

“Legal Diplomacy”

Law, Politics and the Genesis of Postwar European Human Rights

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It is somewhat of a paradox that Europe was to become the avant-garde of the supranational protection of human rights following WWII. No continent had been more severely impacted by the hostilities and atrocities of WWII – and no continent was more to blame for the break out of the conflict. Yet, with the radical reconfiguration of Europe following the War – prompted particularly by the breakdown of empire and the rise of the European integration in the context of Cold War politics – Europe was to become the bridgehead of the international protection of human rights. The postwar legal and institutional set-up dedicated to the protection of human rights in Europe, today, stands out as one of the most far-reaching and successful attempts at an international human rights protection regime. It has even become the de facto model for developing human rights elsewhere.¹ The original objective was, however, more specific and concerned saving Europe from its own political and legal ills. It is clear from the debates and negotiations leading to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) that many regarded the Convention as part of a broader European integration project in which human rights was to be a source of legitimacy and politico-moral commitment.² Despite these high ambitions in respect to European integration, the actual reality of the initial development ECHR is perhaps better described as the laying down of the cornerstones of what became eventually the much celebrated European human rights system. Certainly, as we now know, the two “Europes” constructed during the postwar period – “Europe of the Market” and “Europe of Human Rights” – have only recently integrated.³

It is the general argument of this article that the historical genesis of the European human rights regime was much less straight-forward and politically self-evident than most commentators assume today. With the objective of contributing to the historiography of international human rights, the article examines how a continuous and subtle interplay of law and politics structured

¹ See, for example, Andrew Moravcsik, “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,” *International Organization* 54 (2000): 217-252, and Lawrence Helfer and Anne-Marie Slaughter, “Toward a Theory of Effective Supranational Adjudication,” *Yale Law Journal* 107/2 (1997): 271-391.

² See, for example, Consultative Assembly, *Official Report* of 7 September, 1949, p. 127 and *Documents of the Assembly* (1949), Document 77, paras 4-5.

³ See, for example, Mireille Delmas-Marty, *Le relatif et l’universel. Les forces imaginantes du droit* (Paris, 2004).

early European human rights law, and how this was to have decisive effects on both its institutional and legal development. During the period in focus, from the mid-1940s to late 1960s, European human rights law was, to a large extent, marked by the fact that law and politics were not yet differentiated social spheres as in national legal and political systems. This is not to say that early European human rights law was simply a “politicised law” or a “legalised politics”, but that the boundaries between these two social fields were blurred. Drawing on the work of Pierre Bourdieu, the subject-area can be described as an emerging “field”; that is, a legal field in the course of being constructed and, therefore, mainly relying on pre-existing international and national practices.⁴ The European Court was, in other words, constructed at the “crossroads” of other pre-existing fields, ranging from national law on related matters to national politics and diplomacy. It is against this background that the article argues that European human rights law originally emerged as a form of “legal diplomacy”. In contrast to what has been labelled “judicial diplomacy”⁵ by “legal diplomacy”, the article seeks, more generally, to understand how the development of European human rights, at its early stage, was as much a political process as a legal one. To more concretely analyse this legal diplomacy, the article emphasizes the key agents of these developments, the “legal entrepreneurs” who managed to perfection the subtle game of law and diplomacy, defining the playing field of postwar European human rights.⁶

Make Law, Not War

The origins of the idea of establishing, during the postwar period, some kind of supranational protection of human rights are disputed in the literature.⁷ In fact, the very changes implied by the

⁴ This notion of “emerging fields” draws on an interpretation of the work of Pierre Bourdieu. See further in Mikael Rask Madsen, “Transnational Fields: Elements of a Reflexive Sociology of the Internationalisation of Law,” *Retfærd* 3/114 (2006): 23-41.

⁵ See, for example, Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford, 2001) and J.H.H. Weiler, “A Quiet Revolution, the European Court of Justice and its Interlocutors,” *Comparative Political Studies*, 26/4 (1994): 510-534. See also the account in Laurent Scheeck, “Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks,” *GARNET Working Paper* 23/07 (2007).

⁶ The notion of “legal entrepreneurs” has been explored previously. See for example Antonin Cohen and Mikael Rask Madsen, “Cold War Law: Legal Entrepreneurs and the Emergence of a European Legal Field (1945–1965),” in *European Ways of Law: Towards a European Sociology of Law*, ed. Volkmar Gessner and David Nelken (Oxford, 2007), 175-202, and Yves Dezalay, “Les courtiers de l’international : Héritiers cosmopolites, mercenaires de l’impérialisme et missionnaires de l’universel,” *Actes de la recherche en sciences sociales*, 151-152 (2004): 5-34.

⁷ See, for example, Jan Herman Burgers, “The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century,” *Human Rights Quarterly* 14 (1992): 447-477, Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia, 2003), Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia, 1999), Elizabeth Borgwardt, *A New Deal for the World: America’s Vision for Human Rights* (Cambridge, 2005), Lynn Hunt, *Inventing Human Rights: A History* (New York, 2007) and Samuel Moyn, “On the Genealogy of Morals,” *The Nation*, April 16 2007.

postwar innovations in terms of the internationalisation of human rights are contested.⁸ A central issue for this literature is the historical continuity, or possible discontinuity, of many of the issues directly related to postwar human rights – the individual subject, international collective guarantee, etc. However, it tends generally to downplay what might very well be the most essential transformations implied by the postwar processes. Building on a larger inquiry into the rise of international human rights after WWII,⁹ this article argues that, during the postwar period, some of the main innovations in terms of human rights were on the legal-institutional level.¹⁰ The postwar investments in international human rights not only created new international norms but also a set of new international venues for human rights activism. The latter were to transform the very idea of how to protect human rights and, thereby, eventually the very notion of human rights. This is, of course, not to claim a certain in-built automatism in the rise of the contemporary legal-institutional framework of international human rights, but rather to point to the clear differences between the interwar period and the postwar period in terms of the structure of opportunities for pursuing international human rights. In the long-run, the actual effects of postwar international human rights and corresponding institutional set-up were to be determined by the interplay of the new institutions and norms and their changing geopolitical contexts.

Generally, the European experience of the international institutionalisation of human rights was to be considerably different from other attempts made during the same period. As argued elsewhere,¹¹ the comparative success of the European human rights regime was due to both the timing of the ECHR and the ways in which the Convention was perceived among a politically well-connected elite of legal entrepreneurs. The drafting of UN human rights had been carried forward by the general momentum related to the founding of the UN and the universalist ideology of some of the chief negotiators, but it had been limited by the lack of commitment to enforce such universal standards. The ECHR was drafted in a surprisingly different context. In Europe, the atrocities of

⁸ See, however, Mark Mazower, “The Strange Triumph of Human rights, 1933-1950,” *The Historical Journal* 47/2 (2004): 379–398 and A. W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford, 2004b).

⁹ See Mikael Rask Madsen, *L’Emergence d’un champ des droits de l’homme dans les pays européens: enjeux professionnels et stratégies d’Etat au carrefour du droit et de la politique (France, Grande-Bretagne et pays scandinaves, 1945–2000)*. Ph.D. diss., Sociology, L’École des hautes études en sciences sociales, Paris, 2005.

¹⁰ This is also, albeit in different ways, argued in Norberto Bobbio, *The Age of Rights* (Cambridge, 1995) and Louis Henkin, *The Age of Rights* (New York, 1990). See also Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford, 2000).

¹¹ See, for example, Mikael Rask Madsen, “La Cour qui venait du froid. Les droits de l’homme dans la genèse de l’Europe d’après guerre,” *Critique Internationale*, 26 (2005): 133-146, and “From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics,” *Law and Social Inquiry*, 32/ 1 (2007): 137–159.

WWII, as well as the breakdown of the protection of fundamental rights by the legal systems in occupied countries, were present in the memory of the key advocates of the Convention. In many cases, these actors had been active in the resistance struggle or members of the allied forces during the war. Moreover, the fear of the break out of new hostilities along the emerging East-West divide gave the whole undertaking a different political urgency of which the advocates of the Convention were not afraid to remind the involved politicians. Their message was clear: If one was, through the use of international law, to seriously hinder the rise of new totalitarian regimes, the European system could not imitate the well-meaning but toothless legal arrangements at the UN level.¹² Real law and effective legal institutions were the necessary conditions for achieving this goal.

Being, thus, an upshot of the emerging Cold War context, the European human rights system was to go further – legally and institutionally – than the other human rights systems created at the same time.¹³ Of most significance was the fact that the European system introduced a human rights court. Moreover, the European Convention was not simply an inter-national agreement in the conventional manner, where States could bring legal actions against each other for breach of a mutually agreed Convention; it also allowed for individuals to bring actions against their own governments at the level of a supranational institution. However, although these international legal innovations have now become practically synonymous with European human rights law, it should be underlined that they were very far from a *fait accomplie* at the stage of negotiating the Convention. If the right to individual petition has become the landmark of contemporary European human rights, it is interesting to note that in the original Convention of 1950, the right of individual petition before the Court was made optional. Perhaps even more striking is the fact that the jurisdiction of the Court was made optional. In other words, the contracting States could choose to only accept the jurisdiction of an intermediate institution, the European Commission of Human Rights, yet the right to individual petition before the Commission was, in fact, also made optional. Further weakening the basic framework of the system, the recommendations of the Commission were not in themselves legally binding and had to be accepted by a Committee of Ministers to gain effect; they were, thus, in principle, under the control of an inter-state political body rather than an independent legal body. The Commission could, however, also choose to bring the case before the Court, granted that the State in question had accepted the jurisdiction of the Court and that the case

¹² See, for example, *Preparatory Work on Article 1 of the European Convention of Human Rights* (Strasbourg, 31 March, 1977), 17.

¹³ These include the Inter-American human rights system and the UN human rights system.

could not be settled by conciliation. Individuals had no option of bringing a case before the Court, whilst States could choose to bring a case before the Court.¹⁴

As it appears from this overview of the main institutional features of the original ECHR system, at the time of negotiating the Convention, there was little political will to set up entirely independent legal institutions. The original institutional framework might indeed be described as somewhat opaque. The legal diplomacy, which this article claims was at the heart of the early production of European human rights law, was, in fact, installed as a basic premise in the institutional order laid out in the ECHR. From the historical sources available, it is clear that establishing a European human rights system was anything but a straightforward process.¹⁵ At the Congress of Europe in 1948, a number of problems, which were to hamper the subsequent negotiations, were already apparent. One of them being the most fundamental, namely the question of the desirability of such a document in light of the existence of the Universal Declaration of Human Rights, adopted just a year earlier. While this issue was eventually overcome, particularly due to the intervention of Winston Churchill,¹⁶ the next question to arise was whether to pursue simply a Declaration of human rights – in the style of the UDHR – or to attempt a more ambitious project in the form of a legally binding European Bill of Rights.¹⁷ It was a problem which already in 1945 had been prophetically anticipated by the Cambridge Professor of International Law, Hersch Lauterpach:

“Should it be decided to reduce any international bill of human rights to a mere statement of political or moral principle, then, indeed, it would be most likely to secure easy acceptance; any possible difficulty in agreeing upon its terms will be merged in the innocuous nature of its ineffectual purpose. But if the second World War ought to end, then a declaration thus emaciated would come dangerously near to a corruption of language. By creating an unwarranted impression of progress it would, in the minds of many, constitute an event which is essentially retrogressive. For it would purport to solve the crucial problem of law and politics in their widest sense by dint of a grandiloquent incantation whose futility would betray a lack both of faith and of candour.”¹⁸

This critique resonated well with a widespread sentiment among many of the main advocates of the ECHR. These “lawyers-statesmen” had almost all experienced the horrors of WWII, and most had developed an ardent dislike of totalitarianism in any form. For them, as for Lauterpach, a strong

¹⁴ The Committee of Ministers also oversaw that the decisions of the Court were effectuated by the Member States.

¹⁵ I refer to the minutes of the Congress of Europe in The Hague in 1948, the work of the main expert group (the Committee on Legal and Administrative Questions which drafted a preliminary document the “Teitgen Rapport” of September 1949), the Senior officials reworking this draft in 1950 and the final sessions of the ministers in 1950.

¹⁶ J. G. Merrils and A. H. Robertson, *Human Rights in Europe: A Study of the European Convention on Human Rights* (Manchester, 2001), 7.

¹⁷ Many of these issues arose again during the formal negotiation of the ECHR. This is recorded in the *travaux préparatoires* of the ECHR.

¹⁸ Hersch Lauterpach, *An International Bill of Rights of Man* (New York, 1945), 9.

legal document – and well-timed political statement – was fundamental. These actors especially made a case against the kind of hypocrisy already observed in the UN, where countries with scant respect for human rights had signed the UDHR with little intention of turning its high prose into effective legal solutions. In Europe, membership of the Council of Europe was, therefore, made conditional upon the respect of human rights and democracy. And the European Convention was precisely to become the benchmark for determining what was to be considered democracy and human rights in Europe.

Having established this founding principle, which obviously implied that the Council of Europe and the ECHR became components of the new ideological divide of Europe, the next question concerned which rights to protect and how to protect them. There was surprisingly little consensus on the rights to protect and the extent to which these rights should be defined in detail. Reflecting the geopolitical context, the debates on the scope of rights, unsurprisingly, saw the tide turn in favour of political and civil rights, while social and economic rights were left for later amendments. The list of rights included in the original Convention was limited, but it was more than sufficient for stating the fundamentals of a democratic society in a world marked by a growing Cold War tension. Pierre-Henri Teitgen noted in 1949, when presenting the so-called Teitgen Report:

“The Committee on Legal and Administrative Questions [...] considered that, for the moment, it is preferable to limit the collective guarantee to those rights and essential freedoms which are practised after long usage and experience in all the democratic countries. While they are the first triumph of democratic regimes, they are also the necessary condition under which they operate”.¹⁹

The actual list of rights included in the Convention might come across as somewhat restricted and little innovative.²⁰ It is certainly no exaggeration to claim that the real innovation of the Convention was on the institutional level. The idea of a supranational European court, in particular, was not only highly innovative, it was also to have effects which went far beyond the Cold War political manoeuvrings which were intrinsic to the setting up of the Council of Europe. It should, however, be pointed out that among the Member States no one could have predicted that such an institution would eventually drive towards a dynamic and expansive interpretations of the Convention, with the consequence of considerably altering the very notion of human rights in Europe and, thereby, also the contents and procedures of the protection of human rights in national legal systems. As argued elsewhere, there was a clear element of export-trade in the whole exercise of writing the

¹⁹ This statement can be found in the Consultative Assembly, *Official Report* of 7 September, 1949, p. 127.

²⁰ For details, see J. G. Merrills and A. H. Robertson (2001), *op.cit.* 8-15.

ECHR.²¹ This had the effect of somewhat blinding the negotiators towards the potential national ramifications of such a document. They generally assumed that their home-countries were in compliance with the Convention, as it was assumed to be based upon existing practices. Their greatest fear was that such a supranational system of law would be abused by subversive agitators with friendly views of the Soviet Union, or the struggle for independence in the colonies;²² that is, they feared that these rather straightforward politics of containment, in the guise of human rights, were to backfire.

From Great Idea to “Convention à la Carte”

A key question related to the broader process of drafting the European Convention is from where the idea of establishing a supranational human rights system came, and which political and legal milieus advocated what was a radical reform of European inter- and intra-state legal affairs. As suggested by A. W. Brian Simpson, the international legal academic Hersch Lauterpacht was clearly very central to the promotion of genuine legal instruments and institutions in the area of human rights in the aftermath of WWII. He shrewdly used the International Law Society to ensure both the diffusion of his ideas among relevant national and international actors, and the legitimacy of an organisation counting some 250 leading international lawyers.²³ At the UN, Lauterpacht had also been a central player, but in a somewhat indirect way. Regardless of his status as a pioneer in the subject-area of international human rights law,²⁴ he had not been appointed official representative of the United Kingdom. This was due to the Foreign Office considering him a “disastrous” candidate: He was not “sound enough”, that is, he was considered too idealistically and personally involved to perform the kind of pragmatic diplomacy favoured by the Foreign Office. Perhaps even more critically, the Foreign Office head legal advisor did not find him “English enough” due to his Jewish ancestry.²⁵ Nevertheless, the drafts supplied by the Foreign Office during the negotiation of the Universal Declaration were clearly marked by Lauterpacht’s thinking.²⁶

²¹ See Mikael Rask Madsen, “France, the UK and “Boomerang” of the Internationalisation of Human Rights (1945-2000),” in *Human Rights Brought Home: Socio-Legal Studies of Human Rights in the National Context*, ed S. Halliday and P. Schmidt (Oxford, 2004a), 57-86.

²² This is particularly clear in respect to the “imperial societies”. On the UK, please see Geoffrey Marston, “The United Kingdom’s part in the preparation of the European Convention on Human Rights, 1950,” *International and Comparative Law Quarterly*, 42/4 (1993): 796-826, 825.

²³ A. W. Brian Simpson, “Hersch Lauterpacht and the Genesis of the Age of Human Rights,” *Law Quarterly Review* (2004a): 49-80.

²⁴ He had notably published a shorter, well-timed book on the subject: Hersch Lauterpacht (1945), op.cit.

²⁵ Simpson (2004a), op.cit.

²⁶ See Madsen (2005), op.cit.

On the European level, Lauterpacht's involvement was also indirect; his only direct involvement in the negotiation and drafting of the ECHR was as an inactive member of the Juridical Committee – the Draupier Commission – which had been set up at The Hague in 1948 to produce a draft European Charter. Moreover, Lauterpacht was not involved in drafting the Teitgen Report, nor was he involved in the many debates under the auspices of the Council of Europe. His role was that of contributing to an idea which is now taken for granted: international and European human rights can only be protected if powerful institutions are created to monitor and enforce such legal documents. However, as already suggested, the text finalised in 1950 was to be marked by some striking compromises as regards the institutional mechanisms. The ECHR had at best a “reflexive” institutional order, balancing legal autonomy with national sovereignty. It is telling that Lauterpacht turned out, eventually, to be in favour of an intermediary Commission, and even denounced the idea of an exclusive Court as “neither practicable nor desirable”.²⁷ The original introduction of the idea of a Court in the draft Charter produced after the Congress of Europe was, in fact, mainly seen as a pragmatic solution fitted to another problem, namely the aforementioned conflicts over the definition of the rights catalogue.²⁸ A Court could, the argument went, be charged with carving out a detailed jurisprudence and, thus, the delicate political problem of definition was, if not solved, then left for later, allowing the negotiations to proceed.²⁹

Introducing the idea of a Court in order to solve the problem of defining the rights catalogue, however, only opened up for a new conflict concerning the actual desirability of such an institution. It is in this light that Lauterpacht's somewhat surprising statement has to be seen. Even if the Court's solution, at first glance, seemed to appeal to common law traditions, the British delegation was among the fiercest opponents of having an imprecise document left with an uncertain supranational institution.³⁰ Furthermore, as a later judge at the European Court writes: “It was considered unacceptable that the code of common law and statute law which had been built up in the country over many years should be made subject to review by an International Court”.³¹ Adding the argument of the paramount role of Parliament in the British political tradition, the

²⁷ Simpson (2004a), op.cit. Lauterpacht would probably have been more than happy with the way in which the ECHR system was to subsequently develop. As A. W. Brian Simpson notes, the idea of “practical and effective” were to become absolutely central in the jurisprudence of the EHRC.

²⁸ For details, see for example Moravcsik (2000), op.cit.

²⁹ Simpson (2004a), op.cit.

³⁰ It was ironically the British member of the Teitgen Commission, Sir Maxwell Fyfe, who argued most strongly in favour of a Court, evoking the role played by the US Supreme Court. See Council of Europe, *Collected Edition of the Travaux Préparatoires* (1961), 50.

³¹ Sir Vincent Evans, “The European Court of Human Rights: A Time for Appraisal,” in *Human Right for the 21st Century*, ed. Robert Blackburn & James J. Busuttil (London, 1997), 88.

almost insurmountable task facing the negotiators was plain to see.³² The question of establishing a Court was, in practice, met with considerable opposition from a host of countries well into the meetings of the summer of 1950.³³ This had the effect that the idea of an intermediary body in the form of a Commission was gradually gaining support as a viable alternative. Only a small majority supported the question of individual petition, whilst the on-going issue of whether to draft clear legal obligations or leave it to the Court to carve out the jurisprudence continued to see very conflicting views.³⁴ The only real agreement was that a document of this kind was needed in light of the geopolitical climate of the day, yet any consensus on the contents remained far off.

In this context, it becomes apparent why, for example, the Teitgen Committee could play a decisive role. It basically provided the right blend of comprehensive legal solutions and “diplomatic appeasement”, which was much in demand if the project was to succeed at all. Moreover, by occasionally playing their trump cards as hardened WWII freedom fighters, these legal-political experts could unambiguously evoke the imminent dangers of the time – the looming imperialism of the Soviet Union – by a double-reference to totalitarianism implying at one and the same time the Nazis and the “Commis”.³⁵ Besides Pierre-Henri Teitgen, a law professor, postwar French Minister of Justice and well-known member of *la Résistance*, the Committee also counted amongst its members Sir David Maxwell Fyfe, a British barrister and former Prosecutor at the Nuremberg War Crime trials, and Antonio Azara, a former Italian Minister of Justice and First President of the Italian Court of Cassation. It was this all-star cast of legal and political expertise that was to secure that most of the draft Convention could pass the final political screening before signature.

The learned opinions of even the most well-endowed and respected lawyers-politicians do, however, not necessarily equate with what can be voted for in a plenary meeting of politicians assisted by their senior legal advisors. In uncertain policy-areas, the crafting, selection and promotion of the main ideas obviously constitute a key stage in the manufacturing of consent. In this respect, there is little doubt that the Teitgen Committee, and its predecessor set up at the Congress of Europe, generally managed to define what this new subject should entail. Yet, the idea of European human rights was, in a somewhat paradoxical way, both novel and well-known; that is,

³² For a detailed analysis of the UK position during the drafting, please see Marston (1993), op. cit.

³³ These countries included Britain, Denmark, the Netherlands, Norway, Sweden, Greece and Turkey.

³⁴ Simpson (2004b), op.cit, 711-712.

³⁵ In one of the draft reports presented by Teitgen, he bluntly stated that the Convention “[...]will allow Member States to prevent – before it is too late – any new member who might be threatened by a rebirth of totalitarianism from succumbing to the influence of evil, as has already happened in conditions of general apathy”. The message could hardly be lost in translation. See *Preparatory Work on Article 1 of the European Convention of Human Rights*. Strasbourg, 31 March, 1977, p. 17.

even though Teitgen & Co. carried out impressive lobbying, the politicians and their senior legal advisors eventually started scrutinising these proposals and redrafting them according to national conceptions of human rights. In the course of the many meetings and negotiations, the “new” subject-area of European human rights was also becoming increasingly familiar to the various national delegations, which meant that they also increasingly started to assume their traditional roles as brokers of national interests. As this became the case, it became equally clear that some compromises were badly needed if the Convention was to be saved.

To make a long and complex story short, the outcome of the decisive meetings of the late summer of 1950 was that a series of optional clauses were introduced in the final text. The acceptance of the Court, individual petition and the application of the Convention in the colonies were all made optional. This was done in a last-ditch manoeuvre to satisfy what continued to be insurmountable differences of the not yet united Europe. As an effect, the great moral-politico framework of the “Free Europe”, which the project of the European Convention had first emerged as in the late 1940s, was at the end of the day turned into more of a “Convention à la carte”. Human rights, the inalienable rights of European men and women, were only being europeanised in as much as the contracting states allowed for it. Furthermore, as a result of this situation, the negotiation of the idea of European human rights was to continue well beyond the day of signature of the ECHR of 4 November, 1950: In 1952, the European Social Charter came to light and in the course of the following decades a series of other amendments, known as the protocols 2-5, also appeared.³⁶ The bottom-line was that the rise of a legal practice of European human rights was to take place in the context of a continuous political meddling with the idea of European human rights. Law and politics did not, in other words, go separate ways after the drafting, as is the custom, but remained mutually dependent variables in the manufacturing of postwar human rights. As suggested in the following, the institutionalisation and juridification of the Convention was to be considerably influenced by this logic of path dependence.

The Double Challenge of the Strasbourg Institutions

For the Convention to be effective, at least ten Member States had to ratify. Britain was the first State to ratify in March 1951, followed by Norway, Sweden and the Federal Republic of Germany in 1952. The Convention entered into force in 1953 after having received six more ratifications from smaller European countries. In light of the many compromises included in the final text, the

³⁶ On the contents of the protocols, see Merrills and Robertson (2001), op.cit. 15-17.

decisive point was then, in reality, whether the Member States would accept the two central optional clauses: the right to individual petition and the jurisdiction of the Court. For the procedure of individual petition to be effective, the Convention required six acceptances: Sweden was the first country to accept in 1952, and was followed by Ireland and Denmark a year later. In 1955, Iceland, the Federal Republic of Germany and Belgium also accepted the right and the procedure entered into force in respect to these six countries. However, accepting the compulsory jurisdiction of the Court was a more drawn out affair. In 1953, Ireland and Denmark were the first to accept the jurisdiction of the Court, trailed by the Netherlands in 1954. In 1955, Belgium and the Federal Republic of Germany also took the step and were followed in 1958 by Luxembourg, Austria and Iceland. Having then received the necessary eight acceptances, the Court was competent by September 1958, yet was only ready to sit in January 1959 after the election of the judges had taken place.

What is apparent from this overview of the countries first to accept the system is the striking absence of three out of the four major European powers. While Germany, for obvious reasons, was eager to be included, neither France, the United Kingdom nor Italy had at this point accepted either of the two key optional clauses. And this, regardless of the fact that British, French and Italian actors – on the government level as well as in the expert commissions – had been the most influential participants in the negotiations. Nevertheless, for some rather peculiar legal reasons, this did not completely sideline the big countries. According to the Convention, any country that was a Member State to the Council of Europe had the right to have a judge on the EHRC bench, whilst the ratification of the Convention was a condition for being represented at the Commission. This meant, for example, that France and Britain were represented at the Court – in fact they held the presidency in turn during the first decade – but only Britain had a Commissioner.³⁷ In 1966, Britain did eventually accept the jurisdiction of the Court and individual petition for a test-period. France, however, only ratified the Convention in 1974, with a safe distance to the War in Algeria, and accepted the right to individual petition when Mitterrand was elected president in 1981. What can be deduced is that the challenge facing the ECHR system in its early years of operation was double, concerning issues of both building legitimacy, vis-à-vis the contracting States, and providing justice to the many individuals who sought recourse before the Strasbourg institutions.³⁸ The absence of the major powers in respect to the most central

³⁷ France had however an observer in the Commission.

³⁸ Cf. Max Sørensen, “Les expériences personnelles de la Convention. L’expérience d’un membre de la Commission,” *Revue des droits de l’Homme* (1975): 329-342, 330.

mechanisms of the Convention was obviously a serious problem in both regards. The functionality and legitimacy of the system depended, at the end of the day, upon individual petition as well as the development of a reasonable jurisprudence in the eyes of the Member States.³⁹

It is in this regard important to note that the early human rights system in Strasbourg was very far from the professionalised and full-time human rights machinery of the post-Protocol 11 era, currently working out of a steel-and-glass palace on the banks of the river Ill.⁴⁰ In the 1950s and 1960s, the premises were cramped and the judges worked part-time, remunerated on a daily basis. In fact, they only met sporadically and, for a period during the 1960s they met about once a year and only because the rules required them to do so. The same was true of the Commission, although it played a more active role due to its task as a screening body for the applications received. A brief survey of the actual applications admitted to the two bodies reveals a picture of a set of institutions having, at best, a very slow start: In the 1950s, only five applications were admitted and only 54 throughout the 1960s. Of these, only a marginal number actually ended up as judgments. As concerns the Court, it only delivered ten judgments during its first ten years of operation in which only a handful found violations of the Convention.⁴¹ In explaining this situation, it is generally suggested in legal literature that the Commission – and not the Court – was the key player during the early period, and that this was due to the particularities of the ECHR screening procedures leaving the Commission to have a first say on the applications.⁴² This explanation of the early institutional dynamics, however, overlooks the fact that the omnipresence of the Commission was, in part, also the product of the institutional frictions of the dual-system of a Court and a Commission, as well as the political conditions surrounding these emerging institutions more generally.⁴³

³⁹ It should be underlined that of the first eight declarations of acceptance of the jurisdiction of the Court, seven were limited to a time-period and, thus, up for renewal. Austria, Denmark, the Federal Republic of Germany, Iceland and Luxembourg had specified this period to be three years – Belgium and the Netherlands initially accepted the jurisdiction for five years. See A. H. Robertson, “The European Court of Human Rights,” *The American Journal of Comparative Law* 9/1 (1960), 1-28, 18.

⁴⁰ Protocol 11 provided a substantial reform of the European human rights system in Strasbourg. Coming into force in 1998, a new and permanent Court was set up to deal with an ever increasing case-load.

⁴¹ Brice Dickson (ed.), *Human Rights and the European Convention* (London, 1997), 19.

⁴² *ibid.*

⁴³ Generally, as noted by a civil servant working for the ECHR system from its opening, the whole enterprise of European human rights was marked more by “human rights than human rights law” (interview, 20 November, 2002). According to the same source, the staff, the civil servants working at the institutions’ secretariat, saw themselves more as the ‘*avocats de la Convention*’ than a corps of professional bureaucrats (interview, 20 November, 2002).

It appears from interviews conducted for this research that the Commission, in fact, worked deliberately to carve out its role.⁴⁴ According to one of the first civil servants employed at the ECHR, the Commission did, in fact, “fermé le robinet”, that is, it cut off the flow of cases to the Court for some six years during the 1960s as a consequence of “une affaire d’amour propre” between the two organs: one in *robes* with the power to issue legally binding decisions and with well paid judges and, the other, in *civilian attire* theoretically only issuing decisions to be given effect by the Committee of Ministers.⁴⁵ According to the same source as a response the Court spent most of its time revisiting its Statute with the objective of enhancing its powers, by seeking for example to obtain consultative prejudicial competence. A number of judges even launched a critique of the Commission in professional journals.⁴⁶ Such an understanding of the institutional frictions might be somewhat exaggerated, but the basic point is supported by data on the actual flow of cases. After the Court had been called on in the two cases of *Lawless* and *De Becker* in the late 1950s, there was a period of five years between 1960 and 1965 where the Court did not receive a single case from the Commission.⁴⁷ The situation is captured in an unpublished essay by the Danish judge on the Court, Alf Ross, titled *The Unemployed Court*.⁴⁸

Considering the available empirical material, there is little doubt that the centrality of the Commission was much more the product of the Commission’s self-initiated strategy of enhancing its power vis-à-vis the Court, than simply the inevitably outcome of the provisions of the Convention. The Commission made the most of its in-born competences within the dual structure of the Convention, but it does not appear from the legal provisions that the driver for this positioning was intra-institutional frictions and ultimately concerned the Commission’s objective of developing its own jurisprudence before it eventually allowed for cases to go to the Court.⁴⁹ This analysis, however, only provides a partial answer as to what came out of this intra-institutional turf war in terms of human rights law. Surprisingly, a closer look at the first practices of the Commission strongly indicates that quantitatively the main task of the Commission was, in fact, to reject claims of human rights violations. It appears that the most significant contribution of the Commission’s early jurisprudence on European human rights concerned the notion of “manifestly ill-founded”

⁴⁴ See also particularly Sørensen (1975), op.cit. See also Sture Petré, “La saisine de la Cour européenne par la Commission européenne des droits de l’homme,” in *Mélanges offerts à Polys Modinos. Problèmes des droits de l’homme et de l’unification européenne* (Paris, 1968): 233- 244.

⁴⁵ Interview, 20 November, 2002.

⁴⁶ See also Sørensen (1975), op.cit. 330 in this respect.

⁴⁷ This has to be seen in light of the fact that the number of applications received was actually relatively high.

⁴⁸ Alf Ross, “En arbejdsløs domstol,” unpublished manuscript.

⁴⁹ This is also apparent when one reads the description of the early year of the Commission provided by its President, Max Sørensen. See Max Sørensen (1975), op.cit.

claims, that is, the development of a jurisprudence of what are *not* human rights violations under the ECHR. In plain language, the “coup” orchestrated by the Commission did not imply great breakthroughs as regards the protection of human rights in Europe but rather cemented the institution’s “first right to reject”, which consequently kept the Court at bay.

The Art of Diplomacy and the Need for Legitimacy

In order to more fully explain the early institutional dynamics of the ECHR, these intra-institutional skirmishes obviously have to be analysed in the context of the external constraints of these emerging institutions. Regardless of what is normally implied by the very term “institution” and certainly “institutional analysis”, it seems relevant to analyse the ECHR institutions as having been produced at the intersection of external and internal constraints. What, hereby, is suggested is not simply to raise the question of input and output legitimacy of these institutions,⁵⁰ but to analyse these dimensions as interdependent; that is, to analyse the correlation between the internal structures of these institutions and their positioning within a larger external structure, that of an emerging field of human rights.⁵¹ The applicability of such an approach in the context of emerging European legal institutions is already suggested by the relative clash between the Commission and Court. However, fully explaining the surprising development of a minimalist notion of European human rights under the auspices of the Commission requires a further examination of the specific diplomatic climate in which the rise of the European human rights system and jurisprudence took place. The minimalist notion of human rights did allow the Commission to control the flow of cases, yet the background to this institutional strategy can only partly be located in the internal constraints of the ECHR institutions. It was equally the product of the political-historical context.

As argued elsewhere, the Strasbourg institutions were, in fact, rather hesitant during the first 15 to 20 years of operation before initiating the dynamic jurisprudence which was to cement their position from the early 1980s as a quasi “European Supreme Court”.⁵² The reasons for this initial reluctance was mainly that the institutions were vulnerable in respect to the Member States and, therefore, had to continuously strike a fine balance between promoting European human rights and convincing the Member States of its relevance and reasonableness.⁵³ It is curious to note that the first major cases – the *Cyprus cases* (the Commission) and the *Lawless case* (the Court) –

⁵⁰ On this notion, see Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford, 1999).

⁵¹ Such a way of conceptualising institutions obviously draws on Pierre Bourdieu, “Le champ économique,” *Actes de la recherche en sciences sociales*, 119 (1997): 48-66.

⁵² Madsen (2004a), *op.cit.*

⁵³ Cf Sørensen (1975), *op.cit.*

indeed gave the Member States the impression that the ECHR system was not going to take an aggressive stance against the Member States in the area of human rights.⁵⁴ There is little doubt that this cautious course of action was due to the political climate of the late 1950s and early 1960s. During the period, Cold War inspired clashes in the area of human rights were at their peak,⁵⁵ and, more importantly, the battle over decolonisation was still unfinished, which placed European States in the eye of the hurricane of the broader geopolitical scheme of human rights. Moreover, as suggested above, a very central task of the ECHR institutions consisted, in fact, of seeking to convince the major European powers, which also happened to be geopolitically the most vulnerable in this respect, of accepting the optional clauses.

The case of the United Kingdom is exemplary in this regard. As noted, the UK only accepted the individual petition and the jurisdiction of the Court in 1966 against the backdrop of a very limited jurisprudence. However, the relevant actors had a “feeling” that these institutions had already developed a sound understanding of what could – and should – be implied by the notion of European human rights. The Foreign Office legal advisor in charge of reviewing the compatibility of English law in respect to the Convention before accepting the optional clauses recalls the situation in an interview:

We had to review our legal system in the light of whatever jurisprudence had developed, and it was very little at that time[...] [T]he jurisprudence of the Court had not been developed at all at that time. Two cases [had] come before the Court. Several thousands complaints have come before the Commission. But, the Commission had taken, I would say, a rather restrictive view on the interpretation of the Convention, not a liberal view, despite the fact the Convention is drafted in quite broad terms. But, the effect of this approach of the Commission was, in fact, to build up the confidence of Governments in the system [...] They didn't feel that the system was going mad and that, you know, any applications from any old chap that felt his rights had been violated would be successful before the Commission”.⁵⁶

As it appears from this quote, the predictions of what could be expected in Strasbourg played a significant role in convincing the Member States of gradually accepting the full ECHR package.⁵⁷ The self-constraining strategy of the Commission manifested in its jurisprudence on “manifestly ill-founded claims”, along with the few and restrained decisions of the Court, had in fact produced the image of a solid and politically reflexive institution, that is, an institution that was willing to listen to the arguments of the Member States and not (yet) pursue an idealist, even radical, human rights agenda.

⁵⁴ See Simpson (2004b), op.cit.

⁵⁵ See, for instance, Yves Dezalay and Bryant Garth, “From the Cold War to Kosovo: The Rise and Renewal of the Field of International Human Rights,” *Annual Review of Law and Social Science* (2006): 231-255.

⁵⁶ Interview, 25 April, 2001.

⁵⁷ For a detailed analysis of the political process of the UK acceptance of the optional clauses, see Lord Lester, “UK Acceptance of the Strasbourg Jurisdiction: What Really Went On in Whitehall in 1965,” *Public Law* (1998): 237-253.

Contributing equally to the image and institutional identity of the ECHR system, were the very persons appointed to the Commission and Court and their status in national legal fields. A brief look at the main professional characteristics of the first judges of the Court provides a picture of a set of actors who, for the majority, were legal academics. Of the first fifteen judges appointed to the Court, nine can be characterised as mainly academics, whereof most were specialised in international law.⁵⁸ It is, in this regard, also important to note that only a few had a background as national judges.⁵⁹ Indeed, contrary to the first judges of the European Court of Justice, who for the most part were appointed because of more specific specialisations in law, economics and the administration of justice,⁶⁰ the jurists of the EHRC were far more a homogenous group of elite legal academics.⁶¹ What is certain, this group of actors could provide, if not expertise on how to run a supranational court, then certainly legal legitimacy in respect to the national legal fields of the Member States in which they all held great prestige. Hence, despite acting out of a, by all means, uncertain institutional framework, they held a legal capital which was easily exchangeable to the different legal orders of the Member States.

It is, in this regard, also important to note that a number of the jurists appointed were also well-situated in respect to national political fields. Many of these jurists had been actively involved in foreign policy issues of a legal nature. For example, the second President of the Court, René Cassin, had a long semi-political career behind him where he had, among others, acted as legal counsel to Charles de Gaulle's Free France Government in London during the War, as well as been appointed to a series of key governmental committees and leading NGOs. Another central actor in this respect was the President of the Commission, the eminent Danish public international law professor, Max Sørensen, who had previously not only provided expert consultancy for the Danish Ministry of Foreign Affairs but also been an employee of the same institution. The ECHR experts' familiarity with the political environments had a double importance in respect to building the

⁵⁸ Kemal Fikret Arik was professor of private international law and Dean of the Faculty of Political Science at the University of Ankara; Frederik Mari Van Asbeck was professor of international law at the University of Leyden; Giorgio Balladore Pallieri was professor of public international law and Dean of the Law Faculty of the Università Cattolica del Sacro Cuore in Milan; Ake Ernst Vilhelm Holmback had been Rector of the University of Uppsala, and Georges Maridakis, Rector of the University of Athens; Hermann Mosler was professor of international law at the University of Heidelberg; Henri Rollin was professor of international law at the University of Brussels; the Danish legal philosopher and expert of public International Law, Alf Ross, was professor at the University of Copenhagen; the eminent expert of public international law, Alfred Verdross, was Dean of the Law Faculty of the University of Vienna.

⁵⁹ Einar Arnalds (Civil Court of Reykjavik), René Cassin (Vice-President of the French Conseil d'Etat but also a professor of law), Lord McNair (former President of the International Court of Justice, as well as professor of international law), Eugene Rodenbourg (President of the Court of Luxembourg) and Terje Wold (President of the Supreme Court of Norway).

⁶⁰ See, for example, Roberson (1960), *op.cit.* 13 note 40.

⁶¹ An examination of the first Commissioners provides a similar picture of a legal academic elite.

legitimacy of the institution. On the one hand, the legal experts were acquainted with foreign policy problems and milieus, and, on the other hand, the foreign policy milieus did see the Judges and Commissioners as, if not belonging to exactly same social circles, then being perceptive to diplomacy and issues of national sovereignty.⁶²

In the retrospective light, it might come across as practically self-evident that the external legitimisation of the ECHR system was paramount during the early years, and that this issue was partly overcome by the means of appointing a set of legal actors who had both a perfect command of international law and an understanding of its diplomatic dimension. It is, in this conjunction, important to emphasize that these emerging practices took place in what might best be described as a vacuum of legal knowledge on European human rights. For the same reason, the very few statements and decisions of the ECHR institutions were scrutinised by the assembled foreign ministries of the contracting States, and, perhaps more importantly, the individual actors representing the ECHR institutions were seen as embodying the ECHR institutions and, thus, were scrutinised as such.⁶³ It is an important yet generally overlooked element in the production of early European human rights that many of the great jurists of the Strasbourg institutions did very little, in fact, to prompt a broader systematisation and conceptualisation of the subject in their respective countries.⁶⁴ In the words of a former Danish judge at the European Court, then a young academic: “[Human rights] didn’t cause discussions or dissertations of any kind...Human rights became a word but not a concept, and no one was really interested”.⁶⁵ In more interpretive terms, European human rights – even in the view of many of the jurists developing the ECHR institutions – was at the time not yet “real law”⁶⁶ and, thus, not to be treated with the usual caution and discipline which serious legal science demands. As implied by this analysis, this new European law is perhaps better described as a particular tool of the complex diplomacy of transforming a Europe of opposing empires into an integrated legal space. As history suggests, it did not remain so. However, during

⁶² An in-depth analysis of the jurists appointed by the UK, almost suggest that the strategy was to expatriate a cell of the Foreign Office to Strasbourg in order to have an impact on the legal and institutional developments. See further in Madsen (2005), op.cit.

⁶³ See, for example, the Foreign Office’s evaluation of the Commission mission to Cyprus in the late 1950s. Simpson (2004b), op.cit., 941.

⁶⁴ Only very few universities offered programmes in the 1960s which tackled directly or indirectly the subject of European human rights. Strasbourg was one of the exceptions in this regard. This was due to both the efforts of the Schuman University and the human rights research institute created by René Cassin after having received the Nobel Peace Prize in 1969.

⁶⁵ Interview, 27 April, 1999.

⁶⁶ Generally on the international and European level, human rights was originally considered as a new sub-discipline of international relations to be treated by public international law – the law between nations – and thus placed in the hands of diplomats backed up by the *jugements* of law professors of public international law, albeit these professors’ actual investments in human rights in terms of legal science were only sporadic.

the first two decades of the life of European human rights law, this new legal knowledge and savoir-faire was, at the end of the day, a very advanced form of diplomacy: a legal diplomacy.

Such an understanding obviously draws on Max Weber's notion of legal rationality and associated forms of domination. The Weberian concepts also provide a tool for understanding the role of a set of key individuals in the making of early European human rights law. While there is little doubt that much of their credibility was due to their symbolic power as a sort of "honoraires of law", more important perhaps is the question of what kind of law and legal rationality was being generated by this "legal nobility". Was it – following the scheme of Max Weber – "formal irrational", "substantively irrational", "formally rational" or "substantively rational"?⁶⁷ This study generally suggests that the answer is somewhere in between "formally rational" and "substantively rational" law, leaning towards the former rather than the latter. This interpretation is partly based upon the fact that the general *corpus juris* on European (and international) human rights was practically non-existent at the time and, thus, could not serve as a source of legal certainty. As well, the ECHR institutions' initial mode of production clearly favoured a case-by-case approach which allowed for balancing national interests and general objectives of human rights.⁶⁸ Their initial operations suggest a very subtle balancing act between pursuing the law of human rights and convincing the Member States of both the importance and reasonableness of their practices. The few cases that made it to the European Commission of Human Rights – and the even fewer that went to the Court – were for the same reasons of crucial importance in respect to building these institutions. As A. W. Brian Simpson has dryly noted, the ones on trial during the early period were, in fact, not the Member States but the Court and the Commission.⁶⁹ It was not until this initial "trial period" was over, beginning in the mid-1970s, that these institutions could substantially rationalise the law of European human rights; that is, they could neutralise and even reduce the underlying political compromises which had predetermined both the institutional framework and the normative contents of European human rights.

Conclusion

⁶⁷ For further introduction to these notions, see, for example, Anthony T. Kronman, *Max Weber* (Stanford, 1983).

⁶⁸ Although the famous margin of appreciation doctrine is commonly thought to have been first elaborated in the decision *Handyside vs. UK* (UK), a closer look at the two founding cases of *Cyprus* and *Lawless* clearly suggests that this key balancing principle was already being put into play in the late 1950s. See further in Michael R. Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights," *The International and Comparative Law Quarterly*, 48/3 (1999): 638-650.

⁶⁹ Simpson (2004b), op.cit.

The history of the postwar European human rights regime stands out from the other international and regional human rights systems developed during the same period. This should, however, not overshadow the fact that European and international human rights are deeply enmeshed in the same 20th century history. The European Convention continued a legal-politico project already commenced by the UN of impeding large-scale conflict and the rise of militant ideologies by developing international law. The European version of this postwar strategy of international law-making, however, almost immediately gained a set of different drivers and characteristics. Although both European and UN human rights were drafted against the background of the atrocities of WWII, the main driving force behind the European regime became the fear of Soviet imperialism into Western Europe. Almost from the outset, this Cold War dimension created a political unity among the negotiating states, which gave the whole undertaking of institutionalizing and developing human rights law a decisive sense of urgency and necessity. The European human rights project, thereby, came to differ significantly from the UN Human Rights regime. If the UN Human Rights Commission was to be paralyzed by Cold War inspired confrontations, the European human rights regime was fuelled by Cold War enthused sentiments. This starting-point only later and gradually transformed towards an idea of European human rights as a dynamic area of law. As well, the idea of European human rights as the underpinning politico-moral framework of European integration, which originally had been evoked as part of Cold War strategy of the late 1940s, has only recently been achieved with the post-Cold War transformations of Europe.⁷⁰

When seen in respect to the broader history of postwar international human rights, the case of European human rights both confirms some general trends and supplies a number of important nuances. It, first and foremost, confirms the paramount importance of Cold War politics on the development of human rights. Focusing on the European case provides, however, a much needed correction to the widespread assumption that the development of human rights was brought to a standstill by the Cold War. This analysis argues in contrast that the Cold War was highly decisive to the evolution of European human rights. In fact, the early politics of European human rights necessarily have to be understood in the light of what has been termed the *Cultural Cold War*; that is, European human rights was not only part of the ideological contest of the period, it was also part of its cultural battle. The struggle for European human rights, in other words, constitutes a highly central but much overlooked component of the Cold War at large. This chapter also confirms the importance of decolonisation on the development of human rights. In this analysis decolonisation

⁷⁰ Perhaps most strikingly with the EU's Charter of Fundamental Rights.

has not been explicitly emphasised, but it nevertheless appears as the main explanation of the reluctance of France and the United Kingdom. For these two imperial societies, it was vital to maintain that the postwar universalisation of human rights was not in contradiction to colonial politics. Whereas this was more or less achieved on the UN-level, European human rights posed a much more serious threat to imperial sovereignty. It has been argued that the European Convention played a direct role in the closing act of the British Empire.⁷¹ Following the analysis suggested here, it is more plausible to argue that for European human rights to develop beyond the initial legal diplomacy analysed in this article, it had to await the end of European empire.⁷² More precisely, it was only with the fading of colonial conflicts that the European human rights institutions were in a situation where they had the liberty to sharpen the legal tools of the Convention without substantial protest from the larger Member States.

This is further linked to a general claim in the literature that the 1970s saw the real breakthrough of international human rights. As concerns European human rights, many of the central legal notions – “living instrument”, “practical and effective”, etc. – did emerge towards the end of the 1970s. However, European human rights did not simply join the bandwagon of human rights activism of the 1970s and 1980s. The metamorphosis of European human rights during the period was, above all, made possible because of the crucial processes of legitimisation of the previous period. This also explains why European human rights law could develop as rapidly and substantially as it did throughout the 1980s compared to other human rights regimes. For the same reason, most analysis of the European human rights regime understands current European human rights as marked by progressive law, not legal diplomacy. A deeper look at the contemporary practice of perhaps the most central legal principles of the early period, the notion of the (national) “margin of appreciation”, however, reveals a more complex picture. The success of European human rights, it appears, remains dependent on the Strasbourg institution’s ability to strike a balance between the national and the European. In the early period, this diplomacy concerned balancing European law and national politics, while today it concerns balancing national and European law. Nevertheless, it is a crucial act of diplomacy performed by jurists.

⁷¹ Simpson (2004b), *op.cit.*

⁷² See Madsen (2007), *op.cit.*