal divisions underlying these policy changes became vividly clear in Bogotá itself – following the assassination of the politician J. Gaitán, violence broke out, starting one of the civil wars that tormented the country for decades.

The *American Declaration* was of considerable significance for the drafting of the *Universal Declaration*, as were the submissions of Latin American countries to the UN Commission on Human Rights, not the least in the field of social and economic rights, drawn from their particular political tradition.¹¹⁷ The idea of duties entered into the text of the *Universal Declaration*, Art. 29, only in limited form. We should avoid drawing rash conclusions about the meaning of this, however, such as equating the existence of duties with more community-oriented outlooks and a lack of them with individualism. The question of whether or not to include duties in a rights catalogue is not easy to answer. Duties are the necessary correlative of claims – a rights catalogue thus implies very many duties, both of states and, given a doctrine of positive obligations and a (direct or indirect) horizontal effect, of private actors. Duties can not only serve benign community-oriented purposes, but also curtail legitimate liberty. Thus, one may well be very sympathetic to the importance of community and still opt against a strong language of duties in legal documents.

One controversial topic of international human rights in the making regarded women's rights. These rights were promoted by actors from quite different backgrounds. Influential voices came from the Global South in this field, too, pushing for the inclusion of normative content concerning the equality of women in Art. 8 of the UN Charter on the equal eligibility of men and women to participate in UN organs and in the *Universal Declaration*.¹¹⁸ They sometimes faced resistance even

¹¹⁴ Sikkink, *Evidence*, 76.

¹¹⁵ Sikkink, *Evidence*, 76.

¹¹⁶ Cf. the politics of Mexico during the drafting process of the *American Declaration*, Sikkink, *Evidence*, 76.

¹¹⁷ Morsink, *Origins*, 131: "Humphrey took much of the wording and almost all of the ideas for social, economic, and cultural rights of his first draft from the tradition of Latin American socialism by way of the bills submitted by Panama (ALI) and Chile (Inter)."; cf. for a more differentiated interpretation, including traditions of Catholic social teaching, Carozza, "Conquest to Constitution," 303; Sikkink, *Evidence*, 77.

¹¹⁸ Morsink, *Origins*, 116 ff.; Sikkink, *Evidence*, 79 ff. Katherine M. Marino, *Feminism for the Americas: The Making of an International Human Rights Movement* (Chapel Hill: University of North Carolina Press, 2019), 198 ff.; Torild Skard, "Getting Our History Right: How Were the

from women delegates and their advisors from countries such as the USA, the UK and Canada, including comments that such efforts were “unlady-like.”¹¹⁹ One telling episode that took place during the drafting of the *Universal Declaration* was the initiative to use language clearly including women in the preamble and Art. 1 *Universal Declaration*. The Dominican Republic filed a proposal to make the reference to equal rights of men and women in the preamble explicit.¹²⁰ Eleanor Roosevelt did not consider this amendment necessary because “the time had come to take for granted that such expressions as ‘everyone’, ‘all persons’ and ‘mankind’ referred to both men and women.”¹²¹ However, the Indian delegate, Lakshmi Menon, together with the female delegate of the Dominican Republic, Minerva Bernardino, argued forcefully for this clarification because the reference to “everyone” or similar expressions may be misconstrued as not creating equal rights for men and women, drawing from constitutional experience such as the interpretation of the Fourteenth Amendment to the US Constitution allowing racial segregation.¹²² The initiative was ultimately successful – against the vote of China and the USA – in securing a reference in the preamble of the *Universal Declaration* to the “equal rights of men and women.”¹²³ The issue also arose concerning the language of Art. 1 *Universal Declaration*. Among others, Hansa Mehta from India argued for a language that explicitly includes women in human rights protection to avoid any misunderstanding. This initiative was only partly successful: Art. 1 refers to “all human beings.”¹²⁴

One issue of decisive importance for the history of human rights was the question of the inclusion of people living in colonies in human rights protection. Attempts to do so explicitly were forcefully opposed by colonial powers such as Britain and France, albeit with only limited success, given the universalist language of the introductory paragraph and Art. 2 Sec. 2 of the *Universal Declaration*.¹²⁵

Equal Rights of Women and Men Included in the Charter of the United Nations?” *Forum for Developmental Studies* 35, no. 1 (2008): 37 ff.

¹¹⁹ Marino, *Feminism for the Americas* (comment by Virginia Gildersleeve, who was, however, herself a women rights’ activist), 203; Sikkink, *Evidence*, 81; Skard, “Getting Our History Right,” 37 ff.

¹²⁰ Cf. Schabas, *The Universal Declaration*, 2073 (A/C.3/217).

¹²¹ Cf. Schabas, *The Universal Declaration*, 2895 (A/C.3/SR.165).

¹²² Cf. Schabas, *The Universal Declaration*, 2895 f. (A/C.3/SR.165) (Menon); Schabas, *The Universal Declaration*, 2903 (A/C.3/SR.166). Menon was not explicitly mentioning but clearly referring to the “separate but equal” doctrine of the US Supreme Court, *Plessy v Ferguson*, 163 U.S. 537 (1896).

¹²³ Schabas, *The Universal Declaration*, 2921 f (A/C.3/SR.167).

¹²⁴ Cf. Schabas, *The Universal Declaration*, 1255 (E/CN.4/SR.34). On the debate, Morsink, *Origins*, 118 ff. In the long run, the final formulation (“all human beings”) may, in an ironic twist, have turned out to be even more inclusive than the reference to “men and women,” at least from current perspectives of critical gender theory. This is an example that the evaluation of certain legal formulations is dependent on a (changing) political context.

¹²⁵ Cf. Morsink, *Origins*, 96 ff.; Klose, *Human Rights*, 39; Sikkink, *Evidence*, 79.

Another controversial theme that continues to be significant is the system of enforcement – examples of the debates in the 1920s and 1930s and during the drafting of the *Universal Declaration* have already been mentioned. Various attempts to strengthen the system were made – for example, by Charles Malik and Hansa Mehta.¹²⁶ Australia even proposed an International Court of Human Rights with the competence to make judgments binding on states.¹²⁷ Successful attempts of Mexico to promote the right to effective remedy, which became Art. 8 *Universal Declaration*, belong in this context, too.¹²⁸

The experience of the “horrors of war and totalitarianism,” as the Chilean delegate, Santa Cruz, put it, of the Holocaust and other forms of mass murder were of foundational importance for the drafting of the *Universal Declaration*. The very recent past had shown very clearly what a world without respect for human rights looked like, and the drafters lost no opportunity to draw on what they had seen.¹²⁹

¹²⁶ Cf. for example Charles Malik’s remarks in Schabas, *The Universal Declaration*, 163 (E/CN.4/SR.2). For Mehta’s repeated interventions, e.g. Schabas, *The Universal Declaration*, 162 (E/CN.4/SR.2); Schabas, *The Universal Declaration*, 204, 207 (E/CN.4/SR.15); Schabas, *The Universal Declaration*, 210 (E/CN.4/SR.16). Cf. also the draft Resolution of India, including implementation of human rights obligations by the Security Council, Schabas, *The Universal Declaration*, 175 f. (E/CN.4/11). Malik and Mehta among others in 1947 attempted to allow the Human Rights Commission to study individual petitions submitted to the Human Rights Commission. Such and other proposals met with the resistance of Western states and the Soviet Union, leading to ECOSOC Resolution 75 (V), which prevented the Commission from investigating petitions, cf. Roland Burke, *Decolonization and the Evolution of International Human Rights* (Philadelphia: University of Pennsylvania Press, 2010), 61 ff. Cf. also Lauren, *Evolution*, 217; Sikkink, *Evidence*, 79. The lack of “true and enforceable” obligations was the main reason for Lauterpacht’s critique of the *Universal Declaration* and his doubts about its moral authority: “That authority is a function of the degree to which states commit themselves to an effective recognition of these rights guaranteed by a will and an agency other than and superior to their own. The moral influence of ideas flows from the sincerity of those who proclaim them,” Lauterpacht, *International Law*, 419.

¹²⁷ Schabas, *The Universal Declaration*, 203 (E/CN.4/15); Schabas, *The Universal Declaration*, 2343 (A/C.3/SR.112).

¹²⁸ Schabas, *The Universal Declaration*, 2340 (A/C.3/309); Carozza, *Conquest to Constitution*, 287, drawing, for instance, from the Latin American institution of *amparo*; Sikkink, *Evidence*, 78 f.

¹²⁹ There were many references to the recent past in the drafting process, cf. e.g. René Cassin: Schabas, *The Universal Declaration*, 801 (E/CN.4/AC.1/SR.8): “He explained that his text alluded to the three fundamental questions of liberty, equality, and fraternity because, during the war, these great fundamental principles of mankind had been forgotten.” Vladimir Koretsky: Schabas, *The Universal Declaration*, 854 (E/CN.4/AC.1/SR.13): referring to the “Fascist destruction of feeble-minded people”; Santa Cruz (Chile): Schabas, *The Universal Declaration*, 1667 (E/CN.4/SR.50): referring to the “horrors of war and totalitarianism”; Cassin: Schabas, *The Universal Declaration*, 1670 (E/CN.4/SR.50), referring to the “inherent equality of human beings, a concept which had recently been attacked by Hitler and his ideological disciples.” On the untenable thesis, e.g. Moyn, *The Last Utopia*, that the Holocaust was irrelevant for the drafting of the *Universal Declaration*, Johannes Morsink, *The Universal Declaration of Human Rights and the Holocaust: An Endangered Connection* (Washington, DC: Georgetown University Press, 2019).

2.4.4 *From the Universal Declaration to the Differentiated International Bill of Human Rights*

2.4.4.1 Human Rights Turned into Constitutional Law

The *Universal Declaration* formed an important source of inspiration for constitutional law after World War II. One example that became particularly influential is Germany's *Basic Law*. Its catalogue of fundamental rights, many of them designed as human rights in the narrow sense of rights of all humans irrespective of nationality, is very much inspired by the *Universal Declaration*. The fundamental rights system of the *Basic Law* influenced other constitutional orders that became influential in their own right. The Constitution of South Africa is a prime example. After 1989, a great number of Central and Eastern European states transformed into constitutional orders protecting fundamental rights. As outlined above, effecting exactly this protection on the level of states was an essential aim of the *Universal Declaration*. The shift towards constitutionalism of the last decades thus forms a crucial element of the history of human rights after 1948. Nothing about this development is irreversible, of course, as recent attacks on constitutional orders based on liberal rights vividly illustrate.

2.4.4.2 Human Rights Turned into International Law

Once the *Universal Declaration of Human Rights* had been passed, a further element on the international human rights agenda was to turn the rights declared into international law and create a system of meaningful implementation. The process of achieving these ends following the adoption of the *Universal Declaration* proved as difficult as might be expected, given this extraordinary legal project's scope and quality. Today, we have covenants of universal application covering a broad range of rights, regional covenants of this kind and specialized conventions dealing with specific issues or groups of persons. There is neither a uniform system of state obligations nor a uniform system of human rights implementation. This situation very much mirrors the convoluted, politically unlikely process of the creation of international human rights law.

A first step was already taken in 1948 with the adoption of the Genocide Convention, one of the archetypical pieces of international human rights law.¹³⁰ The Geneva Convention on Refugees is another issue-specific piece of international law serving the protection of a particularly vulnerable group of people.¹³¹

¹³⁰ UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide* (CPPCG), UNTS 78 (277), December 9, 1948. For some comments on the relation of the Genocide convention and the UN minority policy, in particular the idea of population transfer as a solution to minority problems, Mazower, *No Enchanted Palace*, 104 ff.

¹³¹ UN General Assembly, *Convention Relating to the Status of Refugees*, UNTS 189 (137), July 28, 1951.

On the regional level, the 1950 ECHR set out a catalogue of human rights that over the decades has become the core of the arguably most advanced and effective system of the international protection of human rights existing to date. Its creation had to overcome considerable political obstacles, not least in the context of decolonization:¹³² “The truth was that a majority in the Council of Europe were, whatever their pretensions in public, unenthusiastic at the prospect of international European human rights protection.”¹³³ Not least because of its effectiveness that has tangible and uncomfortable consequences for states, the ECHR continues to be an object of various forms of critique.¹³⁴ The Inter-American system of protection developed more slowly and in many ways under more difficult circumstances, given the number of authoritarian regimes it had to accommodate. By now, however, it has achieved a standard of protection comparable to that of the European system and has contributed many innovations to the understanding of international human rights.

The first international treaty of universal application was the 1965 *Convention on the Elimination of All Forms of Racial Discrimination* (ICERD),¹³⁵ which catalyzed the final adoption in 1966 of the two major human rights covenants on civil and political rights (ICCPR)¹³⁶ and social, economic and cultural rights (ICESCR),¹³⁷ although these only entered into force in 1976. Recent decades have witnessed the development of an increasingly differentiated system of international human rights protection. Its landmark elements include the *Convention on the Elimination of All Discrimination Against Women* (1979),¹³⁸ the *Torture Convention* (1984),¹³⁹ the

¹³² Including the attempt by France and Britain to take the project of the political agenda, cf. Steven L. B. Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (Cambridge: Cambridge University Press, 2017), 39. For a slightly different interpretation, Simpson, *Human Rights*, 667. The ECHR was extended by the UK and France to the territories the international relations of which they are responsible for in 1953 and 1974, respectively.

¹³³ Simpson, *Human Rights*, 667.

¹³⁴ One consequence of this critique is Council of Europe, *Protocol No. 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms*, ETS 213, June 24, 2013, entering into force August 1, 2021, “affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.” The protocol intends to diminish worries of Member States about an ever-expanding reach of the European Convention system.

¹³⁵ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), UNTS 660 (195), December 21, 1965.

¹³⁶ UN General Assembly, *International Covenant on Civil and Political Rights* (ICCPR), UNTS 999 (171), December 16, 1966.

¹³⁷ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (ICESCR), UNTS 993 (3), December 16, 1966.

¹³⁸ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), UNTS 1249 (13), December 18, 1979.

¹³⁹ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNTS 1465 (85), December 10, 1984.

Convention on the Rights of the Child (1989)¹⁴⁰ and the *Convention on the Rights of Persons with Disabilities* (2006).¹⁴¹

A further element of the international human rights system is international humanitarian law based on the *Geneva Conventions* of 1948 and their additional protocols¹⁴² that intend to protect the fundamental rights of persons in armed conflicts. Yet another pillar is international criminal law, born of the Nuremberg and Tokyo Trials. Following the ad hoc tribunals for Yugoslavia and Ruanda, international criminal law took on tangible form in the *Statute of Rome*¹⁴³ and the establishment of the International Criminal Court among other institutions. It should be noted that the ideas of humanitarian and international criminal law are deeply rooted in the history of legal thought.

The law of the EU is another important element of international human rights protection on the regional level that comes with its own new and legally challenging qualities. Fundamental rights – beyond the so-called fundamental freedoms of movement, establishment, services and capital, which are at least partly similar to fundamental rights – were first established pretorian style by the case law of the then European Court of Justice (ECJ) (now Court of Justice of the EU; CJEU) as part of EU law.¹⁴⁴ The Charter of Fundamental Rights, which initially was only declaratory in character, was turned into mandatory primary law by the Treaty of Lisbon.¹⁴⁵ It binds the EU and all Member States implementing EU law.¹⁴⁶ Given the expansion of EU law in recent years, its scope of application encompasses significant areas of law. One major issue encountered when the Charter was being drafted was the question of which rights under EU law were to be understood as human rights in the

¹⁴⁰ UN General Assembly, *Convention on the Rights of the Child*, UNTS 1577 (3), November 20, 1989.

¹⁴¹ UN General Assembly, *Convention on the Rights of Persons with Disabilities*, A/RES/61/106, December 13, 2006.

¹⁴² International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, UNTS 75 (31), August 12, 1949; ICRC, *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, UNTS 75 (85), August 12, 1949; ICRC, *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, UNTS 75 (135), August 12, 1949; ICRC, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, UNTS 75 (287), August 12, 1949. ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, UNTS 1125 (3), June 8, 1977; ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, UNTS 1125 (609), June 8, 1977; ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)*, UNTS 2404 (261), December 8, 2005.

¹⁴³ UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), UNTS 2187 (3), July 17, 1998.

¹⁴⁴ Cf. Matthias Mahlmann, "1789 Renewed? Prospects of the Protection of Human Rights in Europe," *Cardozo Journal of International and Comparative Law* 11, no. 3 (2004): 903–38.

¹⁴⁵ Art. 6 para. 1 TEU.

¹⁴⁶ Art. 51 para. 1 CFR.

narrow sense.¹⁴⁷ Central rights finally were enacted as such human rights, including human dignity,¹⁴⁸ the right to life and physical integrity,¹⁴⁹ the prohibition of torture,¹⁵⁰ freedom of religion,¹⁵¹ freedom of speech,¹⁵² habeas corpus rights¹⁵³ and the prohibition of discrimination.¹⁵⁴ This means that every person can invoke these rights within the scope of application of EU law. The justificatory reason is clear: Persons are entitled to these rights because they are humans, not because they are citizens of a Member State of the EU. For other rights, citizenship of an EU Member State is a precondition – such as the right to vote for the European Parliament.¹⁵⁵ The fact that such a right is not a human right in the narrow sense is uncontroversial, although the question of whether people permanently residing in a country should enjoy this right is. In other cases, the personal scope of the rights was the object of intense debate and criticism – for example, concerning freedom of movement.

The creation of the abovementioned ICERD in 1965 also spearheaded important steps down another thorny road: the road towards the institutionalization of implementation mechanisms. It did so in concrete terms through a “treaty body” entrusted with this task (the Committee on the Elimination of Racial Discrimination; CERD) and competences including an individual petition mechanism, interstate complaints and reporting duties.¹⁵⁶ This became one model of how to implement human rights.

Ideas on how to enforce human rights on an international level, including some kind of international human rights court, had been pursued and proposed early on in the development of international human rights, as we have seen.¹⁵⁷ Such implementation mechanisms represent an important step in making human rights effective limits to state power. Even mandatory human rights norms remain no more than a harmless nuisance if they are not backed with effective mechanisms of implementation. Ideally, these will take the form of an individual complaint mechanism to an independent court with the power authoritatively to determine the meaning of human rights and the concrete content of state obligations, such as the ECtHR or the Inter-American Court of Human Rights, approaching the quality of implementation on the state level. One major challenge is creating trust in the workings of such international institutions so as to overcome resistance against their creation and maintain their legitimacy once established. This problem – which in principle arises for such institutions on the national level as well – is a particular issue on the international level because many states without democratic, human rights-based systems are involved in appointing these

¹⁴⁷ Cf. Mahlmann, “1789 Renewed?”

¹⁴⁸ Art. 1 CFR.

¹⁴⁹ Art. 2 CFR.

¹⁵⁰ Art. 4 CFR.

¹⁵¹ Art. 10 CFR.

¹⁵² Art. 11 CFR.

¹⁵³ Art. 6 CFR.

¹⁵⁴ Art. 21 CFR.

¹⁵⁵ Art. 39 para. 1 CFR.

¹⁵⁶ Art. 8 ff. ICERD.

¹⁵⁷ Cf. n. 126.

institutions' decision-makers. If we are committed to the idea of an international rule of law, this problem needs to be taken very seriously indeed.

Unsurprisingly, many efforts were made to prevent the development of such effective implementation mechanisms by powerful actors from both the Global North and the Global South.

The implementation mechanisms that were finally established despite this resistance vary considerably. On the national level, they include a fully-fledged constitutional review with courts having the competence to nullify laws as unconstitutional because they breach fundamental rights (including human rights in the narrow sense).¹⁵⁸ Then there is supranational jurisdiction that is binding for Member States, with a direct effect on and supremacy over national law, as in the case of the EU and the CJEU.¹⁵⁹ There is binding international jurisdiction, albeit not with the effect of nullifying laws or the decisions of public authorities,¹⁶⁰ and there are individual petition procedures¹⁶¹ and other mechanisms, such as periodic reviews of state actions,¹⁶² special rapporteurs,¹⁶³ advisory opinions¹⁶⁴ with sometimes opaque (if any) legal effects and work "to promote and protect the effective enjoyment by all of all civil, cultural, economic, political and social rights" in a variety of extrajudicial ways.¹⁶⁵

2.5 THE PARAMETERS OF CHANGE

2.5.1 Policy and Politics

The growth of this heterogeneous and fragmented human rights system was conditioned by the factors shaping world politics after 1948. These included the Cold

¹⁵⁸ Cf. Bundesverfassungsgerichtsgesetz (German Federal Constitutional Court Act [BVerfGG]), March 12, 1951, § 31.

¹⁵⁹ Art. 19 TEU; European Union, *Consolidated Version of the Treaty on the Functioning of the European Union* (TFEU), C 326/49, October 26, 2012, Art. 256 ff., Art. 260 para. 1. Cf. ECJ (European Court of Justice), *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Judgement of February 5, 1963, Case 26-62; ECJ, *Flaminio Costa v E.N.E.L.*, Judgement of July 15, 1964, Case 6/64.

¹⁶⁰ Art. 46 para. 1 ECHR.

¹⁶¹ Cf. for instance Art. 14 ICERD.

¹⁶² Cf. Art. 9 ICERD.

¹⁶³ Cf. "Special Procedures," Human Rights Council, accessed August 16, 2021, www.ohchr.org/EN/HRBodies/HRC/Pages/SpecialProcedures.aspx.

¹⁶⁴ Cf. Art. 64 (1) ACHR; Inter-American Court of Human Rights, *Advisory Opinion OC-23/17, The Environment and Human Rights*, November 15, 2017.

¹⁶⁵ Cf. the mandate of the UN High Commissioner of Human Rights, UN General Assembly, *Forty-eighth session: Agenda item 14 (b)*, A/RES/48/141, January 7, 1994, Nr. 4 (a)–(k). It is important to note that individual rights in international law are not limited to human rights, see Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law*, trans. Jonathan Huston (Cambridge: Cambridge University Press, 2016), concluding: "The individual is a full, i.e., a primary, original, *erga omnes* subject in the international community, a potential bearer of new international rights and duties. The catchphrase for describing this new legal status, including the totality of rights under international law, might be the international individual right" (emphasis in original).

War, in which human rights were used as a tactical weapon to weaken the respective opponent in more than one form, albeit interwoven with other power-political considerations.¹⁶⁶ Major powers in both West and East, North and South were reluctant to commit themselves to a system of human rights, fearing scrutiny of some of their policies or of the regimes they supported – from apartheid South Africa to Pinochet’s Chile or the Argentinian Junta.¹⁶⁷ Colonial regimes were still a major element of the world order at the time when this project began, and racism still formed part of major actors’ institutional structures.¹⁶⁸ Much depended on policy changes in the governments of states and their shifting attitude towards human rights in general and international human rights in particular. Both policies and attitudes often were influenced by domestic considerations, such as the southern US states’ fear that an international human rights regime might challenge their system of racial segregation.¹⁶⁹ Such domestic influences are the reason for the resistance in the US Senate to binding human rights treaties that led Eisenhower and Dulles to decide not to ratify the international human rights instruments prepared at the level of the UN after the *Universal Declaration* as part of a foreign policy that did not support the development of international human rights,¹⁷⁰ the UK’s 1966 policy shift following the electoral victory of the Labour Party under Wilson in 1964 that accepted broader human rights obligations of states, not least to bring the UK in line with international developments,¹⁷¹ or the shift of opinion of Western states about the right to self-determination in the Conference on Security and Co-operation in Europe (CSCE) Helsinki Process.¹⁷² The wide-ranging reforms taking place in many societies from the 1960s onwards as part of liberalization and cultural transformation played another important role for domestic and international human rights issues,¹⁷³ although some of the competing political projects, including those

¹⁶⁶ An interesting example of such complex considerations is Willy Brandt’s letter to President Kennedy of August 16, 1961, proposing to condemn the building of the Berlin Wall at the UN level as a human rights violation. Brandt at that time was mayor of Berlin and later became the first Social-Democratic Chancellor of the Federal Republic of Germany. The USA did not support this initiative. By not highlighting human rights violations in international fora, it was hoping to shield France from international criticism following a colonial massacre at Bizerte during the Algerian War. The Federal German Government followed the US policy requests after a meeting with Vice President Johnson and General Lucius Clay, cf. Jensen, *Making*, 48, citing Johnson’s official archived report.

¹⁶⁷ Cf. on the Nixon–Kissinger policies towards Pinochet and its context, Jensen, *Making*, 244 ff.

¹⁶⁸ Cf. the examples of colonial relativism above.

¹⁶⁹ Burke, *Decolonization*, 68.

¹⁷⁰ Jensen, *Making*, 40 f. on the debate about the Bricker amendment; Burke, *Decolonization*, 127.

¹⁷¹ Burke, *Decolonization*, 79; Jensen, *Making*, 67, 91 and 252 on the second Wilson premiership.

¹⁷² Jensen, *Making*, 205, 226 f.

¹⁷³ Cf. Jensen, *Making*, 3: “The European imperial powers, among the most powerful opponents of universality in the first two decades after the Second World War, went through a political process that reformed their views on human rights as they were increasingly liberated from their own empire in the middle decades of the twentieth century. It transformed their approaches to foreign policy and international human rights diplomacy.” *Ibid.* 3, 104 ff. on the process in which the USA “confronted its own long-lasting and foundational tradition of racism” and its effects on US policy on international human rights.

proposing radical, revolutionary transformation, were skeptical about human rights – for example, on the Marxist–Leninist left. The rise of NGOs like Amnesty International as part of wider political movements that they themselves shaped in turn forms part of this context.

2.5.2 *Regime Change and the Creation of New Political Bodies*

Regime change and – given the increasing number of new states – regime creation were further crucial factors.¹⁷⁴ The process of decolonization increasingly led to authoritarian regimes gaining power in the newly independent states. The First UN Human Rights Conference was attended by eighty-three countries, of which about two-thirds were undemocratic.¹⁷⁵ Twenty-six coups took place in Africa in the 1960s alone, followed by Idi Amin’s rise to power in Uganda in 1971, the introduction of martial law in the Philippines by President Marcos in 1972 and the putsch in Afghanistan that put an end to some (albeit severely limited) democratic endeavors in that country, including its 1964 constitution.¹⁷⁶ There were many reasons for the rise of authoritarian regimes as part of the decolonization process. In the context of a history of human rights we should remember, however, that this development was majorly influenced by the actions of world powers from the Global North, from the coup against Mosaddegh and support for the Shah’s regime in Iran in 1953 by the USA and the UK, to the 1961 coup against Lumumba in Congo that paved the way for Mobutu’s dictatorial rule,¹⁷⁷ to the military action by what was then West Pakistan against what is now Bangladesh in 1971.¹⁷⁸ A wave of authoritarianism swept Latin America, too, in the decades after World War II,¹⁷⁹ including US-backed coups – for instance, in Guatemala in 1954, disposing democratically elected President Arbenz.¹⁸⁰ The USA supported dictators throughout the region – Jiménez in Venezuela, Batista in Cuba, Trujillo in the Dominican Republic, Somoza in Nicaragua, Pinochet in Chile¹⁸¹ and the military governments in Argentina and Brazil after the coup of 1964¹⁸² – as did other Western states. All of this created a massive human rights toll.¹⁸³

¹⁷⁴ In 1955, twenty-nine states took part in the Bandung Conference; in 1968, forty more states joined this group, Burke, *Decolonization*, 94.

¹⁷⁵ Burke, *Decolonization*, 97.

¹⁷⁶ Burke, *Decolonization*, 129.

¹⁷⁷ Belgium officially apologized for its role in the coup in 2002.

¹⁷⁸ Sikkink, *Evidence*, 110.

¹⁷⁹ Cf. the 1948 military coup of Jiménez in Venezuela and the 1952 military coup by Batista in Cuba.

¹⁸⁰ Sikkink, *Evidence*, 98.

¹⁸¹ Cf. for documentation, “The Chile Documentation Project,” The National Security Archive, accessed August 16, 2021, <https://nsarchive.gwu.edu/project/chile-documentation-project>.

¹⁸² Cf. for instance on Brazil, “Brazil Marks 50th Anniversary of Military Coup,” The National Security Archive, accessed August 16, 2021, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB465>.

¹⁸³ Cf. on the gruesome human rights consequences, e.g. the report of the Brazilian Truth Commission 2014, “Conheça e acesse o relatório final da CNV,” accessed August 16, 2021,

In addition, the authoritarian socialist regimes consolidated after World War II. The USSR's record includes the crushing of uprisings in East Berlin in 1951 and in Budapest in 1956 and of the Prague Spring in 1968, as well as the invasion of Afghanistan in 1979 – again with awful consequences for the human rights of very many people.

On the other hand, some regime changes also served the cause of human rights, as illustrated prominently by postapartheid South Africa, post-Pinochet Chile or the end of the Argentinian junta in 1983, which helped to pave the way to the adoption of the *Convention against Torture* in 1984.¹⁸⁴ In addition, the collapse of the socialist state systems after 1989 opened the door to major progress in the development of international human rights, as exemplified by the expansion of the membership of the Council of Europe and concomitant expansion of the protection system of the ECHR. A major driver of this development was represented by the politics of human rights, not only top down in the official channels of the CSCE Helsinki Process, but also courageously bottom up – for instance, in the Charter 77 movement in Czechoslovakia.¹⁸⁵

2.5.3 Political Ideologies

These regime changes went hand in hand with shifting political ideologies that held very different attitudes towards the idea of human rights. Authoritarian regimes employed arguments of cultural relativism to shield their power against critique, from apartheid South Africa to post-Tiananmen China.¹⁸⁶

The concepts that relativists champion in terms of respect for Third World cultures has ended up providing a powerful excuse for those who murder, torture and abuse Third World people. . . . The fundamental similarity between states that assert cultural objections to human rights is not the culture of the people they represent but the authoritarian character of their government. Misuses of cultural difference unites European colonial dictatorships, like the British in Kenya, racial police states like apartheid South Africa, African Marxist autocracies like Ethiopia, Islamic theocracies like Iran, and medieval absolutisms like Saudi Arabia.¹⁸⁷

<http://cnv.memoriasreveladas.gov.br/index.php/outros-destaques/574-conheca-e-acesse-o-relatorio-final-da-cnv>.

¹⁸⁴ Jensen, *Making*, 267 f.

¹⁸⁵ Cf. on the Helsinki Process and the Helsinki Final Act, Jensen, *Making*, 209 ff.

¹⁸⁶ On the shift of the parameters of politics from the Asian-African Conference in Bandung, Indonesia, in 1955 and the first UN Human Rights Conference 1968 in Tehran, Burke, *Decolonization*, 13 ff. For a less differentiated account, Glendon, *A World*, 223 f. Burke, *Decolonization*, 128 ff. on the “westernizing” of human rights in the debates about the creation of a UN Human Rights Commissioner.

¹⁸⁷ Burke, *Decolonization*, 143 f.

Unsurprisingly, the World Conference on Human Rights held in Vienna in 1993 struck an uneasy compromise between universalist aspirations and emphases on cultural difference, the latter promoted not least by Iran, China and Singapore.¹⁸⁸

Yet another influence was the Communist vision of social organization in which human rights were interpreted primarily in terms of economic development and well-being – a position that met with criticism, including from prominent Marxist thinkers.¹⁸⁹ This debate was embedded in the larger question of the relation between human rights and development.¹⁹⁰ In some political outlooks, the latter took priority over the former, sometimes as a serious political platform, sometimes as a useful justificatory tool for authoritarian regimes.

Such different political visions were important for the conceptualization of concrete human rights. A good example is the struggle over what religious freedom means, not least in the context of the (ultimately unsuccessful) attempt from 1962 to 1967 to create an international human rights treaty securing freedom of religion and conscience. Here, again, the dividing lines were political, not cultural or religious.¹⁹¹

Given these political parameters, the multifaceted powers opposing a meaningful institutionalization of human rights and the – at first glance – rather weak forces mustered in its support, what is surprising is not that the development of the international protection of human rights was a slow and often dirty process and remains highly limited today, but rather that it did not grind to a halt altogether. Civil society played an important role in effecting this change, influencing the institutionalization of human rights in profound ways, not least by bringing human rights concerns home even to those lucky enough not to experience severe human rights abuses themselves. As it turned out, Kant's eighteenth-century perception of

¹⁸⁸ Cf. UN General Assembly, *Vienna Declaration and Programme of Action*, A/CONF.157/23, July 12, 1993, I.Nr. 5; Burke, *Decolonization*, 141.

¹⁸⁹ Ernst Bloch, *Naturrecht und menschliche Würde* (Frankfurt am Main: Suhrkamp, 1961); cf. the comments of Charles Malik on the different opinions of Third World delegates at Bandung, as quoted by Burke, *Decolonization*, 20: "One of the basic issues on which we were sharply divided . . . was the question of Human Rights. What are the ultimate fundamental Human Rights? For the Communists these rights are for the most part social and economic rights; but for some of the rest of us the ultimate human rights that should now be guaranteed by the world and by the diverse nations are the personal, legal, political rights to freedom – to freedom of thought, to freedom of expression, and certainly free elections. So, on this issue too, of the concept of human rights, we were sharply divided . . . Liberation! To the Communists, in the present context of this Conference meant the liberation of the various nations and peoples of Asia and Africa from foreign Western rule. But to some of us – while this certainly belongs to the notion of freedom, freedom was much larger and deeper than liberation from foreign rule. To us freedom meant freedom of mind, freedom of thought, freedom of press, freedom to criticise, to judge for yourself – freedom in short, to be the full human being. And in these respects, the Communists could not possibly agree with some of the rest of us."

¹⁹⁰ Cf. UN General Assembly, *Thirty-second Session*, A/RES/32/130, December 16, 1977.

¹⁹¹ Cf. Jensen, *Making*, 138 ff. An example for different opinions about this issue among Muslim states is the restrictive stance of Saudi Arabia and its critique by Pakistan.

universal sympathy for and moral solidarity with victims of human rights abuse was quite clear-eyed. This sympathy and solidarity became a political factor increasingly to be counted on. The groundswell of human rights in civil societies in the twentieth and twenty-first centuries is one of the most impressive vindications of the power of the human rights idea – just as the rising tide of contempt for fundamental rights is a warning that the power of its foes is undiminished.

2.6 THE MYTH OF THE WESTERN ORIGINS OF INTERNATIONAL HUMAN RIGHTS

We have already encountered the hypothesis that the international human rights regime is both the outcome and the normative embodiment of the hegemony of the Global North.¹⁹² This is perhaps the most common foundation for the view that human rights are the product of particular, culturally relative outlooks, a view of some importance for our current inquiry because – as mentioned above – it matters whether the inquiry into the foundations of rights is an inquiry into a piece of Western ideology or something more profound than that.

Several elements of the historical development show that this hypothesis is a misperception, besides the influence of actors from the Global South on the drafting of the *Universal Declaration* and on the subsequent development of the human rights system, which was decisive, although some of these actors became entangled in politics that were not true to the idea of human rights at some stage in their careers.¹⁹³

One major set of issues during the first period of international human rights law were the abovementioned colonial exception clauses, promoted by the colonial powers such as the UK, France, Belgium and the Netherlands. These clauses were often defended on the grounds of the colonies' cultural difference and lack of development – the form of colonial relativism encountered above.¹⁹⁴ President

¹⁹² Cf. much-quoted Fareed Zakaria, "Culture Is Destiny. A Conversation with Lee Kuan Yew," *Foreign Affairs* 73, no. 2 (1994): 109; Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002).

¹⁹³ One example is Carlos Romulo of the Philippines, an important voice in international human rights politics, who championed universality and liberal rights and criticized authoritarian politics in the Third World, but nevertheless at the end of his career served the Marcos government, cf. Burke, *Decolonization*, 93. Another is Minerva Bernardino, Dominican Republic, given her involvement with Trujillo's regime, Burke, *Decolonization*, 115.

¹⁹⁴ Cf. Burke's summary of the debate of October 26, 1950, on such clauses in the draft human rights covenants, Burke, *Decolonization*, 40: "Speaker from Belgium, France, and Great Britain explained that the 'backward' indigenous inhabitants were not ready for 'Western' human rights. Even René Cassin, famous co-architect of the *Universal Declaration*, defended the clause, advising that it was unwise to hold 'different people to uniform obligations,'" a stance Cassin later abandoned, Burke, *Decolonization*, 105. In November 1950, the colonial clause was removed from the draft covenant due to an initiative of the Philippines and Syria, Burke, *Decolonization*, 41.

Nixon's observation that "some of the people of Africa have been out of the trees only for about fifty years"¹⁹⁵ was a late echo of these views.

The anticolonial forces mobilized universalist principles of the equal rights of all human beings against these clauses, ultimately with success.¹⁹⁶ One major precondition of any meaningful human rights system, namely the nonselectivity and universalism of human rights, owes its existence to a large extent to the Global South's struggle for recognition.¹⁹⁷ Cultural relativism at this stage was a shield deployed against the aspirations of the colonies, not a sword challenging Western hegemony.¹⁹⁸ Following the publication of *Atlantic Charter*, the colonial powers already had to face the problem that many people in the colonies demanded that the values of freedom, democracy and rights defended in World War II be applied to them, too. After all, they were expected to provide crucial material support for the war effort and even to risk their lives in great numbers. The attempt to maintain the colonial system embodied a blatant self-contradiction. Moreover, massive human rights violations by colonial powers, including atrocious colonial military operations like the French campaigns in Madagascar, Southeast Asia and Algeria or the British counterinsurgency violence in Malaya, Cyprus and Kenya, which for a long time were "a taboo in public debate"¹⁹⁹ in many countries, showed the true colors of the colonial regimes.²⁰⁰ Human rights thus became an "anticolonial inspiration."²⁰¹ Other liberation movements relied on human rights, too. One good example is the human rights catalogue that the African National Congress drafted after the publication of the *Atlantic Charter*, calling all to unite in "this mass liberation movement and struggle, expressed in this Bill of Citizenship Rights until freedom, right and justice are won for all races and colours."²⁰²

One concrete long-term legal effect of this was the broadening of the scope of international humanitarian law to include anticolonial and internal armed conflicts.²⁰³ Another was the colonial powers' resistance to the development of a robust

¹⁹⁵ Burke, *Decolonization*, 146.

¹⁹⁶ On the attempts to include a separate article on the colonies in the Universal Declaration, Fn 125 above.

¹⁹⁷ Jensen comments on the implied "process of civilization": "[I]t would be timely to acknowledge the ways that the Global South civilized the West," Jensen, *Making*, 279, 218, 232.

¹⁹⁸ Cf. Burke, *Decolonization*, 114: "Cultural relativism did not appear with the influx of African, and to a lesser degree, Asian states into the UN in the late 1950s and early 1960s. On the contrary, in the early 1950s, it was driven by imperial powers and strongly opposed by the few Third World delegates then present in the UN. The first struggle for universality was the exact opposite of what academic proponents of cultural relativism hold as orthodoxy."

¹⁹⁹ Klose, *Human Rights*, 2.

²⁰⁰ Cf. the detailed account by Klose, *Human Rights*, 56 ff.

²⁰¹ Klose, *Human Rights*, 17 ff.

²⁰² African National Congress, *Africans' Claims in South Africa*, December 16, 1943, Congress Series No. II.

²⁰³ Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977; Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of

international human rights regime. Only once the colonial powers were forced to give up control over their colonies and the ethical corruption that the colonial regime entailed no longer played a role did this obstacle to a meaningful rule of human rights fall away.²⁰⁴

The debate on the *Convention on the Political Rights of Women*,²⁰⁵ the UN's first attempt to improve women's rights, is a further good example of the role of relativism. Arguments about cultural difference played a major role here, and an attempt even was made to reintroduce colonial exception clauses into the covenant. These arguments were ultimately defeated by defenders of women's rights, including Begum Ra'ana Liaquat Ali Khan from Pakistan,²⁰⁶ who later in life stood up for women's rights against the dictator Zia-ul-Haq, who himself used the argument of cultural relativism in his attempts to curtail these rights in Pakistan. The struggle against cultural customs continued to be an important issue in the efforts to protect women's rights, not least in the context of arguments for modernization and development.²⁰⁷ These efforts culminated in the *Convention on the Elimination of All Discrimination of Women* (CEDAW) of 1967, central provisions of which cannot be justified without recourse to universal, not culture-dependent rights of women.²⁰⁸

The arguments supporting the establishment of the apartheid regime on the grounds of cultural relativism – citing the Bantu laws, for example – provide another example of the ideological functions cultural relativism may serve.²⁰⁹

It should be noted that this form of relativism differs in decisive aspects from varieties of cultural relativism current today. Importantly, it was based on an ideology of some cultures' lack of development, paternalism and racism, whereas contemporary forms of cultural relativism predominantly are inspired by the equality of different cultures and the equal worth of all human beings. However, the history

Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, cf. Klose, *Human Rights*, 238.

²⁰⁴ Klose, *Human Rights*, 228 ff.

²⁰⁵ UN General Assembly, *Convention on the Political Rights of Women*, A/RES/640(VII), December 20, 1952.

²⁰⁶ Burke, *Decolonization*, 121 ff.

²⁰⁷ Cf. e.g. General Assembly resolution concerning the status of women in private law: UN General Assembly, *Status of Women in Private Law: Customs, Ancient Laws and Practices Affecting the Human Dignity of Women*, A/RES/843(IX), December 17, 1954; UN General Assembly, *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, opened for signature and ratification by General Assembly resolution 1763 A (XVII) of November 7, 1962, entry into force: December 9, 1964; Burke, *Decolonization*, 125 ff.

²⁰⁸ Cf. Art. 2 (f) CEDAW, obliging state parties "[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women" and Art. 5 (a) CEDAW, mandating state parties to take all appropriate measures "[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

²⁰⁹ Burke, *Decolonization*, 122.

of human rights teaches us to consider closely whether not only the former variant, but the latter, too, can serve as a tool to secure the dominion of illegitimate power. We will return to this problem and the question of whether an egalitarian relativism can be held without refuting itself by self-contradiction below.

The politically motivated selectivity of human rights standards was another issue, well exemplified by the many discussions about whether Soviet rule over Eastern Europe constituted colonialism or not²¹⁰ and the lack of criticism by some political actors of Soviet power politics in Eastern Europe, including in Hungary in 1956 and in Czechoslovakia in 1968.²¹¹ Rulers used human rights arguments hypocritically for all kinds of political purposes, without applying these arguments to their own regimes.²¹²

In subsequent human rights politics, actors from the Global South continued to play a decisive role²¹³ – from initiatives on early human rights instruments to the initiation of covenants like the ICERD that catalyzed further development,²¹⁴ through to influencing important steps towards meaningful monitoring systems, focusing first on apartheid and gaining successively universal application,²¹⁵ although such initiatives always faced opposition from the Global South, too – unsurprisingly so, given the kind of regimes involved.²¹⁶ One interesting example is Jamaica, which for some years became a global leader in human rights initiatives.²¹⁷ The universality of human rights as rights to be claimed by all human beings remained the key idea underpinning these politics.²¹⁸ Powers from the Global North often opposed these initiatives, sometimes successfully, sometimes not.²¹⁹

²¹⁰ Burke, *Decolonization*, 27 ff.

²¹¹ Burke, *Decolonization*, 46 f. The problem of (politically motivated) selectivity of UN action on human rights has a long history, cf. Jensen, *Making*, 259 ff.

²¹² Cf. the criticism by South Vietnam of the Democratic Republic of Vietnam and “dictatorial communism,” Burke, *Decolonization*, 29.

²¹³ Cf. Jensen, *Making*, 51 ff., 67, 102 ff., 139 ff. On the background, Burke, *Decolonization*, 6 ff., including a lack of interest of Western powers in human rights development, the perception that human rights were an issue where states from the Global South had more political leeway than in other fields because the issues had no significant consequences for their security or that of the Western democracies, less pressure from the West or Soviets on the issues or the quality and initiative of individual delegates.

²¹⁴ Jensen, *Making*, 102.

²¹⁵ Burke, *Decolonization*, 70 ff. Jensen, *Making*, 125.

²¹⁶ Cf. the opposition against the draft enforcement article of the ICERD by the delegate of Baath Party-led Iraq, Burke, *Decolonization*, 74, or the arguments of African authoritarian regimes (e.g. of the Mobutu regime in Congo) against such mechanisms in the ICPPR, moving the provision finally to an optional protocol, Burke, *Decolonization*, 77 f.

²¹⁷ Jensen, *Making*, 69 ff.: Jamaica was a main broker of progress in UN human rights diplomacy from 1962 to 1968. Examples include its role in promoting the ICERD and the International Year of Human Rights in 1968. Importantly, this was not a single-issue policy but embedded in wider political visions, *ibid.* 85.

²¹⁸ Cf. Final Communiqué of the Asian–African Conference, Bandung, April 24, 1955, Burke, *Decolonization*, 19 ff.

²¹⁹ Cf. n. 125 or the June 1949 initiative to study allegations of human rights abuses, Burke, *Decolonization*, 8.

One important issue in the development of human rights as international law is their relation to the idea of self-determination, which features prominently in the international covenants as a central right.²²⁰ This seems defensible in light of human rights doctrine. Individual self-determination and liberty, necessarily including political rights, cannot be reconciled with a colonial rule that entirely denies or severely limits these rights. Furthermore, colonial rule was often brutal and repressive and led to a plethora of human rights violations. The denial of racial equality is incompatible with the basic human rights of equality and dignity.

Understood in this light, there is no contradiction between individual human rights and the right to self-determination. In fact, the latter serves the purpose of the former. The American revolutionaries' demand for self-determination was based on this kind of thinking: Independence served the cause of inalienable rights. The constitutional systems of democratic states around the world accordingly are built on the idea of national self-determination under a democratic government bound by human rights.

As a consequence, the anticolonial movement seems naturally wedded to the idea of human rights not only because of the experience of colonial human rights violations, but also because of the aspiration of political autonomy.²²¹ But this is just one way in which the right to self-determination was understood – a democratic interpretation based on human rights. The right to self-determination was also put to other political uses in the process of decolonization, where it was basically decoupled from individual rights and turned into a collective right used to justify encroachment upon individual human rights in the domestic system. In these political ideologies, collective independence trumped human rights. In addition, self-determination functioned as a shield against foreign critique and intervention. This stance could and indeed did serve authoritarian regimes. It is important to note the background of this position, however, which was many

²²⁰ Art. 1 ICCPR; Art. 1 ICESCR. Cf. on the development Burke, *Decolonization*, 35 ff. Adom Getachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination* (Princeton, NJ: Princeton University Press, 2019), 71 ff.; Klose, *Human Rights*, 40 f.

²²¹ Cf. for example the UN General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, A/RES/1514(XV), December 14, 1960, 1: "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights"; UN General Assembly, *The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and People*, A/RES/1654(XVI), November 27, 1961, with different nuances, UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, A/RES/2625 (XXV), October 24, 1970 (Declaration on Friendly Relations); Burke, *Decolonization*, 43. On Bandung, Burke, *Decolonization*, 14: "On the Bandung agenda, support for rights was balanced, albeit precariously, with the intense desire for national liberation." UN General Assembly, *The Right of Peoples and Nations to Self-Determination*, A/RES/637, December 16, 1952, had asserted that "self-determination is a prerequisite to the full enjoyment of all fundamental human rights."

Third World states' experience of foreign intervention, often under the pretext of protecting rights and freedom. The right to self-determination is an important normative asset to protect a political community against the many forms of domination and power politics. Justifying such an intervention in the name of human rights consequently is not a step to be taken lightly (if at all). The right to self-determination soon became an internal issue for newly independent states facing their own secessionist movements.²²²

The question of the relation between decolonization and human rights is thus answered not only by the obstacles that the political forces of decolonization were up against, but also by the kind of postcolonial order that was established. For the anticolonial movements, the crucial matter to determine was the nature of the postcolonial regime: "Is political freedom achieved when the national banner rises over the seat of government, the foreign ruler goes, and power passes into the hands of our own leaders? Is the struggle for national independence the struggle to substitute a local oligarchy for the foreign oligarchy?"²²³

The fact that self-determination resulted in regimes disrespectful of human rights has led some to question whether there is in fact any connection between decolonization and human rights.²²⁴ History teaches a different lesson, however: The ambiguous role of the right to self-determination in the history of international human rights underlines the need for a very nuanced and differentiated approach to the complex role of decolonization in this process. Decolonization was neither simply a human rights movement nor unrelated to human rights.²²⁵ Sometimes human rights were the foundations of its politics, sometimes they were of no concern.²²⁶

These ambiguities illustrate the Jamaican diplomat Richardson's famous observation about "the moment of truth" of global human rights aspirations. At the First UN Conference on Human Rights in Tehran, Richardson, who contributed

²²² "The limits of the right to self-determination were brutally illustrated in 1968 by the Biafran conflict and the atrocities of the Nigerian Federal Government. Once European colonialism had departed, the right to self-determination ceased to exist," Burke, *Decolonization*, 57.

²²³ Carlos Peña Rómulo, *The Meaning of Bandung* (Chapel Hill: University of North Carolina Press, 1956), 67.

²²⁴ Cf. Simpson, *Human Rights*, 300, because its "primary aim was not to reduce the power of the state over the individual." Simpson grants, however, that colonialism violated basic human rights, including equality and dignity, *ibid.*; Moyn, *The Last Utopia*, 111; Burke, *Decolonization*, 3; Getachew, *Worldmaking*, 33 for some discussion.

²²⁵ Burke, *Decolonization*, 6: "The politics of anticolonialism both advanced and obstructed the progress of international human rights."

²²⁶ Burke, *Decolonization*, 12: "A historical exploration problematizes the easy oversimplifications that are so often made about the role of the Asian, African, and Arab states. Decolonization's impact on the human rights enterprise cannot be captured in a single historical moment, or defined solely by the claims of its most prolific ideologues. The Third World of the 1950s spoke with just as much legitimacy as that of the 1970s and what it said then was much less amenable to the defenders of authoritarianism."

significantly to the development of human rights, spoke of the moment “when we came face to face with the nature of the beast – when we saw what it means to be promoting the cause of human rights by working through governments” – often, one might want to add, authoritarian or dictatorial governments.²²⁷

The ambiguous role of the Global South in the development of international human rights is further underlined by the fact that the principled support of human rights from (state) actors from the Global South diminished in lockstep with the increase in the authoritarian regimes that in many countries tragically were the successors of colonial rule.²²⁸

The vagaries of international politics led to some progress in the development of human rights despite this evolving political landscape, however, with the ironic result that those regimes that had to fear much from the system of human rights supervision contributed significantly to its creation and to the possibility of future scrutiny of their regimes in several important regards (e.g. the development of the right to individual petition to the Commission on Human Rights).²²⁹ This once again illustrates why it is wrong to overly quickly equate the political intentions of agents with the actual political outcomes of their actions – the mismatch between intentions and results is a basic element of political processes, often with tragic results, but sometimes also with beneficial consequences.

²²⁷ Burke, *Decolonization*, 94. Eagerton Robertson was a driving force behind the organization of this conference. The hosts, the Shah Reza Pahlawi and his regime, backed by the USA, well exemplify how important it is to be clear about which political regime one is talking of when referring to the Global South. On the conference, Burke, *Decolonization*, 92 ff., 109: “The events of Tehran were emblematic of fundamental changes that had emerged in political systems that characterized much of the Third World, with a tendency toward diminution of democracy and individual rights. Sandwiched between the oppression of the colonial era and the oppression of postcolonial dictatorships, the early and mid-1950s were unique for their relatively widespread support for human rights. As the decade wore on, many of Bandung’s democracies had collapsed into authoritarianism. Indonesia, Egypt, Burma, Iraq, Pakistan, the Philippines, Sudan, and Ghana were all more authoritarian in 1968 than they had been in 1955. The spirit of Tehran was radically different from the legendary ‘spirit of Bandung’.”

²²⁸ Cf. for instance Jensen, *Making*, 167 ff.

²²⁹ As Burke, *Decolonization*, 91 sums up the development leading to the right to individual petition to the Commission on Human Rights in the 1960s in comparison to the 1950s: “The most stunning paradox in the history of the human rights program was that a UN dominated by dictatorships should prove more successful in expanding human rights monitoring than one occupied by a majority of democracies. Only in an environment of Afro-Asian solidarity, where repressive states could be confident of the immunity granted by bloc voting, was such an impressive reform of the Commission’s powers possible. Perversely, the most impressive achievements of the Afro-Asian bloc in the international sphere occurred when human rights were approaching their nadir in many of the countries across Asia and Africa. The diplomats of the undemocratic Third World had inadvertently succeeded in accomplishing what their democratic predecessors had begun. Hence the extraordinary irony of the 1960s, where an alliance of African and Asian dictatorships facilitated the construction of a human rights system that contained unprecedented potential for the future investigation of their own regimes.”

2.7 LESSONS TO BE DRAWN

2.7.1 *A First Lesson: The Rediscovery of the Political Roots of Human Rights*

The process of the slow becoming of human rights as powerful ethical principles fleshed out and made into the increasingly densely woven law of the land, from the aspirational declarations of the eighteenth century and their roots in the history of ideas to the drafting of the *Universal Declaration* and – on this basis – to the developed contemporary system of the protection of human rights, was the unsurprising stuff of which historical developments are made. It involved multiple agents with often-competing aims as well as deep controversies, some even leading to violent struggle. Agents' options were conditioned by social structures, such as pre-World War II nationalism, an established, violently defended colonial system, the facts and political parameters created by World War II, including the power relations of the Cold War, heterogeneous social and political movements, the complex economic parameters of political action in a world with very different economic systems, changing profoundly over time and in the impact they had, decolonization and European integration. Support for human rights in the process spanned a very wide political spectrum, in both religious and secular terms. This is manifest in the making of national constitutions and is also evident for international human rights.

The complex matrix of reasoning of the agents shaping the current human rights system – principles, political expediency and tactics, interests in maintaining or limiting power, different political visions, contextual factors of power relations, for instance – highlights that arguments about the determination of human rights by culture (e.g. the Global North) or religion (e.g. Catholic personalism) miss the point and divert attention from the deeper political and ethical issues at stake.

The historical record displays the major conclusion to be drawn quite clearly: It is as erroneous – be the thrust of the argument apologetic or critical – to make an imaginary essentialized homogeneous Global South the true source of human rights as it is to understand human rights as the product of an imaginary essentialized homogeneous Global North. Human rights are a political project derived from an ethical outlook centered on the respect for individual human beings. The political orientation of the relevant actors is decisive for the development of human rights, not whether they came from the Global North or the Global South. This is illustrated vividly by the ups and downs of the process establishing the current imperfect human rights architecture, both in the Global North and in the Global South. Overlooking this means to depoliticize the struggle for human rights – a fatal flaw of any analysis of such a deeply political project. Arguments that make the legitimacy of human rights' content dependent upon the particular background of the protagonists or institutions that played a role in shaping them have the unfortunate effect of obfuscating the central conclusions to be drawn from the history of human rights. The question then no longer is what the normative principles and the

politics of human rights protagonists and of their foes are, but what their cultural background is.

Eleanor Roosevelt's stance on the explicit extension of rights to "men and women," however, was certainly not simply that of a representative of the Global North, nor had she a hidden patriarchal agenda. The activities of persons such as Lakshmi Menon or Hansa Mehta likewise indicate the limited explanatory power of reductionist accounts that link human rights to a particular religious outlook or cultural background – Menon and Mehta were very important for the drafting of the *Universal Declaration* but were not agents of the Global North, nor of "Christian human rights." Nor were they early spearheads of the "neoliberalism" that some believe to be at the core of the rise of human rights, as we will see in greater detail later in this inquiry. Colonial powers like the UK or France opposed the application of human rights in their colonies not because of their respective Christian (though confessionally different) religious culture, but because of their colonial interests.²³⁰ What is important about Pinochet is not that he was from Chile, but his vision of dictatorship. What is important about Álvarez is not his Chilean background, but the force of his arguments for the international protection of human rights.

The central normative issue is whether there is *the intention to protect individuals against state power and other threats to central goods of their human existence as a matter of right or not*, whatever the background of the actors or institutions involved may be. The question is whether the individual counts and to what degree they do so compared to other aims that motivate political action – from the protection of received power and privilege to the achievement of a classless society where all antagonisms cease to exist. Human rights are the language neither of the Global North nor of the Global South.²³¹ They are the language of all who concluded from their principles and experience that human beings matter, that their opportunity to pursue their own idea of personal well-being cannot be traded for other goods and that – in light of centuries of political practice – societies need to establish legally protected rights to secure the possibility for humans to flourish. There were forces that promoted and forces that acted against this idea in both the Global North and the Global South. During the time when the International Bill of Human Rights was made, countries of the Global North were engaged in colonial and postcolonial wars, from Algeria to Vietnam. Democratic movements were crushed, as in the Prague Spring. Dictatorship, often supported by the power centers of the Global North, ruled for decades in the Global South, from Chile to Uganda, from Argentina to the Philippines. Human rights found both champions and vicious foes

²³⁰ Cf. Morsink, *Origins*, 96 ff.; Klose, *Human Rights*, 234 f. on the results of his detailed study of the colonial wars in Kenya and Algeria: "European democracies like France and Great Britain were not the stronghold and defender of liberal values but the source for the negation of basic universal rights," including arbitrary detention, torture and forced resettlement; Sikkink, *Evidence*, 79.

²³¹ Sikkink, *Evidence*, 71 argues for human rights as the language of the Global South.

in working-class movements, in different religious communities and in diverse political currents.

Furthermore, we simply cannot draw conclusions about an individual's or political group's attitude towards human rights from their general political outlook, aside from extreme cases such as fascism. It is possible to be a working-class activist who deeply (and honestly) believes in the equality of human beings and still be prepared to forfeit the rights of persons for the greater good of a classless society (part of the tragedy of some major socialist and communist movements). It is possible to believe in the duty of charity on religious grounds and still be prepared to sacrifice individuals on the altar of the higher purposes of organized religion. It is possible to be a champion of freedom but nevertheless support the suppression of strikes because of the towering importance of economic profits. It is possible to fight colonial oppression and still show little regard for human rights because of the perceived needs of the struggle against the colonizer or because of the perceived necessities of development. All of these justifications may be nothing but cynical ideology masking other interests – but they need not be.

One of the key lessons of the twentieth century and its twisted political course is that the idea of human rights cuts across simply drawn religious and cultural divides and political party lines – this is both part of its frailty and part of its strength. The analysis of these historical processes becomes shamefully diminished in depth if these intricacies are glossed over with the rough brush of simplistic monocausal explanations.

The analysis of the origin of human rights therefore requires much more precise historical and political analysis, looking at the kind of regimes that acted and their political agendas and goals, always differentiating between governments and those governed. The views on human rights embraced by those imprisoning or killing their opposition and repressing dissent are after all not necessarily the same as the views of those who are the object of these measures. This analysis admittedly is much more demanding than thinking in the rough grids of North/South divides and the like. However, there is no alternative for a serious history of human rights.

2.7.2 *A Second Lesson: The Rediscovery of Autonomous Critical Thought*

In the light of these findings, it is important to clarify what exactly is meant by “origin of human rights.” One understanding seems to be that “origin” refers to an identifiable agent with a particular background (say, Field Marshal Smuts, or the philosopher Jacques Maritain). Some properties of this agent's respective background are then taken to determine their views and intentions, which in turn somehow determine the nature of human rights – Smuts' racism the content of the idea of human dignity, or Maritain's Catholicism the true meaning of the *Universal Declaration*, for instance. This thought can be framed in broader terms, including the wider cultural context in which these individuals were working. It can encompass institutions and the organs of states (e.g. “the government of the USA”) and peter out in very thinly defined ideas such as “the Global North,” “European,” “Indian,” “the (semi-)

periphery,” without determining what “European” means exactly and what element of the concept of human rights depends on the “Europeanness” of a specific actor in any sufficiently precise manner. Which element of “Indianness” made Hansa Mehta pursue gender-neutral language in the *Universal Declaration*, and which element of “Americanness” led Eleanor Roosevelt to oppose it? Why does this matter for our understanding of human rights norms?

Origins can mean other things as well, such as a social structure, the capitalist economy or a system of ideas like “Western thought.” Here, again, the problems arise of what these mean exactly and what the supposed causal connection to a concrete human rights position is. Why is Hansa Mehta’s opinion about gender-neutral language capitalist or an expression of “Western thought” (as some take all human rights to be), even though it goes against what Eleanor Roosevelt, who came from a Western capitalist country, admonished her to do?

This kind of analysis seems to imply that individuals’ independent and critical ethical or legal reflections and insights do not play an interesting role in the process of developing the human rights idea. The origin of human rights must lie somewhere else, it is assumed. The free exercise of human thought, leading more often than not to error and illusions, but in principle capable of grasping something that stands the test of critical reflection, plays no decisive role in such accounts. But is this plausible? Did these agents not think? How exactly was their background relevant for their reflections? How important was it? Could they just not help thinking in a European, Indian or South American way? Are human beings mere puppets on the strings of their culture?

This stance also seems to imply that there cannot be some common human framework of experience and understanding. It leads to the highly dubitable consequence of diminishing the importance of human beings’ capacity for autonomous, authentic thought independent of the properties of their respective backgrounds, most importantly the place and cultural context in which they happen to live.

Social history, the struggles for progress and in particular the history of human rights tell a different story, as we have seen. There are of course many social and cultural influences on human beings. The place and time of a given human life matters profoundly for that person’s outlook. But time and place are capacious concepts in the intellectual and emotional lives of human beings – one can communicate with voices from very different times and places and profit, grow with and learn from them. Moreover, human beings as subjects of autonomous thinking ultimately are able to transcend given social and cultural contexts – this is part of the epistemic dignity of individuals, and the ultimate cause of the constant transformation of human cultures.²³²

²³² It is consequently ill-advised to question the authenticity of actors during these debates, asking whether delegates from the Global South were sufficiently “global-southern” to authentically represent this region – for instance, because of their education in Europe.

2.8 POLITICS, ETHICS AND A PRELIMINARY CONCLUSION

These two lessons are no mere side issues for the cognitive interests of this inquiry. On the contrary, they refocus our attention on a crucial problem. If everything hinges upon the *ethical and political reasons* for establishing a system of legal protection of human rights on the constitutional and international level and on the *reasons* for the work creating the political structures for this endeavor in institutional frameworks and civil society, and if these reasons are not simply the function of geographical settings and cultural or religious background factors, then the central questions are: *What are the grounds for this struggle for human rights? If human rights are about the ethical calibration of political purposes and legal institutions, what are the ethical determinants of political and legal thought in the defense of human rights? And can these ethical principles be justified?* What about the justification of the many detailed questions that flesh out what human rights really mean – from their personal scope to their possible legitimate limitations? *What does the understanding of the human mind add to the answers to these questions?*

If, by contrast, the result of our inquiry had been different, if it had shown that human rights are an expression of the colonial ideology of the Global North, the inquiry would have a very different object – the study of the psychology of ideology, perhaps.

The central lesson of the genealogy of human rights is that this genealogy is not enough to understand the ascent and current reality of human rights. The argument about the actual manifold origins of the current human rights system is – as already mentioned – both true and important. But even if this were not so, the case of the legitimacy of human rights would not have been settled. Even if human rights had been of purely European (or Indian or African) origin, we would still face the question of how convincing this idea of human rights is, after all (wherever it stems from). Are there reasons that are relevant to all human beings or not? Are all humans able to comprehend these reasons? In order to understand human rights and their role in history, it seems, we have to turn to the grounds of their justification and the cognitive preconditions of their formulation.

The explicit formulation of human rights did not spring from nowhere. The declarations of the eighteenth century had deep roots in history. The question to address now is whether the results formulated concerning the more recent history of human rights resonate well with what the earlier history of human rights – or, more precisely, the history of those normative ideas that ultimately led to explicit human rights in ethics and law – teaches us. Does this history confirm these findings, or does it present them in an entirely different light? The following chapter will shed some light on this question.