The Temporality of Memory and the authority of the European Court of Human Rights

Introduction

During the UK's 1975 referendum on membership of the European Economic Community arguments about the role of European unity preserving the peace after World War Two were generally well received and had widespread common currency.[1] A generation later in the 2016 referendum on Brexit David Cameron's reference to the European Union's role in preventing the outbreak of conflict was widely ridiculed. But the 1975 referendum was closer in time to the start of World War One than the 2016 referendum was to the end of the Second World War. Leaders of both Yes and No campaigns in the 1975 referendum had fought in Second and First World War whereas in 2016 the youngest veterans were in their late eighties. The passage of time had led to collective memories fragmenting. The sociologist Maurice Halbwachs described collective memory as social endeavour which reconstructed 'an image of the past' which accorded with the 'predominant thoughts' of that society.'[2] Halbwachs did not invent the concept of societal collective memory, but he did explain the temporality of collective memory and how the past could be constructed into a communal identity and shared so that it became a self-sustaining, explanation of how a society functioned.[3]

Collective memories are an important but sometimes under considered part of international human rights law.[4] They are often articulated as the source of a human rights instrument's authority. For example the African Charter of Human and Peoples' Rights in its preamble refers to 'the virtues of [African state's] historical tradition and the values of African civilization' as well as the 'the total liberation of Africa' as the shared values on which the state parties to the Charter agreed upon, forming the basis of its authority.[5] Positioning human rights as a remedy to colonialism was a major feature in thinking about the African Charter on Human and Peoples' Rights' as a distinct system of human rights.[6] Decisions of the African Commission on Human and Peoples' Rights such as *SEARC v Nigeria,*[7] specifically referenced colonialism in its interpretation of Article 21 of the Charter (the right to natural resources) when concluded that the right exited because of 'colonialism… during which the human and material resources of Africa were largely exploited for the benefit of outside powers' and because of this the drafters of the Charter 'wanted to remind African governments of the continent's painful legacy.' The collective memory of colonialism among African states provided a foundational consensus on what human rights were for which was

[1] Robert Saunders *Yes to Europe!* (Cambridge University Press (CUP), 2019)
[2] Maurice Halbwachs *On Collective Memory* (University of Chicago Press Trans Lewis Coser 1992) 40.
[3] Nicolas Russell, 'Collective Memory before and after Halbwachs.' (2006) 79 The French Review 792.
[4] For leading studies in this field see Daniel Levy and Natan Sznaider *Human Rights and Memory* (University of Pennsylvania Press, 2010); Lea David *The Past Can't Heal Us: The Dangers of Mandating Memory in the Name of Human Rights* (CUP 2020).
[5] Preamble, African Charter of Human and Peoples' Rights (adopted 27 June 1981, entry into force 21 October 1986) 218 UNTS 1520.
[6] For accounts referencing colonialism see Richard N. Kiwanuka, 'The Meaning of "People" in the African Charter on Human and Peoples' Rights.' (1988) 82 American Journal of International Law (AJIL) 80.
[7] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (2002) Comm No. 155/66, para. 56.

important both for the creation of the African Charter and for the ensuing legitimacy of its interpretative and enforcement bodies.

As this chapter argues with reference to the European Convention on Human Rights (ECHR), the collective memory which forms its foundational legitimating consensus was a memory of totalitarianism, situated in the early Cold War, to which human rights was positioned as a remedy. This basic consensus on the role of human rights was the dominant assumption amongst the Convention's drafters in 1949-1950, and as the first part of the chapter sets out this consensus is a necessary feature of the European Court of Human Rights' (ECtHR) authority in interpreting the ECHR. The focus on the ECtHR in this chapter is in part because it is the world's oldest and most powerful international human rights body. As a consequence, literature on compliance with human rights law often discusses it in the context of protecting human rights or the judicialization of human rights protection.[8] As this chapter demonstrates one of the reasons for this has been the relatively strong consensus surrounding the ECtHR's role linked to the political climate of its foundation in the late 1940s and early 1950s, which cemented a strong interstate consensus on the importance of human rights protection as remedy to the threat of totalitarianism.[9] Methodologically this is known as historical institutionalism – an analytic lens for examining international institutions which stresses concepts with temporal properties and on processes and mechanisms that impact the origin, stability and change of institutions over time.[10] But as this chapter argues as time passes – in a linear sense as the present gets further away from the early Cold War context of the ECHR's origins - challenges are created for the legitimacy of the ECtHR. In part this is because the way in which a foundational consensus based on forms of politically constructed shared memory operates can be temporally contingent, linked to particular places and times, and making a historically intuitionist explanation of organisational authority open to contest by those whom it exercises authority over.

Consensus and Authority: How an international human rights regime maintains its authority

The literature in the area of compliance with human rights law is vast but for the purposes of this chapter it is important to focus on the role of a collective interstate consensus, within that literature. This form of consensus serves both as a mechanism for the internal and external maintenance of a legal regime's authority. Authority, as Joseph Raz points out, is different from coercion, in that authority claims that following the commands of another agent is appropriate because that agent has legitimacy.[11] International human rights law, and the bodies created to enforce it, for the most part lack direct coercive powers. In so far as there is coercion, or the threat of coercion, on a state in relation to human rights compliance

[8] John Cary Sims 'Compliance without remands: the experience under the European Convention on Human Rights.' (2004) 36 Arizona. State Law Journal 639; Courtney Hillebrecht, 'Rethinking compliance: the challenges and prospects of measuring compliance with International Human Rights Tribunals.' (2009) 1 Journal of Human Rights Practice 362.
[9] Andrew Moravcsik, 'The origins of human rights regimes: Democratic delegation in Postwar Europe.' (2000) 54 International Organization 217; AW Brian Simpson 'Britain and the European Convention.' (2001) 34 Cornell Journal of International Law 523.
[10] Orfeo Fioretos, 'Institutions and Time in International Relations.' In Fioretos (eds) *International Politics and Institutions in Time* (Oxford Univeristy Press (OUP) 2017) 12.
[11] Jospeh Raz 'Introduction.' In Raz (ed.) *Authority* (NYU Press 1990) 3.

it in the field of reputation cost.[12] Yet, the specific type of reputation affected by non-compliance with international human rights law is either indirect or existential and the potential impact, and fear on a State's part, of reputation damage is too unpredictable and uncertain to create a lasting basis for a Court's authority. Therefore in order for a human rights body to function and to issue decisions in relation to the protection of human rights, whether they are judicial decisions (in the form of cases that the country wins or loses) or decisions that are declarative (such as those produced in the concluding observations of treaty bodies) it is necessary for it to develop a form of content independent legitimacy.[13] This then makes compliance and the reasons to comply with a particular decision of that body the default presumption, or an expectation arises among State officials in favour of compliance.[14] For example, Shai Dothan in relation to ECtHR compliance has noted that one of things that has encouraged compliance with relatively high cost decisions is that the Court has constructed its legitimacy with a series of predictable and relatively low-cost decisions.[15]

At this point it is important to emphasise the conceptual distinction between normative and sociological legitimacy – the former form of legitimate authority may be signified by the capacity of the body itself, the rights it adjudicates or its procedural legitimacy.[16] Whereas the latter describes the socio-political reasons behind a tribunal or review body's legitimacy.[17] Whilst distinct the two are often practically interrelated; for example the literature on the spiral model of human rights change sees social pressure within states interacting with external agents, such as human rights bodies, in order to create human rights change within states.[18] This requires an institution to have both normative legitimacy and to have a broader sociological legitimacy. Courtney Hilebrecht's study of the Inter-American Court of human rights identified how the interaction between regional human rights institutions and political actors in countries, both grassroots activists as well as government officials, was vital for giving an organisation as a whole legitimacy.[19] Liberal explanations of compliance with international human rights law also point towards the existence of an inter-state consensus about the utility of human rights. For instance in in the case of the ECHR the desire among member states in the Council of Europe to lock in democratic forms of government, was a key component of the consensus which underpins compliance with the Convention and its organs.[20] 'Consensus' in these arguments refers to a form of elite level socialisation of the leaders of state governments leading to the political internalization of human rights norms among political elites which is an essential precursor to the implementation of a human rights

[12] See Alex Geisinger and Michael Ashley Stein. 'Rational choice, reputation, and human rights treaties.' (2017) 106 Michigan Law Review 1129; Andrew Guzman, 'Reputation and international law.' (2005) 34 Georgia Journal of International and Comparative Law 379.

[13] Steven Wheatley 'On the legitimate authority of international human rights bodies.' In Andreas Føllesdal, Johan Schaffer and Geir Ulfstein et al. (eds.) *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (CUP 2014).

[14] Başak Çali *The Authority of International Law Obedience, Respect, and Rebuttal* (OUP 2015) 11.

[15] Shai Dothan, 'Judicial Tactics in the European Court of Human Rights.' (2012) 12 Chicago Journal of International Law 116.

[16] Nienke Grossman 'The Normative Legitimacy of International Courts' (2013) 86 Temple Law Review 61.

[17] Samantha Besson 'The legitimate authority of international human rights bodies.' In Føllesdal et al.

[18] For the theory see Thomas Risse, and Kathryn Sikkink, 'The Socialisation of human rights norms into domestic practices: introduction.' In Thomas Risse-Kappen, Thomas Risse, Stephen C. Ropp, Kathryn Sikkink (eds.) *The Power of Human Rights: International Norms and Domestic Change* (CUP 1999).

[19] Courtney Hillebrecht, *Domestic politics and international human rights tribunals: the problem of compliance*. (CUP, 2014).

[20] Moravcsik (n. 9).

body's decisions becoming the default position.[21] This is different from, but related to, the use of 'European consensus' as tool a by the ECtHR in relation to the interpretation of a particular right, where the Court examines practice from around Europe to identify a trend or common practice across member states in relation to the implementation or restriction of that right.[22] In these cases consensus is more commonly used to describe the policy of states in the present rather than foundations of an institution's authority in the past but as will be show below the two can intersect.

To understand the authority of an institution, it is necessary to look beyond Raz's work on the construction of normative authority, which is premised on distinguishing power and right, and bring in Jacques Derrida's work on the foundations of law's authority.[23] In *The Mystical Foundation of Authority* Derrida argues that law has a mythical foundation of violence that can be separated from the functional or reinforcing violence that law uses to maintain its power.[24] This draws on the work of Walter Benjamin who distinguished two kinds of force at work in the law: the force creating law and the force maintaining law'.[25] The latter form of force is exercised by the police or other state security forces, the former form of force occurs in different ways. Benjamin specifies wars as an example of foundational force as the conclusion of wars often leads to treaties or peace agreements, which found a legal order that then becomes a subsequent basis for further law-making.[26] Most studies of international law's authority seek to sidestep violence and take as a given that compliance with the law operates in the absence of force compelling obedience to the law.[27] In fact as Jean d'Aspermont argues debates about authority in international law are often characterised by their self-referentiality as they refer to authority inwardly, by cross referencing existing sources of law.[28] Self-referentiality is a structural way of avoiding the foundational question in international law, by focusing on its sources rather than the forces which brought the law into being and lie behind the law. What Derrida seeks to do is show how law cannot disavow the mystical foundations of its authority as law's 'generalised violence' is connected with the bringing to bear of the law in a particular instance which references the violence of its foundations.[29]

It may seem somewhat unusual to be talking of violence in connection with the ECHR which was a treaty that was at the heart of a regional organisation designed to promote democracy but, as shown in the section below, at the time of the ECHR's creation human rights were

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[21] For this argument see Harold Hongju Koh, 'How is international human rights law enforced.' (1998) 74 Indiana International Law Journal 1397.

[22] For the definitive study on the subject see Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP, 2015) 9-36.

[23] For clarity on Raz's work on this point see Jospeh Raz 'The Problem of Authority: Revisiting the Service Conception.' (2006) 90 Minnesota Law Review 1003.

[24] Jacques Derrida *"Force of Law: The 'Mystical Foundation of Authority'"* From Drucilla Cornell, M Rosenfeld and DG Carlson (eds.) *"Deconstruction and the Possibility of Justice"* (Routledge, 2001) pp. 3-67

[25] M Mahlmann "Law and force: 20th century radical legal philosophy, post-modernism and the foundations of law" (2003) 9 Res Publica 19.

[26] See Walter Benjamin *One-Way Street and Other Writings* (Penguin, Trans. JA Underwood 2009) 1-29.

[27] Thomas M. Franck 'Legitimacy in the International System' (1980) 82 AJIL 705; Daniel Bodansky, 'The Legitimacy of International Governance: A coming challenge for international environmental law' (1999) 93 AJIL 596.

[28] Jean d'Aspremont 'Bypassing the Authority of International Law: The Virtue of Modern Self-Referentiality.' In G. Herandez and G. Jokubauskaite (eds), Constructing Authority in International Law (2018) available at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040975 >.

[29] Petra Gehring, 'Force and "Mystical Foundation" of Law: How Jacques Derrida Addresses Legal Discourse.' (2005) 6 German Law Journal 151

seen a means of countering the violence of fascism or a takeover by authoritarian communism. As Andreas Huyssen notes memory and the law interact in complex ways but the collective memory of violence and the dead from that violence underpins the claims made by human rights instruments.[30] Methodologically speaking this is not a collective memory but what Wulf Kansteiner describes as a *collected* memory – an 'aggregate of individual memories' which is constructed through a 'focus on acts of memorialization'.[31] This can be through a formal legal construction which references the historical past or by the inference of a set of collected memories as a justification for the exercise of authority, in either event the act of construction differs from a collective sense of memory which is more communal and bottom-up in its formation.[32] It therefore makes sense to use the term collected memory as this better describes the nature of construction of memory in an international human rights instrument.

A collected memory can generate or create a sense of shared identity and the act of memorialisation and of asking subjects to remember helps make identity concrete. As Jann Assmann puts it collected memories 'preserves the store of knowledge from which a group derives an awareness of its unity and peculiarity.'[33] To do this however, requires fixing a memory, or set of memories, at a particular in time, to give a sense of beginning to the political community to which a legal instrument belongs.[34] Those working on the sociology of memory, such as Barbra Misztal, have argued that memory and temporality cannot be detached from one another because collective memory is an important socially accepted currency as what is remembered is always a 'memory of an intersubjective past, of past time lived in relation to others.'[35] The formation of national identity, is often seen as a temporal process which can knit together a fragmented past into a unified whole using it as the basis for legitimating the operation of a nation state's institutions.[36] A collected memory works by building a past which can then be remembered in the present, both temporally punctuating the past but also creating controlled ways for collected memory to manifest itself in the present. In the ECHR's case a threat-remedy model of human rights was constructed, with human rights being positioned as a remedy to the threat of authoritarianism which was then enshrined into the structure of the ECHR acting as a form of foundational authority for its application by the ECtHR. Collected memories can also act as a form of identity confirmation. As Rafael Narvaez argues collective memory involves a politics of identity, objects and concepts 'unfold[ing] from the past unto the present, can also be records of the past ….helping the group see from within' in this way memory can help fashion contemporary identity.[37] The ECHR did not explicitly aim to create a unified European national identity, but it did seek to create a consensus as to what a western European state was, or ought to be, as

[30] Andreas Huyssen, 'International Human Rights and The Politics of Memory Limits and Challenges.' (2011) 43 Criticism 607.
[31] Wulf Kansteiner, 'Finding Meaning in Memory: A Methodological Critique of Collective Memory Studies.' (2002) 41 History and Theory 179, 186.
[32] Barbra Misztal, 'Memory and the Construction of Temporality, Meaning and Attachment.' (2005) 149 Sociological Review 31
[33] Jan Assmann and John Czaplicka, 'Collective Memory and Cultural Identity.' (1995) 65 New German Critique 125, 130.
[34]The making of the past requires a fixed point or punctuation point of history or pre-history Eviatar Zerubavel 'Time Maps: Collective Memory and the Social Shape of the Past.' (University of Chicago Press, 2012) 8-9.
[35] Misztal *Theories of Social Remembering* (Open University Press 2003) 6.
[36] Tim Edensor 'Reconsidering National Temporalities Institutional Times, Everyday Routines, Serial Spaces and Synchronicities.' (2006) 9 European Journal of Social Theory 525, 527-528.
[37] Rafael Narvaez 'Embodiment, Collective Memory and Time (2006) 13 Body & Society 51, 64-65.

an international identity and in so doing created a foundational consensus for the ECtHR's authority.

The Historical Consensus of the European Court of Human Rights

Contrary to popular myth, the formation of the Council of Europe was not a product of the end of World War Two but born out of the early stages of the Cold War. Popular myth can seem a somewhat pejorative term, but so many descriptions of the ECHR's formation situate it as taking place at or adjacent to the Second World War in similar terms to the UN Charter.[38] In fact as a number of historians have subsequently identified the early Cold War as being more influential in the shaping of the ECHR.[39] In August 1949 the delegates of the Consultative Assembly of the Council of Europe assembled at the University of Strasbourg, where according to the British Conservative lawyer David Maxwell-Fyfe 'most of the leading figures of Free Europe' were present.[40] Entirely coincidently that same day the Soviet Union detonated its first atomic bomb. The omnipresent nature of the Cold War threat was neatly captured in some of the strident comments of delegates. Pierre-Henri Teitgen, a French lawyer and government minister, warned the Consultative Assembly of the Council of Europe guard against 'Caesarism and Nazism.'[41] Fascism and 'Hitlerism' Teitgen continued had 'tainted European public opinion' infiltrating 'doctrines of death …into our countries' allowing Communist forces to 'take advantage of disorder.[42]

The British delegate to the Consultative Assembly, Lord MacNally, warned that any human rights instrument developed by the Council of Europe must be capable of resisting 'attempts to undermine our democratic way of life from within or without' and that such an instrument would have to 'give Western Europe as a whole greater political stability.'[43] The solution to the existential threat of communism was, as Teitgen argued, for states to 'bind themselves by the observance of the guarantee by an international Convention signed in the name of Europe… and then then create a guaranteeing organ namely a European Court of Human Rights.'[44] Western powers, particularly the British and French delegations, saw the ECHR not just as a mechanism for preventing a totalitarian takeover but also as a useful value statement to juxtapose communism and western democracy.[45] As Ed Bates notes however, this did not mean they were convinced of the need for a human rights court; Henri Rolin, who would go onto become the President of ECtHR argued in 1949 that a Court was not necessary for a collective pact against totalitarianism.[46] The legacy of those who viewed the Convention as

[38] These competing historical narratives in the history of human rights law are analysed in G Daniel Cohen, 'The Holocaust and the "Human Rights Revolution": A Reassessment.' In Akira Iriye (eds.) *The Human Rights Revolution: An International History* (OUP 2012). Michael Ignatieff more generally makes this case about international human rights law in general Michael Ignatieff *Human Rights as Politics and Ideology* (Princeton University Press, 2003) 4-5.
[39] Simpson (n. 9); Floribert Baudet, "'A statement against the totalitarian countries of Europe': human rights and the early Cold War.' (2016) 16 Cold War History 125.
[40] Ed Bates *The Evolution of the European Convention on Human Rights* (OUP 2010) 51-61.
[41] Collected Edition of the "Travaux Preparatoires of the European Convention on Human Rights" Vol. I 'Preparatory commission of the Council of Europe committee of Ministers Consultative Assembly 11 May – 8 September 1949' (The Hague, 1975) 41.
[42] Ibid.
[43] Ibid. p.30.
[44] Ibid. p.76.
[45] Anne Deighton 'The British in Strasbourg: negotiating the European Convention on Human Rights, 1950.' In Rasmus Mariager, Karl Molin and Kjersti Brathagen *Human Rights in Europe during the Cold War* (Routledge 2014).
[46] Bates (n. 40) 71.

an anti-totalitarian instrument can be found in the reference in the preamble to 'the foundation of justice and peace' being secured through an 'effective political democracy', clearly defining and demarcating the identity of parties to the ECHR.[47] It also can be seen in the framing of a number of the substantive rights to prohibit the arbitrary exercise of legal power (see Article 5, 6 and 13) and Article 17, a rights abuse clause, which was aimed at preventing fascist or communist political movements using Convention rights to advance their political aims and undermine other rights.[48]

There were however other ideas about what the ECHR was for; some delegates to the Consultative Assembly chose to explain the need for a human rights instrument in terms of representing a common heritage rooted in European traditions. The Swedish delegate said that the 'genius of Europe' was not just the 'belief in the existence of human rights' but that 'western civilisation' was embedded in the culture of European countries.[49] Similar culturally deterministic arguments were made by the Greek delegate who noted the role that classical Greek culture had played in the creation of human rights. There was another side to this story as the ECHR was also premised on the idea of constructing a forward-looking European identity. The European movement in 1948 had sought to construct broader pan-European cooperation on a whole range of different areas, including economic growth and patent protection. Writing for an American audience in 1956 William Coblentz and Robert Warshaw described the ECHR as ranking alongside the 'Marshall Plan, NATO … the Schuman plan' in the remaking of European unity.[50] Polys Modinos writing in 1962 described the ECtHR as a 'revolutionary' development 'for the revival of our outworn institutions.'[51] Other sources between 1955 and 1968 also seem to describe the ECtHR in distinctly prospective terms, as part of a new European future based on international institutions.[52] The Convention's preamble also reflected these ideas with references to 'European countries which are like-minded and have a common heritage of political traditions, ideals' but this paragraph specifically linked these values to the 'collective enforcement' of rights, meaning that whilst the ECHR was an expression of a values based community its key function was the enforcement of those values.[53] In *Austria v Italy*, an early interstate case, the Commission described the ECHR as a statute to create 'a common public order of the free democracies of Europe' that was intended to safeguard 'their common heritage of political traditions' as well as protect the 'freedom and the rule of law' of states in Europe.[54]

The idea of the ECHR as a statement of values was ultimately secondary to the broader idea that ECHR membership, and by implication ECtHR compliance, was necessary to tackle an external threat. As Mikael Madsen notes, in a comparison of the European human rights

[47] European Convention on Human Rights (ECH) ETS 5 1950, Preamble.
[48] ECHR Art 17. For the link between this and the history see Hannes Cannie and Dirk Voorhoof, 'The abuse clause and freedom of expression in the European Human Rights convention: an added Value for Democracy and Human Rights Protection?' (2011) 29 Netherlands Quarterly of Human Rights (NQHR) 54; Frederick Cowell 'Anti-Totalitarian Memory: Explaining the Presence of Rights Abuse Clauses in International Human Rights Law.' (2018) 6 Birkbeck Law Review 35.
[49] Ibid 82.
[50] William K Coblentz and Robert Warshaw 'European Convention for the Protection of Human Rights and Fundamental Freedoms' (1956) 44 California Law Review 94.
[51] Polys Modinos 'Effects and Repercussions of the European Convention on Human Rights.' (1962) 11 ICLQ 1097, 1098.
[52] For examples see Gordon L. Weil, 'The Evolution of the European Convention on Human Rights.' (1963) 57 AJIL 804; Karel Vasak, 'The European Convention of Human Rights beyond the Frontiers of Europe.' (1963) 12 International and Comparative Law Quarterly (ICLQ) 1206.
[53] ECHR Preamble.
[54] *Austria v Italy* App no. 788/60 (ECHR 11 January 1961) p.18

system and the UN human rights system, the relative like-mindedness of states in the European system meant that it achieved a relatively high degree of institutional stability but this like-mindedness was contingent upon seeing European human rights as 'mainly a measure against an external threat.'[55] Additionally, the substantive rights that the Convention protected were small 'L' liberal freedoms and were often interpreted in such a manner by the ECtHR - for example rulings on the right to property under Article 1 Protocol 1 were often distinctly liberal in character.[56] This was in part a reflection of the founding forces of the ECHR which, as Marco Duranti, has argued aimed to protect traditionally conservative western European societies and their constitutional orders.[57] Yet in spite of the presence of an external threat, scepticism over broader intervention by European institutions in domestic affairs remained a difficult obstacle to overcome. When European states were contemplating the draft European Political Community (EPC) Treaty in 1954 the French government strongly objected to powers that would allow the putative EPC being able to intervene in violations of rights by member states.[58] In 1957 when the Treaty of Rome created the European Economic Community there was no direct commitment to human rights in the treaty.[59] It wasn't until 1959 that the European Court of Human Rights became operational and its caseload during the 1960s and 1970s was minimal.[60] In the 1980s the ECtHR was prepared to rule against governments in cases involving national security and the freedom of the individual, in a manner which could be highly controversial, but this could be broadly accepted because of the European human rights system's role in providing a broader protection against totalitarianism.

The end of the Cold War would seem to render this imperative somewhat moot. Instead there was a reinvention of the nature of the external threat as a form of positive role model, making it almost inevitable that newly democratising states in Eastern Europe would join the Council of Europe.[61] In the 1950s when the ECHR was opened for signature there was, as Susan Marks put it, a 'bold line' that distinguished 'the democratic 'we'' who were signatories of the ECHR from the 'totalitarian 'they'' who were not.[62] Following the end of the Cold War in the 1990s eastern European states moved from being a 'they' into being part of the 'we'. As some historians noted the post-Cold War democratic transition of these states led to their greater integration within Europe and European institutions, as Spain and Portugal had done a generation earlier following their transition from fascist dictatorship in the 1970s.[63] There was a reconfiguration of the ECHR's foundational consensus which unified the idea of the ECHR as an instrument with a teleological vision of a European future and the idea of it as an

[55] Mikael Rask Madsen 'From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics.' (2007) 32 Law & Social Inquiry 137, 140.
[56] Tom Allen, 'Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights.' (2010) 59 ICLQ 1055.
[57] Maroc Duranti *The Conservative Human Rights Revolution: European Identity, Transnational Politics and the Origins of the European Convention* (OUP, 2016)
[58] Kiran Klaus Patel *Project Europe: A History* (CUP, 2018) 150-151.
[59] Ibid.
[60] For data on this point see Steven Greer *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP, 2005) 33-38.
[61] Yannis Stivachtis and Mike Habegger 'The Council of Europe: The Institutional Limits of Contemporary European International Society?' In Stivachtis and Mark Webber *Europe after Enlargement* (Routledge, 2017) 59, 60.
[62] Susan Marks, 'The European Convention on Human Rights and its Democratic Society.' (1996) 66 British Yearbook of International Law 209, 210.
[63] See Ian Kershaw *Roller-Coaster: Europe, 1950-2017* (Allen Lane, 2018) 299-307.

anti-totalitarian instrument into one.[64] This can be seen in some of the literature on the ECHR and transitional justice describing the cases coming from the newly democratising states in eastern Europe.[65] The idea of a memory being shared by new entrants into the system may seem odd, but forms of memory construction are as some theorists of memory point out elite constructs, using official forms controlled and curated by political and legal power structures.[66] The ECHR's foundational collected memory, which saw human rights as a remedy for totalitarianism, gained it's elastic character in part because of the social structure in which the participants (i.e. state parties) operated. The ECHR relied on an induction of the political elites heading governments and sitting in the parliamentary assembly of the Council of Europe into participating and acknowledging a form of collected memory and then used this to serve as the foundational consensus for the ECHR and the ECtHR's operation.

The Temporality of Collected Memory and Backlash to the European Court of Human Rights

References to European consensus as a dynamic formulation in ECtHR judgments is an attempt to both make the Court responsive to changing social conditions but also to give it a source of authority as the representative of broader European public opinion.[67] Yet, in order to issue decisions against states, and maintain its authority to do so, the ECtHR also relies on a form of foundational consensus as outlined in section one of this chapter. This, as discussed above in section two, is built on the collected memory of the threat of totalitarianism and the ability of human rights to operate as a remedial mechanism towards that threat. The study of collective memory or collected memory, as Jeffery Olick argues, can be seen as part of the 'field of political culture research insofar as it is concerned with the cultural constitution of political identities and activities.'[68] The collected memory that provides the ECtHR's foundational consensus is a political identity that both appeals to states as an identity worth associating with and as a justificatory mechanism for the Court's operation underpinning a state's formal legal obligation towards compliance with the Court.

However, compliance can break down with states refusing to implement ECtHR decisions in certain cases which in turn can lead to more systemic forms of non-compliance. The idea that international human rights law and international tribunals are suffering from a crisis of authority has received a lot of scholarly attention, usually in the context of what is sometimes referred to as backlash.[69] Wayne Sandholtz, Yining Bei and Kayla Caldwell draw distinction between what they classify was 'resistance' to an international court, which would include 'criticism of specific judgments' or 'failure to comply with a specific judgment', from 'backlash' which they argue involves states ceasing to 'cooperate or comply with the court', 'withdrawal'

[64] See Levy and Sznaider (n. 4) 124-128.
[65] See Aeyal Gross 'Reinforcing the New Democracies: The European Convention on Human Rights and the Former Communist Countries - A Study of the Case Law.'(1996) 7 European Journal of International Law (EJIL) 89.
[66] For an example see Pierre Nora, "General Introduction: Between Memory and History." In Lawrence Kritzman (eds.) *Realms of Memory: Rethinking the French Past, vol. 1* (Columbia University Press, 1996).
[67] See Dzehtsiarou (n 22) chp 6. See also Or Bassok, 'The European Consensus Doctrine and the ECtHR Quest for Public Confidence' In Panos Kapotas and Vassilis P. Tzevelekos (eds.) *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (CUP, 2018) 238 -244.
[68] Jeffrey Olick, '*The Politics of Regret: On Collective Memory and Historical Responsibility* (Routledge, 2013) 22.
[69] See for example Eric Posner, 'Liberal Internationalism and the Populist Backlash.' (2017) 49 Arizona State Law Journal 795; G John Ikenberry, 'The end of liberal international order?' (2018) 94 International Affairs 7.

or some form of reform to limit or terminate the court.[70] However, rather than being two distinct categories it is often more appropriate to think of backlash as existing as a continuum of state behaviour with lower-level incidents of non-compliance escalating into more severe forms of backlash.[71] Even when a state eventually complies with a decision that they once opposed a Court's authority can be weakened by backlash and concerns have been raised in the context of the ECtHR about how individual cases of backlash can have wider knock on effects on its authority.[72] Although there has been some analysis of backlash in the context of wider political trends, the temporal nature of some of the causes of backlash towards the ECtHR has been under examined.

The linear passing of time since the ECHRs creation in the early 1950s, has led to the relationship between the collected memories underpinning Convention and the authority of the Court starting to fracture. For a collected memory to provide a foundational legitimating function of the sort described in section one it needs to, in the words of Peter Novick have 'no sense of the passage of time' denying 'pastness' and insisting on certain concepts as having a continuing presence.[73] Novick was writing about collective, bottom-up memories which he described as conveying some 'eternal or essential truth about the group' but this equally applies to the construction of a collected memory by an instrument like the ECHR.[74] Collective memories underpinning the Convention can punctuate the past and explain the ongoing authority of the Court in the present, because as Halbwachs observed, memory is not history but serves as a function of explaining the present.[75] But the ECHR's collected memory has increasingly struggled to fulfil the function of legitimising authority and has instead become associated with the idea of 'pastness' which is one of factors behind instances of backlash and leads to suggestions that Court needs to reform or adapt to meet the new needs of states. To understand how this emerges it is important to first look at how the interpretation of the ECHR by the ECtHR has used its foundational consensus and then at how that feeds into backlash to the ECtHR.

(i) Evolutionary interpretation of the ECHR and the passage of time

Evolutive interpretation of the ECHR by the ECtHR treats the Convention as a 'living instrument', which can be interpreted in a manner which evolves with changing understandings of concepts and meanings. The 'living instrument' metaphor has been applied to the interpretation of a variety of different law-making international treaties, such as the 1994 Marrakesh Agreement Establishing the World Trade Organisation, as well as other more diverse treaties such as the 1840 Waitangi Treaty, establishing the rights of the British Crown and the Maori people in the founding of New Zealand.[76] Since 1978 the ECtHR has interpreted

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[70] Wayne Sandholtz, Yining Bei and Kayla Caldwell, 'Backlash and international human rights courts.' In Alison Brysk and Michael Stohl (eds.) *Contracting Human Rights: Crisis, Accountability, and Opportunity* (Edward Elgar, 2018) 160.

[71] Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, 'Backlash against international courts: explaining the forms and patterns of resistance to international court.' (2018)14 International Journal of Law in Context 197.

[72] Nils Muižnieks 'Non-implementation of the Court's judgments: our shared responsibility' Council of Europe 28 August 2016 http://www.coe.int/en/web/commissioner/-/non-implementation-of-the-court-s-judgments-our-shared-responsibility .

[73] Peter Novick *That Noble Dream: The "Objectivity Question" and the American Historical Profession.* (CUP, 1988) 4.

[74] Ibid. see also James Wertsch 'Collective Memory and Narrative Templates.' (2008) 7 Social Research: An International Quarterly 133, 147-148.

[75] Hawlbachs (n. 2)

[76] Daniel Moeckli and Nigel White, NigelTreaties as Living Instruments.' Dino Kritsiotis and Michael Bowman,

the ECHR in this fashion holding in *Marckx v Belgium* that the Convention must be 'interpreted in the light of present day conditions.'[77] In this case the state party was defending a set of laws that distinguished between legitimate and illegitimate children in adoption procedures. The Court conceded the state's contention that at the time the Convention was drafted in the 1950s 'it was regarded as permissible and normal in many European countries to draw a distinction in this area between the "illegitimate" and the "legitimate" family', but that the Convention needs to be interpreted in light of 'present-day conditions.'[78] Evolutive interpretation relies on seeing an instrument as not being fixed in the temporal moment of its signing and ratification. On the one hand this allows an instrument to adapt to changing circumstances and especially in relation to a human rights instruments makes them relevant to the present, asserting what Fleur John's calls the 'timelessness' of human rights.[79] Yet, on the other hand an evolutive interpretation can lead states to question whether when they ratified a treaty they envisaged a particular interpretation of a right, leading the doctrine to come into tension with the doctrine of state consent.[80] Political and legal institutions in the domestic sphere make evolutive interpretations regularly but they do not suffer from the same political difficulties that international bodies suffer from when interpreting legal instruments.[81]

Literature on backlash to the ECtHR identifies evolutive interpretation as a core feature of backlash.[82] This is in part because of the nature of the specific judgment which has triggered backlash, and also due to the structural form of evolutionary interpretation which implies a teleological progress towards a future that is determined by an external judicial institution.[83] The ECtHR as an institution is therefore caught maintaining two temporal positions about evolutive interpretation: firstly it maintains that it is a necessity in order for rights to reflect the contemporary needs of society and developing understandings of rights. For example in *Soering v UK* the extradition of an individual to the United States to face the death penalty was held to be a violation of Article 3 of the ECHR (the prohibition of the torture and inhuman and degrading treatment) the Court's application of the 'living instrument' doctrine was influenced by current 'developments and commonly accepted standards in the penal policy' in European states.[84] But in order to maintain its authority to issue such rulings it relied on the second temporal position; maintaining that as a Court it is justified in making rulings against states, using an evolutive interpretation of rights, because of the collected memory of totalitarianism and Court's role in responding to the threat within that collected memory. In *Soering* it did this explicitly by refering to the 'common heritage' of the Convention reasoning it would hardly be compatible with that heritage for a state to extradite someone where there were 'substantial grounds for believing that he would be in danger of being

Conceptual and contextual perspectives on the modern law of treaties (CUP 2018).

[77] *Marckx v Belgium* App No. 6833/74 (1979) 2 EHRR 330.

[78] Ibid para. 41.

[79] Fleur Johns, 'The Temporal Rivalries of Human Rights' (2016) 23 Indiana Journal of Global Legal Studies 39, 44.

[80] This argument is explored in Dzehtsiarou, 'European consensus and the evolutive interpretation of the European Convention on Human Rights.' (2011) 12 German Law Journal 1730, 1734-1737.

[81] Dzehtsiarou and DK Coffey 'Legitimacy and Independence of International Tribunals: An Analysis of the European Court of Human Rights.' (2014) 37 Hastings International and Comparative Law Review 271.

[82] See C Draghici, The Strasbourg Court between European and Local Consensus: Anti-Democratic or Guardian of Democratic Process? (2017) Public Law 11.

[83] Madsen et al. (n. 71)

[84] *Soering v United Kingdom* [1989] 11 EHRR 439, 102.

subjected to torture'.[85] In the early period of Court's operation, this temporal element was not explicit, but World War Two was very recent, many of the heads of government of ECHR Parties had fought in it, and the Cold War was at its height. In early cases the Convention's origins were quite literally in the minds of some of the leading judges; one of the judges sitting in the Grand Chamber in *Tyrer v UK*,[86] who with majority of judges agreed that Convention was a 'living instrument' was Pierre-Henri Teitgen one of the Convention's drafters who as noted above had envisaged it as a bulwark against 'Nazism'.[87]

Also the Court's development of the living instrument doctrine in the 1970s and 1980s came at a time when States were still willing to use the as the ECHR as a foreign policy tool as interstate cases against Turkey and Greece illustrated.[88] As the Council of Europe's membership expanded in the 1990s however, the Convention's use as a foreign policy tool receded and more attention began to be paid to the Court's role in social policy decisions. Decisions made about the evolution of the Convention's meaning could then be positioned as being anti-democratic because they went against what a domestic state had decided on the matter. Although often framed as a problem of interpretation in some of the literature, the aging of the ECHR's original foundational consensus meant it could no longer automatically assume it had the authority it once did.[89] By the 2010s, after two decades of increasing democratisation in most Council of Europe member states there was a widespread desire for the interpretation of the ECHR to be more concentrated in national institutions.[90] Reforms to the ECtHR were an ongoing process, but the increasing language of sovereignty preservation in the 2010s, often cited as a reaction to the evolving nature of the Court's power, was also at a deeper level a reflection of changing perceptions of the foundational consensus on which the Court's authority rested.[91]

(ii) Originalism – the ECtHR's departure from a true ideal

The argument over the implementation of *Hirst v UK* – which held that the UK's blanket ban on prisoner voting was a disproportionate restriction of the right to participate in elections – showcased a particular kind of argument against the evolutive interpretation of the ECHR – originalism.[92] In many ways originalism was an explicit counter to the living instrument doctrine.[93] Originalism was buried in a broader critique of the ECtHR but much like its American counterpart originalist thinking on the ECHR maintained that there existed a true or original interpretation of the Convention in line with its founders thinking. In the debate in the UK parliament on implementing *Hirst* a number of Members of Parliament (MPs) criticised

[85] Ibid. 88.
[86] *Tyrer v UK* App. no. 5856/72 (1978) 2 EHRR 1.
[87] Robert Spano 'The European Court of Human Rights and National Courts: A Constructive Conversation or a Dialogue of Disrespect?' (2015) 33 Nordic Journal of Human Rights 1.
[88] Madsen, 'The challenging authority of the European Court of Human Rights: from Cold War legal diplomacy to the Brighton Declaration and backlash.' (2016) 79 Law & Contemporary Problems141.
[89] For an example see Thomas Kleinlein 'Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control' (2017) 28 EJIL 871.
[90] Basak Cali, 'Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights.' (2017) 35 Wisconsin International Law Journal 237.
[91] See, Giuseppe Franco Ferrari and Oreste Pollicino, 'The Impact of Supranational Laws on the National Sovereignty of Member States, with Particular Regard to the Judicial Reaction of UK and Italy to the New Aggressive Approach of the European Court of Human Rights.' (2011) 2 Comparative Law Review 1.
[92] *Hirst v United Kingdom (No 2)* (2005) ECHR 681.
[93] See Spano (n.87).

the ECtHR for interfering with the UK's sovereignty by making such a decision.[94] The substance of the backlash soon evolved, as Helen Hardman notes, away from the specific question of prisoners voting and the principle of democracy, towards one of the legitimacy of an international court limiting executive power.[95] As one a former judge at the ECtHR noted many countries react badly to decisions against them and occasionally there are muted threats to withdraw from the country concerned.[96] Some of the backlash in the UK to *Hirst* however began to focus on the legitimacy of the ECtHR's interpretation of the ECHR as a departure from its original or true purpose. In 2013 the then UK Justice Secretary Chris Grayling MP criticised the ECtHR saying that his 'concern' was with the Court not the Convention because 'the way in which [the ECHR] is being interpreted … has moved a long way away from the intentions of the people who drafted it in the first place.'[97] Other critics of the ECHR seized on both *Hirst* and *Vinter* – to make the case that the Court was moving away from the 'original words of the convention' towards its own form of judicial activism.[98] Perhaps the most high profile example of this originalist line of criticism came in 2012 when the then Prime Minister David Cameron delivered a speech to the Council of Europe which celebrated the UK's contribution in creating the ECHR after World War Two but warned that the ECtHR's interpretative role was causing 'the very concept of rights' to be in danger of 'slipping from something noble to something discredited.'[99] This originalist line of argumentation, in the UK context, traces its intellectual pedigree back to Lord Hoffman's claim in 2009 that when the ECHR was created the original member states had not 'agreed to uniformity of the application of those abstract rights in each of their countries, still less in the 47 states which now belong.'[100]

From historical and legal perspectives there are number of different arguments against the idea that ECtHR interpretation was never contemplated by the original ten parties to the Convention, but this argument is in fact a proxy much larger point of contention concerning the temporality of the original legitimating consensus of the ECHR. Arguments about a treaty's original meaning invoke its foundational consensus into the present by asking, through the process of interpretation, what the original intentions of the parties were and then moving forwards in time to assess how this applies in the present.[101] This approach to interpretation is supported by Martin Dawidowicz, who concludes in an examination of the Vienna Convention on the Law of Treaties, that the determination of whether or not the meaning of a treaty term has evolved can only be made by reference to its meaning' at the

[94] Danny Nicol, 'Legitimacy of the Commons debate on prisoner voting.' (2011) Public Law 681.
[95] Helen Hardman, 'Prisoner voting rights: the conflict between the government and the courts was really about executive power.' LSE British Politics and Policy 20 June 2019 < https://blogs.lse.ac.uk/politicsandpolicy/prisoner-voting-rights/ >.
[96] Egbert Myjer 'Why much of the criticism of the European Court of Human Rights is Unfounded.' Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds.) *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength* (Edward Elgar, 2013).
[97] HC Debate 17 December 2013 Vol.572. Col. 598.
[98] *Vinter & Ors v UK* [2013] ECHR 645. See Christopher Chope HC Debate 30 June 2015 Vol 597. Col 420.
[99] David Cameron 'Cameron's speech on the European court of human rights in full.' Reproduced in *The Guardian* 25 Jan 2012 https://www.theguardian.com/law/2012/jan/25/cameron-speech-european-court-human-rights-full
[100] Lord Hoffman 'The Universality of Human Rights.' Judicial Studies Board Annual Lecture 19 March 2009 https://www.judiciary.uk/wp-content/uploads/2014/12/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf
[101] See Julian Wyatt *Intertemporal Linguistics in International Law: Beyond Contemporaneous and Evolutionary Treaty Interpretation* (Bloomsbury Publishing, 2019).

time a treaty was concluded.[102] For law making treaties such as the ECHR which create rights and obligations for people living within state parties to treaty in the present, harking back to the past can be a way of privileging the original foundational consensus of an instrument rather than contemporary rights abuses. Especially when the historical consensus privileged a particular ideology of rights. Historians such as Duranti have shown the Convention's goal was to protect conservative constitutionalism of western Europe.[103] Originalism's goal is to confine the ECHR to that world. Equally originalism privileges a particular group of states, namely the states which created the ECHR. It is not entirely coincidental that reforms to the Convention, such as Protocol 15, have had the effect of privileging certain states with more established domestic institutions who are better placed to argue that those institutions are able to balance limitations and restrictions of rights in the ECHR.[104] In this case the past provided a means of envisaging a different role for the Court, whether that described the reality of how the Court previously functioned is another matter altogether; originalism in an ECHR context was a means of opposing the living instrument doctrine and of reasserting a set of privileges for certain states. Yet, to do that required imbibing the collected memory underpinning the ECHR with a distinct sense of 'pastness', weakening its capacity to provide what Wertsch called an 'essential truth' about the present.[105] Weakening is the appropriate term to use here because as John's argues international human rights law succeeds as a form of law which makes universal claims by being temporally 'ever-present'.[106] Situating the true concern of rights as being in the past, or associated with a sense of 'pastness' as originalism does, is means of weakening its authority to deal with the present.

(iii) The re-imagination of external threats and the temporality of consensus

One of the issues with the ECHR's foundational legitimating consensus being based on a threat-remedy conception of totalitarianism is that threat is temporally located in a particular time, in this case the late 1940s and 1950s. As the political circumstances that constituted a threat in that era changed it became possible for governments to suggest that there were different contemporary external threats facing European states. In *Ilias and Ahmed v Hungary* before the Grand Chamber of the ECtHR, the Hungarian government argued that the 'practical impossibility of removing undocumented migrants who were not entitled to international protection had rendered immigration uncontrollable.'[107] As a consequence the Hungarian government argued that this was creating a form of 'social tension, a feeling of powerlessness and a sense of loss of sovereignty in affected States.'[108] When the Grand Chamber found that there had been no violation of the Article 5 rights of the claimants there was some criticism of the way that this decision had been reached.[109] The applicants were

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[102] Martin Dawidowicz 'The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on Costa Rica v. Nicaragua (2011) 24 Foundation of the Leiden Journal of International Law 201 208.
[103] Duranti (n. 57).
[104] For evidence of this see Øyvind Stiansen and Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights' (2018) available at https://ecpr.eu/Filestore/PaperProposal/f99b79f8-cd8d-444b-985a-4a9dd5ac02b7.pdf
[105] Wertsch (n.74) 418.
[106] Johns (n. 79) 54.
[107] *Ilias and Ahmed v Hungary* app. no. 47287/15 (ECHR 21 November 2019) para 109.
[108] Ibid.
[109] Vladislava Stoyanova 'The Grand Chamber Judgment in *Ilias and Ahmed v Hungary:* Immigration Detention and how the Ground beneath our Feet Continues to Erode.' Strasbourg Observer 23 December 2019 <https://strasbourgobservers.com/2019/12/23/the-grand-chamber-judgment-in-ilias-and-ahmed-v-hungary-immigration-detention-and-how-the-ground-beneath-our-feet-continues-to-erode/ >

migrants who had been detained in the Röszke transit zone on the border between Hungary and Serbia, where the Chamber ruled there had been a violation of their Article 5 rights because they had been held without 'any formal decision of the authorities and solely by virtue of an elastically interpreted general provision of the law'.[110] Their detention was the result of a series of policies authorised by Hungarian prime minister Viktor Orban to deter migrants, who had been crossing the Mediterranean in large numbers since 2013, from entering into the country.[111] The Grand Chamber's decision can be understood as part of a wider trend in ECtHR jurisprudence where the reasoning of governments for detaining immigrants goes under-scrutinised and deference is given to governments claiming that they are dealing with a migrant crisis.[112] It can also be read in context of a wider trend toward the reconceptualization of immigration as a form of external threat facing the European order, setting up the prevention of migration from external sources as an alternate threat to the foundational consensus which the ECtHR and other European institutions need to acknowledge . In March 2017 speaking at the European People's Party's annual congress in Malta, Orbán said that the ECtHR was fast becoming a 'threat to the security of EU people' because its decisions were an 'invitation for migrants.'[113] Migration began to be constructed as a threat in Hungary where the government alleged that migrants were inferior 'racialised 'others' who they argued posed a 'threat to order' and the 'imagined sameness' of society.[114]

Attacks on EU policies and the ECtHR were used interchangeably by the Hungarian government to suggest that not only the migrants themselves but also the policy agenda of the EU in relation to immigration was a threat to national sovereignty.[115] The progressive interpretation of migration as an external threat happened across the course of the 2000s with the literature on the subject showing how discussions of migration interacted with concerns about security and terrorism.[116] This fused together two issues which had previously not necessarily been automatically connected as literature on immigration cases at the ECtHR in the 1990s showed.[117] Historically the ECHR had been relatively silent on the rights of migrants, in the original text the main references to migration were framed in terms of restricting the political activity of non-citizens with a relatively clear Cold War context in mind.[118] Decisions in the mid-1990s about the treatment of immigrants and their access to

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[110] *Ilias and Ahmed v. Hungary* Application no. 47287/15 (ECHR 14 March 2017) para 68.
[111] Céline Cantata and Prem Kumar Rajaram, 'The Politics of the Refugee Crisis in Hungary: Bordering and Ordering the Nation and its Others.' In Cecilia Menjívar, Marie Ruiz, and Immanuel Ness *The Oxford Handbook of Migration Crises* (OUP 2019) 181, 186.
[112] Cathryn Costello, 'Immigration Detention: The Grounds Beneath Our Feet' (2015) 68 Current Legal Problems 143.
[113] Sarantis Michalopoulos, 'Orban attacks the European Court of Human Rights.' EURACTIV.com 30 March 2017 < https://www.euractiv.com/section/global-europe/news/orban-attacks-the-european-court-of-human-rights-at-epp-congress/ >.
[114] Catherine Thorleifsson, 'Disposable strangers: far-right securitisation of forced migration in Hungary.' (2017) 25 Social Anthropology 318, 319.
[115] Lenka Bustikova and Petra Guasti, 'The Illiberal Turn or Swerve in Central Europe?' (2017) 5 Politics and Governance 166.
[116] David Bonner 'Porus Borders, terrorism and Migration Policy.' In *Irregular Migration And Human Rights: Theoretical, European And International Perspectives* (Martinus Nijhoff Publishers, 2004); Jørgen Carling 'The European Paradox of Unwanted Immigration.' In J Peter Burges and Serge Gutwirth (eds.) *A Threat Against Europe? Security, Migration and Integration* (VUB Press, 2011).
[117] For examples of this literature see Kathleen Marie-Whitney, 'Does the European Convention on Human Rights Protect Refugees from Safe Countries' (1996) 26 Georgia Journal of International and Comparative Law 375; Kees Groenendijk, 'Long-term immigrants and the Council of Europe.' (1999) 1 European Journal of Migration & Law 275.
[118] Marie-Bénédicte Dembour *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015) 35-55.

social benefits, such as *Gaygusuz v Austria*, showed how the Convention system could be used to protect migrant rights.[119] By the early 2010s high-profile cases in countries such as Denmark and Belgium involving the rights of non-nationals, not only triggered backlash in the domestic sphere but also served to cement the idea that the ECtHR favoured or was giving rights to migrants.[120] Domestic politics in many countries shaped the perception of migration as a threat, which as research by Madsen showed was sufficient to weaken the institutional commitment of states to the Court.[121] In popular political imagination the ECtHR ignored the supposed threat to European states from migrants, by finding that domestic policies restricting the rights of migrants were Convention violations. Although the data about the precise scale and strength of these political sentiments in European countries has been questioned, their impact was to weaken the elite consensus surrounding the Court's authority leading either towards acts of backlash or to reforms designed to make the Court more responsive to the position of state parties.[122] More broadly responses to immigration cases were symptomatic of the ECHR's original collected memory lacking the justificatory power it once had, with the passage of time allowing for new and competing ideas about the threats European states faced.

Conclusion: The Vanishing Point of Collected Memory

If the linear passage of time corrodes and fractures the capacity of a collected memory to act as a foundational form of authority for an international instrument, is it possible that a vanishing point is reached where a collected memory is fully relegated to the past. As the introduction noted when looking at the two UK referendums, in both cases politicians appealed to the collected memory underpinning the legal process of European integration. In the latter case however collected memory no longer served the same legitimating function for international institutions. A vanishing point had been reached where a collected memory belonged decisively to the past. The French anthropologist Émile Durkheim observed that the notion of time was in a sense a collective endeavour requiring a societal wide appreciation of both its units of measure but also a clear understanding of what constituted the past.[123] Collected memories capacity to authorise the present depends on it not being relegated to the past but instead punctuating it providing a basis for the legitimating the operation of the present. As Rosalyn Higgins described it, the horizontality of the international legal system works when the shared belief that the legal act of state consent which happened in a 'then' is relevant to and governs the 'now'.[124]

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[119] *Gaygusuz v. Austria* (1997) 23 EHRR 364.

[120] Jacques Hartmann, 'A Danish Crusade for the Reform of the European Court of Human Rights." EJIL: talk! 14 November 2017 https://www.ejiltalk.org/a-danish-crusade-for-the-reform-of-the-european-court-of-human-rights/ ; Marc Bossuyt 'Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers.' (2010) 3 Inter-American & European Human Rights Journal 2.

[121] Mikael Madsen 'Two-level politics and the backlash against international courts: Evidence from the politicisation of the European court of human rights.'(2020) The British Journal of Politics and International Relations published online https://doi.org/10.1177/1369148120948180 >.

[122] Ibid. On Questioning the evidence see Jacques Hartmann and Samuel White. 'The Alleged Backlash Against Human Rights: Evidence From Denmark and the UK.' Kasey McCall-Smith, Andrea Birdsall, and Elisenda Casanas Adam (eds.) *Human Rights in Times of Transition: Liberal Democracies and Challenges of National Security* (Edward Elgar Publishing, 2020)

[123] Émile Durkheim The Elementary Forms of Religious Life (OUP trans Craol Cosman 2008) 11-13.

[124] Rosalyn Higgins 'Time and the Law: International Perspectives on an Old Problem.' (1997) 46 ICLQ 501,501.

It is possible a point is reached where a collected memory no longer serves the same function it once did, and a historical institutionalist account of an institution's authority loses its salience. Whilst legal obligations would remain, and there may well be another basis for an international tribunal's authority, its foundational consensus has been eroded. The analogy of a vanishing point has its limitations, as the third section of this chapter indicates, the corrosion of collected memory is a gradual process. Arguments about the authority of the Court and the passage of time are a component of much wider instances of backlash against the ECtHR, rooted in response to specific cases or the politics of certain countries. Nevertheless, the fact that instruments creating legal obligations to protect human rights can rest on a consensus that is temporally contingent, illustrates just how fragile the foundations of international human rights law actually are.