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Comments welcome !

The Battle for International Law in the Decolonization Era

(De)colonizing Human Rights

Florian Hoffmann & Bethania Assy

I. A Battle of Narratives: Stories of Human Rights and Decolonization

The story of human rights in the decolonization era is a story about a story about a story. It starts with a story about the crucial role the (then) incipient discourse of human rights is deemed to have played in and for the decolonization process. Its crucial plot elements feature the reception of the Universal Declaration of Human Rights (UDHR) by the still colonized militants of decolonization, and their subsequent adoption of the language of human rights to articulate their core demands of self-government, self-determination, and racial equality; and an ultimately successful march through the institutions –in particular of the UN-, where rights-based arguments put the colonizing powers against a wall of adverse international public opinion and which led, first, to their withdrawal, and then to the gradual formation of the newly independent states into the 'Third World';¹ it also recounts defining events -such as the Bandung and Teheran conferences-, movements -such as the Non-Aligned Movement and the Pan-African Movement-, and concepts -such as the right to non-discrimination or the right to development-, in order to show the positive and potentially crucial impact human rights have had on the decolonization process and decolonization has had on the incipient international human rights system. It is the most familiar and, to an extent, still predominant story of human rights and decolonization, widely referenced in human rights text books and in UN documents,

¹ See for instance, R Burke, *Decolonization and the Evolution of International Human Rights* (University of Pennsylvania Press Philadelphia 2011); S Jensen, *The Making of International Human Rights: The 1960s, Decolonization and the Reconstruction of Global Values* (2016); F Klose, *Human Rights in the Shadow of Colonial Violence. The Wars of Independence in Kenya and Algeria* (University of Pennsylvania Press Philadelphia 2013); JS Martinez, *The Slave Trade and the Origins of International Human Rights Law* (Oxford University Press Oxford 2011); DR Maul, *Human Rights, Development and Decolonization* (International Labour Office 2012); M Terretta, "'We Had Been Fooled into Thinking That the UN Watches over the Entire World": Human Rights, UN Trust Territories, and Africa's Decolonization' (2012) 34 *Human Rights Quarterly* 329-360; see also, generally, P Alston, 'Does the Past Matter? On the Origins of Human Rights' (2013) 126 *Harvard Law Review* 2043-2079.

and, thus, a crucial plotline of the (post-1990) grand narrative about the ascendancy of human rights ‘as a fact of the world’.²

Yet, this story has itself of late become the object of storytelling in the wake of a revisionist turn in the historiography of human rights. This second story seeks to deconstruct the earlier one by recounting it as an exercise in anachronistic mythmaking that obscures the ‘real’ role, or rather, lack thereof, human rights allegedly had in the decolonization process. In this re-telling, human rights have played an at once less important and more ambivalent role for decolonization, with the outer layer cliché plot being portrayed as no more than the anachronistic back-projection of contemporary views held by the self-professed human rights movement.³ It pits that projection against a historically reconstructed ‘reality’ in which the use of human rights by the decolonization activists and later governors of newly independent states in Africa and Asia is shown to have been deeply strategic, with rights language frequently serving merely as a cipher or indeed, an empty signifier to articulate much broader political demands. It also purports to show how the (former) colonial powers were either unreceptive to rights-based critique or quickly learned to direct it back to their former colonies as a way of political ‘monitoring’. This story, then, is a classical demythologization exercise in which a re-reading of the historical record is used to play out a newly revealed ‘reality’ against an old myth.⁴ As such, it remains deeply connected to the plotline of the story it seeks to undo.

One way to work through this deadlock is to transpose the two stories into yet another battle story, namely one over the semantics of (human) rights in the historical colonial encounter. For it is in that encounter that the concept of (natural) rights begins to be articulated by Iberian counterreformation scholastics in and around the ‘School of Salamanca’ as a central topos in the emerging doctrine of a universal(ized) *ius gentium*. It was the experience of radical alterity and the challenge it posed to a European narrative already in flux on account of endogenous developments, most notably the reformation, that provoked this intellectual move. The formula that human rights necessarily derived from the concept of an international society constituted by law can be seen as both a response to the contemporary European -and particularly Iberian- predicament as well as an attempt to grapple with Ameríndian civilizations that seemed, to

² E Rabossi, ‘La Teoria de los Derechos Humanos Naturalizada’ (1990) 5 *Revista del Centro de Estudios Constitucionales* 159-177; see also F Hoffmann ‘Shooting in the Dark: reflections towards a pragmatic theory of human rights (activism)’ (2006) 41 *Texas International Law Journal* 403-414.

³ See, for instance S Moyn, *The Last Utopia* (Harvard University Press Cambridge 2010); S Moyn, ‘The Embarrassment of Human Rights’ (2015) *Texas Journal of International Law* 1-7; J Eckel, ‘Human Rights and Decolonization: New Perspectives and Open Questions’ (2010) 1 *Humanity* 111-135; as well as J Eckel *Die Ambivalenz des Guten: Menschenrechte in der Internationalen Politik seit den 1940ern* (Vandenhoeck & Ruprecht Göttingen 2015); and essays in SL Hoffmann (ed), *Human Rights in the Twentieth Century* (Cambridge University Press Cambridge 2011); although the revisionist literature of decolonization does not squarely map onto the post- and decolonial approaches in the ambit of the Third World Approaches to International Law (TWAAIL), the latter has, in the present context, nonetheless to be considered as both a precursor and companion to the former; see, hence, and now classically, A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press Cambridge 2007); as well as, inter alia, B Rajagopal, *International Law From Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003); J Gathii, ‘International Law and Eurocentricity’ (1998) 9 *European Journal of International Law* 184-211; L Eslava and S Pahuja, ‘Beyond the (Post) Colonial: TWAAIL and the Everyday Life of International Law’ (2012) 45 *Journal of Law and Politics in Africa, Asia and Latin America-Verfassung und Recht in Übersee* (VRÜ) 195-221; L Eslava, *Global Space, Local Life* (Cambridge University Press Cambridge 2015); and the contributions in A Anghie, B Chimni, K Mickelson and O Okafor (eds.), *The Third World and International Order: Law, Politics, and Globalization* (Leiden Martinus Nijhoff 2003).

⁴ See, for a take on this form of ideology critique S Marks, ‘Big Brother Is Bleeping Us—With the Message That Ideology Doesn’t Matter’ (2001) 12 *European Journal of International Law* 109–123; for the classic (Frankfurtian) account, see M Horkheimer and TW Adorno, *The Dialectic of Enlightenment* (G Schmid Noerr ed and E Jephcott trans) (Stanford University Press Stanford 2002).

contemporary Europeans, at once highly sophisticated and entirely alien. While the colonization and decolonization periods are far removed in terms of historical context, the latter, arguably, shares with the former the conceptual challenge of making sense of something new while remaining within an existing, if now inverted, cognitive horizon. In this sense, the particular responses found to this challenge in colonizing Europe can throw some additional light on the responses sought by a decolonizing Third World. Such a detour might, in any case, be necessary to move beyond the deadlocked historiographical debate, even if this, in turn, involves engaging in yet another battle, namely over the semantics of the intellectual reaction to colonialism in fifteenth century Europe.

II. A Battle of Historiographies: The Grand Narrative and the Revisionist Challenge

The battle in historiography over the role human rights have played in the decolonization process is closely related to the broader discussion that has unfolded over the past decade or so on the way the history of human rights ought to be constructed. The latter has involved debates over the origins and periodization of human rights which have followed the usual dramaturgy of an established orthodoxy being challenged by a revisionist counter-narrative.⁵ On the face of it, this has been a contest over historical facts, that is, over the particular moments on a linear timeline at which the concept of human rights can be said to have emerged and over how the concept is then thought to have evolved on that timeline. On a deeper level, however, this *querelle* is about the semantic unity of the concept of human rights and about whether what is referred to as human rights on different points of the timeline can, or cannot, be plausibly connected to form a continuum and, thus, a progress narrative. It is, in other words, about the meta-historiography of human rights, that is, about the factors that are taken to shape human rights as an idea across time. Is it synchronic context or diachronic reception that produces ideas such as human rights? Are ideas articulations of fundamental propositions, timeless *philosophemes* that occur in different guises throughout concrete history, or are they, instead, *epistemes* that emerge from the material and linguistic conditions of their societal context,⁶ or instantiations of the intentions of their articulators who think within specific discursive practices,⁷ or a combination of these? And how are ideas transmitted across time, how is the relationship between author and reader, removed in time and by hermeneutic horizon, conceived?⁸

Unfortunately, even the most recent battles over human rights historiography have largely avoided this level of (self-)reflection and have tended to style themselves as mere debates over the correct reading of historical fact, rather than assuming what they really are, notably an exchange over incommensurate meta-theoretical positions on the history of the idea of human rights. The spectrum of this exchange has been demarcated by, on one side, an orthodoxy that has assumed both the semantic continuity of (the idea of) human rights over time as well as

⁵ DO Pendas, 'Toward a New Politics? On the Recent Historiography of Human Rights' (2012) 21 *Contemporary European History* 95-111 at 96; see also C McCrudden, 'Human Rights Histories' (2014) *Oxford Journal of Legal Studies* 1-42.

⁶ See, for instance, D Kelley, 'What is Happening to the History of Ideas?' (1990) 51 *Journal of the History of Ideas* 3-25 at 7; and L Krieger, *Times Reasons: philosophies of history old and new* (University of Chicago Press Chicago 1989); as well as R Kosellek, *Vergangene Zukunft: zur Semantik geschichtlicher Zeiten*, (Suhrkamp Frankfurt 1979 at 130.

⁷ See, in particular Q Skinner, 'Meaning and Understanding in the History of Ideas' (1969) 8 *History and Theory* 3-53 at 35.

⁸ See M Richter, 'Reconstructing the History of Political Languages: Pocock, Skinner, and the Geschichtliche Grundbegriffe' (1990) 29 *History and Theory* 38-70; and HG Gadamer *Truth and Method* (2nd ed) (Bloomsbury London 2004).

general progress in their realization; and, on the other side, a revisionist critique which has denied both semantic unity and linear progress.⁹ On the extreme, ‘ultra-orthodox’ points of (orthodox) historiography are the ‘linear progress narratives’ that attribute cross-temporal (and cross-cultural) self-evidence to the idea of human rights and adopt a teleological account of history as a gradual progression towards their ever greater realization. In their most sweeping versions, these histories locate the origins of human rights in a distant and mystified antiquity and then interpret a set of highly stylized historical moments, often beginning with *Magna Carta*, and going on to the English Bill of Rights in the seventeenth century, the French and American Revolutions in the eighteenth century, the Abolitionist, the Suffragette, and the early humanitarian (law) movements in the nineteenth century, the minority rights regime and mandate (petition) systems within the League of Nations context and the subsequent foundation of the UN as well as the drafting of the Universal Declaration of Human Rights in the early, then the decolonization struggle, the civil rights movement and the emergence of international human rights advocacy in the later twentieth century, and up to the World Conference on Human Rights and the (seeming) triumph of human rights in the 1990s.¹⁰

A less sweeping variant of the orthodox position is made up of what Philip Alston has termed ‘precise-timeframe theories’ which tend to focus on any of the above foundational moments in order to explain the origins and subsequent evolution of human rights.¹¹ These approaches attempt to shed the anachronistic back-projection of the contemporary understanding of human rights by the ultra-orthodox narratives and, instead, seek to construct plausible historical trajectories from their chosen origin point. Yet, as the revisionists would point out, these approaches still remain wedded to a progress narrative and are therefore prone to eclecticism and overinterpretation so as to preserve semantic continuity and a coherent narrative. Indeed, if the ‘linear progress narratives’ can be described as what Devin Pendas has called a Hegelian historiography focused on the gradual realization, in history, of a universal idea of human rights, the ‘precise timeframe’ approach still adopts a Whig history narrative by which historical evolution is necessarily bound up with progress.¹²

It is, essentially, as a reaction to this presumption of continuity and coherence as well as to Hegelian and Whig residues in history-writing that a strongly revisionist historiography of human rights has positioned itself as a polar opposite to the orthodox narrative. In the words of its grand-apostle, Samuel Moyn, this anti-anachronistic ‘new revisionism’ sees as ‘the most troubling shortcoming of the contemporary attempt to give human rights a history [...the distortion of] the past to suit the present.’¹³ As an antidote, the revisionists have contested the semantic unity of what has been called human rights and have preached a ‘discontinuist’ reading of the various events around which the human rights narrative has been constructed.¹⁴ While these histories have tended to present themselves as more accurate and ‘realist’ interpretations of the facts, their main argument actually rests on a fundamentally different historiographical

⁹ ‘Does the Past Matter’ (n 1) 2063.

¹⁰ See, for instance, M Ishay, *The History of Human Rights* (University of California Press Berkeley 2008); and PG Lauren, *The Evolution of International Human Rights* (Pennsylvania University Press Philadelphia 2003).

¹¹ See MJ Lacey and K Haakonsen (eds.), *A Culture of Rights: The Bill of Rights in Philosophy, Politics and Law* (Cambridge University Press Cambridge 1991); MA Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House New York 2002); J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press Philadelphia 1999); A Prost and J Winter, *René Cassin and Human Rights: From the Great War to the Universal Declaration* (Cambridge University Press Cambridge 2013); and L Hunt, *Inventing Human Rights* (Norton New York 2008).

¹² ‘Toward a New Politics?’ (n 5) 95; see also J Zaremby, ‘On the Uses and Disadvantages of History for Human Rights Law: Reading Samuel Moyn’s *The Last Utopia: Human Rights in History*’ (2012) 15 *Yale Human Rights and Development Law Journal* 155-177.

¹³ S Moyn, *Human Rights and the Uses of History* (Verso New York 2014) at 13.

¹⁴ *Last Utopia* (n 3) 20.

approach; where orthodox historiography seeks to inductively (re)construct causal connections between different event contexts (aka periods) in order to establish the cross-temporal meaning of human rights, the revisionist approach starts from a particular premise about that meaning and then proceeds to find its articulation in a specific event context. In other -and somewhat cruder- words the former approach seeks to establish meaning from presumed facts, the latter the facts from presumed meaning. Yet, it is these presumptions that represent the open flank of either approach. If the orthodoxy's quest for cross temporal meaning carries the inherent risk of overinterpretation and anachronism, then the revisionists are bound to base the plausibility of their narrower definition on diffuse trends in general intellectual history.

Moyn is a case in point: for him, human rights have to be understood (only) as expressions of an anti-sovereignist cosmopolitan utopia that springs from the liberal internationalist tradition and has come to replace socialism as the primary ideal of emancipatory politics. This rather particular understanding of human rights is born, according to Moyn, in the 1970s and that period is, therefore, the (only) correct historical period in which to locate the origins of the contemporary understanding of human rights and from which to construct their subsequent reception history up to the present day.¹⁵ In line with revisionist historiography, human rights are, thus, instantiations of a broader movement in global intellectual history which, in turn, is driven by competing utopias that are deemed to be expressed through 'basic concepts.'¹⁶ What was denoted by the term 'rights' in previous periods carries, according to Moyn, the opposite connotation, notably of appeals to the protection afforded by sovereign statehood and, by implication, to the ideal of sovereign statehood itself. Despite their linguistic similitude, domestic and international (human) rights are, thus, entirely different ideas and spring not only from different but, in fact, conflicting utopias. As a consequence, to forcefully read a unified idea of human rights into what to Moyn are disparate historical episodes is not just anachronistic but misses the point of what human rights really are about.

To hammer in his point, Moyn has particularly focussed on debunking the event clusters that orthodox histories tend to highlight as crucial stepping stones in the evolution of the idea of human rights, starting with the founding of the UN and the drafting of the UDHR, as well as and crucially for this reflection, the role played by human rights during the decolonization process. Indeed, the latter context is especially important to Moyn's narrative, as it allows him to contrast the (later) internationalist concept of human rights with the (earlier) mere strategic use of rights language to articulate claims for self-determination, co-equal development, and anti-(racial)-discrimination. Hence, to Moyn, not only is the idea that the international community more or less endorsed human rights at the end of World-War II historically implausible, but so is the contention that human rights were one of the driving forces of international legal discourse as of that period.¹⁷ To him, the very term human rights only slipped into the Charter as a gesture to a liberal (Anglo-American) public and was never intended to qualify the predominantly realist outlook on the incipient post-War world.¹⁸ While shock over the Holocaust and a brief social-democratic consensus enabled the drafting of the UDHR in 1948, this did not mark the universalization of those rights previously linked to national citizenship and, therefore, to state sovereignty, but was, rather, a toothless diversion that ultimately only reaffirmed the precedence of the latter over an internationalism oriented towards human dignity.¹⁹ Nor did, by this account, even most liberal international lawyers initially buy the idea of human rights as legal norms binding sovereign states - influential minority voices

¹⁵ Ibid 210.

¹⁶ *Uses of History* (n 13).

¹⁷ *Last Utopia* (n 3) 44 and 176.

¹⁸ Ibid 47.

¹⁹ Ibid 176.

arguing just that, such as Hersh Lauterbach's, notwithstanding.²⁰ The early Cold War quarrels over the drafting of the Covenants and the consequent tardiness of their adoption (1966) and entry into force (1976) is taken as further evidence of the lack of commitment by the international community to take rights seriously.²¹

Nor is the decolonization process that spans, roughly, the late 1950s and the 1960s a human rights game changer in Moyn's book. If others have seen decolonization not only as an important event cluster of its own, but also as one of the main drivers behind the global phenomenon that the '1960s' would become -and which, in turn, produced the 'conditions of possibility' for those '1970s' Moyn is concerned about-,²² it is not so in his historiography of human rights. For anticolonialism, as he terms the ideological framework of decolonization, as well as the reactions against it, are here interpreted to have used the language of human rights not only 'merely' strategically but also in a mindset that starkly differs from the internationalism he identifies with (post-70) human rights. In essence, the anticolonial quest for self-determination, that is, for co-equal state sovereignty, is here first strategically framed as both a right in and of itself and as a movement for the realization of (human) rights in the context of (colonial) racial discrimination.²³ If, to Moyn, the UDHR was at most a reference to the 'rights of man' enjoyed under the auspices of national citizenship, at worst the mere attempt by (European) Christian-democratic conservatives to (re-)appropriate rights-language to counter the socialist/communist utopia, it provided only the stage props for the great decolonization play that was to unfold shortly thereafter.²⁴ Human rights only properly entered the anticolonial frame afterwards, and then only in at once haphazard and paradoxical ways, for, as Moyn seeks to show, outside of the *sui generis* claim for a 'right to self-determination', general rights language played not only a merely ancillary role in anticolonial discourse but was also parallelly used by opponents of decolonization to diffuse claims for self-determination.²⁵ If anything, human rights gained some anticolonial currency on account of the disappearance of a concrete commitment to self-determination, originally enshrined, as it was, in the Atlantic Charter, in the later Dumbarton Oaks documents and the UDHR itself, which led some anticolonial activists to invest into the post-UDHR debates around the drafting of the Covenants.²⁶ Yet, Moyn insists that insofar as both the anti- and the pro-colonial use of human rights in this period was ineluctably bound up with advocacy for or opposition against self-determination, the vision behind that use was fundamentally different from the internationalist vision that emerged in the late 70s.

The 1955 Bandung conference, all-important for the formation of an (anticolonial) Third World consciousness, is taken as a case in point: it at once endorsed the UDHR, yet surrounded it with co-equal commitments to national sovereignty and non-interference; and whereas the latter represented a broad consensus at the conference, the former only emerged after considerable debate, not least on account of the evident lack of (postcolonial) universality of the (still colonial) UDHR.²⁷ Likewise, Moyn largely dismisses two further developments in the decolonization context that have often been held up as (pre-70s) stepping stones towards the contemporary (internationalist) understanding of human rights. One concerns the use of human rights in ad hoc petitioning both to the Trusteeship Council and to the Commission on Human Rights, the other the widespread introduction of bills of rights in post-independence

²⁰ See Hersh Lauterpacht, *International Law and Human Rights* (Praeger Westport 1950).

²¹ *Last Utopia* (n 3) 176.

²² See F Jameson, 'Periodizing the 60s' (1984) 9 *Social Text* 178- 209.

²³ *Last Utopia* (n 3) 84.

²⁴ *Ibid* 44; and 'Towards a New Politics' (n 5) 44.

²⁵ *Last Utopia* (n 3) 118.

²⁶ *Ibid* 100.

²⁷ *Ibid* 94; and *Decolonization* (n 1) 13.

constitutions. As to the former, Moyn acknowledges the importance of rights-oriented petitioning for the way the trusteeship system evolved in the wake of decolonization, but claims that this did not establish an independent standing for the rhetoric of human rights apart from or on top of claims for self-determination.²⁸ Ultimately, the redemptive horizon at this stage remained independence and human rights mere instruments thereto. Likewise, the widespread adoption of constitutional bills of rights in newly independent states is seen by Moyn as more of a gesture to the (status) symbols of the aspired Westphalian statehood than as earnest expressions of interest to subordinate the incipient nation-building projects to individual rights claims.²⁹ Indeed, it were actually some of the former colonial powers that, after initial scepticism, came to see bills of rights as a way both to protect (White) minority interests and to ‘condition’ the new governments in their conduct, not least through the incipient UN (human rights) machinery.³⁰ Lastly, Moyn points to the persistent ambivalence within the anticolonial movement as to the means of revolution, notably violence or non-violence. While even voices arguing for armed resistance would occasionally frame their vision in terms of the unfulfilled promise of human rights, the inherent contradiction this implied effectively side-lined the moral force of such arguments. And even those favouring non-violent means rarely used human rights as expressions of their utopia.³¹ It is, hence, according to Moyn, only once Western imperialism is transformed from direct colonial rule to indirect forms of (economic) control, and once, therefore, conditions within the new Third World move into focus, that human rights start to take off – conditions that begin to be met only in the 1970s.³²

Moyn’s revisionist narrative is, of course, just one among a host of attempts in recent years to draw a historically more precise picture of human rights and to, on that basis, either re-affirm or reject the classical story of conceptual continuity. The decolonization process tends to feature prominently in this *querelle* as it is seen, not least by Moyn himself, as a test case for the ideology critique of human rights – for if it can be shown that the actual reference to human rights by many actors across the spectrum during that period were but superstructural reverberations of different causal bases, such as, in Moyn’s case, the quest for self-determination within a sovereigntist ideological framework, then a strong point can be made that this might be so with regard to other periods and uses of human rights as well. Whether this revisionist line can be taken or not depends, then, on differentiated readings around three areas of inquiry, usefully identified by Jan Eckel, a fellow revisionist traveller of Moyn, as, firstly, the question over the significance of human rights language for and within anticolonial movements, secondly, the question of the use of human rights by newly independent states in a UN context, and thirdly, the question of how the (former) colonial powers employed human rights language during the decolonization period.³³ On each of these questions, the recent literature divides into a continuist/anti-revisionist and a discontinuist/revisionist camp, both premised on a critique of the earlier continuous progress narratives but each applying a different historiographical gaze to draw opposite conclusions. The continuists generally argue that human rights are neither semantically closed nor their evolution mono-causal. They tend to see all uses of the language as pieces of a continually growing human rights jigsaw that evolves in a non-linear yet interconnected way, and they, thus, concentrate on filling in blank spaces with what they deem to be forgotten or underappreciated pieces. Recent works in this vein include, inter alia, Roland Burke’s *Decolonization and the Evolution of International Human Rights*

²⁸ *Last Utopia* (n 3) 109; and ‘We Had Been Fooled’ (n 1).

²⁹ *Last Utopia* (n 3) 111.

³⁰ *Ibid* 114.

³¹ *Ibid* 115.

³² *Ibid* 117.

³³ ‘Human Rights and Decolonization’ (n 3) 113.

(2011),³⁴ Meredith Terretta's 'We Had Been Fooled into Thinking that the UN Watches over the Entire World': Human Rights, UN Trust Territories, and Africa's Decolonization' (2012),³⁵ Fabian Klose's *Human Rights in the Shadow of Colonial Violence* (2013),³⁶ or Steven Jensen's *The Making of International Human Rights – The 1960s, Decolonization and the Reconstruction of Global Values* (2016).³⁷ For the most part, these pieces build their case on the basis of (re-)readings of specific episodes, such as Terretta on the role of anticolonial activists both in the Third World itself -here the British and French Cameroons- and in the West in relation to the UN's Trusteeship system, Klose on colonial power conduct during the colonial wars in Kenya and Algeria, Jensen on the role two specific Third World states, Jamaica and Liberia, played in the construction of the UN human rights system, as well as on the role the issue areas of race and religion played in this context. Burke, by contrast, takes a longer-term view and focusses on what he sees as four moments that symbolize the trajectory of human rights in relation to decolonization, notably the Bandung conference in the 1955, the 'turn to self-determination' in the early 60s, followed by the descent to hypocrisy in the First World Conference on Human Rights in 1968, and, finally, the emergence of the cultural relativist critique of human rights from with the Third World itself in the 1980s. He stresses, amongst others, the initial importance that the presumed universality of the international protection of human rights had for newly independent states, though he also highlights that much of the Third World's early support for international petitioning came from autocratic regimes.³⁸ Although partly critical of each other for overlooking either of Eckel's three dimensions, these contemporary continuist readings share the conviction that repeated resort to the language of human rights during the decolonization period was not merely coincidental and strategic either on part of anticolonial activists in the Third World and the West, or on part of new Third World governments acting within the UN machinery, or even on part of the (former) colonial powers. And there is also an, albeit subtle, consensus among authors in this line that the term human rights, for all its semantic diversity -or, as the revisionists would have it, inconsistency-, forms a bracket around the period between the 1940s and the 1970s that cannot be argued away.

This has, of course, been the contention of the discontinuist/revisionist fold in Moyn's wake. With regard to decolonization it preceded Moyn's account, inter alia, with Brian Simpson's seminal *Human Rights and the End of Empire* (2001)³⁹ and Mark Mazover's *No enchanted palace: the end of empire and the ideological origins of the United Nations* (2009)⁴⁰ both of which seek to relativize the anti-revisionist argument about the crucial and positive role played by the UN in the formation of the international human rights regime of today. Following closely in Moyn's trail are then Jan Eckel's *Die Ambivalenz des Guten: Menschenrechte in der Internationalen Politik seit den 1940ern* (2014)⁴¹ which represents, perhaps, the most thorough revisionist reading of the same period covered by Burke. While he actually agrees with much of Burke's and Klose's work, Eckel draws different conclusions from the picture that emerges, notably that despite the seemingly ubiquitous reference to human rights in all three of his issue areas, it were 'anticolonialism, anti-neocolonialism, anti-imperialism, anti-racism, anti-discrimination, and anti-apartheid [that remained] the foremost catchwords' of the anticolonial imagination, and not human rights.⁴² Indeed, he goes as far as calling that imagination an

³⁴ See *Decolonization* (n 1).

³⁵ See 'We Had Been Fooled' (n 1).

³⁶ See 'Human Rights in the Shadow' (n 1).

³⁷ *Making of International Human Rights* (n 1).

³⁸ *Decolonization* (n 1) 91.

³⁹ B Simpson, *Human Rights and the End of Empire* (Oxford University Press Oxford 2004).

⁴⁰ Mark Mazover, *No enchanted palace: the end of empire and the ideological origins of the United Nations* (Princeton University Press Princeton 2009).

⁴¹ *Ambivalenz* (n 1).

⁴² *Human Rights and Decolonization* (n 3) 115.

'ideology *ex negativo*' that was driven, on both sides of the colonial divide, by stylized antagonisms for which human rights became modes of articulation rather than expressions of a positive and concrete vision.⁴³ Other longer-*duré* analyses, such as Roger Normand and Sarah Zaidi's *Human rights at the UN: The political history of universal justice* (2008) add to this cautious scepticism that appears, today, all together more nuanced than Moyn's initial polemic.⁴⁴

Hence, the historiographical divide over the role of human rights in decolonization is no longer one between an (over)generalizing anachronism and a differentiating historicism, instead the debate takes place within a (broadly) historicist horizon and is driven by disparate interpretations of an ever more finely-grained picture of the historical facts. Where, for instance, the continuist position musters the well-documented reference to human rights in anticolonial thought to underscore its argument, the discontinuist position draws attention to the overall (smaller) proportion which human rights references represent in comparison to all documentary evidence of anticolonial thought. Likewise, where the continuists tend to focus on the UN to showcase rights-oriented anticolonial activism, the discontinuists point out that the UN itself was less relevant to the decolonization process than the UN-centric reading makes one believe. Indeed, to an extent the debate between continuists and discontinuists appears itself to have given way to minute quarrels over the way in which particular narratives are constructed, which actors and institutions are deemed important and what type of documentary evidence is deemed as more or less expressive of their attitudes and positions. Are official pronouncements sufficient to fathom either side's thinking, or do behind-the-scenes records and *travaux-préparatoires* need to be considered? Are elite or grassroots attitudes more relevant for any claim about the salience of human rights during decolonization, and how, if at all, can -or should- authentic commitments to human rights be distinguished from 'shrewd political calculations'?⁴⁵

Perhaps unsurprisingly, the overall picture that emerges across the divide is quite close to what one might (cautiously) define as the common sense view anyone engaged in actual human rights *praxis* would come to hold, notably that human rights did occupy some cognitive space in most anticolonial militants' minds that can neither be reduced to ulterior motives nor held out to be a primary driving force. In addition, human rights were not only not essentially epiphenomenal, as the Moyn school would have it, but they were also much less semantically determined as derivatives of national sovereignty rather than of a cosmopolitan world polity. If anything, the debate between continuists and discontinuists has produced a highly differentiated picture of the archival evidence which underlines both the preponderance of human rights language and the indeterminacy of its semantic content.

The only unequivocal 'fact' that emerges from this ambivalent and diffuse historical picture is that human rights emerged in the 1940s from earlier incarnations as a powerful signifier which, because of its very conceptual openness and semantic indeterminacy, has engaged people's imagination all through to the 1970s and on to the contemporary period. This, then, represents their conceptual continuity, despite and because of their discontinuous use in different contexts and periods. The historiographical debate on its own will, thus, remain inherently inconclusive as each of the two positions is marked by what could be termed a hermeneutic 'problem of induction' – that is, within a certain set of premises, no amount of additional evidence will corroborate the correctness of these premises vis-à-vis their opposite, but will tend to merely

⁴³ Ibid. 115

⁴⁴ Roger Normand and Sarah Zaidi's *Human rights at the UN: The political history of universal justice* (Indiana University Press Bloomington 2008).

⁴⁵ *Human Rights and Decolonization* (n 3) 115.

reinforce these premises.⁴⁶ This leads to an incremental closure of the epistemic horizon and to increasing incommensurability vis-à-vis alternative interpretations.

History alone will not, therefore resolve this particular ‘battle’, or, rather, historiographical militancy will not. The question of whether human rights as they are used today are actually the same thing as the rights that commanded at least some sustained attention during the decolonization period, or whether those rights are, in turn, recognizable re-incarnations of the rights of the UDHR, of the anti-slavery and women’s suffrage movements, or, indeed, of national bills of rights, needs to be reformulated. The real question is, arguably, not whether conceptual continuity can ultimately be demonstrated or not, but how human rights have acquired such power of signification over time and beyond any semantic coherence or political relevance. Why should this power have come to be vested in human rights, more so than in other discourses? If Moyn’s revisionist venture has not, ultimately, succeeded in making a compelling case for sharp discontinuity, his deep reading of the 1970s remains instructive, not because human rights as such were invented then, but because they were arguably re-invented as an internationalist project. As such, the 70s represent but another, heretofore underappreciated point in a long and continuing line of historical moments during which human rights have shown their immense power of re-signification. What the historiographical discussion on either the significance of the 70s for human rights or the insignificance of human rights for decolonization in the previous decade show is that this power is linked to moments of intellectual crisis – more precisely to transitional moments in which established vocabularies are challenged by radically new experiences and cognitive horizons, such as those of post-colonial international relations or post-socialist utopias. It is at such *kairoi*, that is, moments in between time, that the language of human rights has often been resorted to as a means to (re-)signify what cannot actually (yet) be signified.

III. A Battle of Hermeneutics: (Re-)Reading the Colonial Encounter in the Americas

Another moment that particularly illustrates this process is, of course, the moment of the colonial encounter itself. It is not a singular historical moment, nor does it comprise a singular experience across its diverse geographies, but, as a *kairos*, all of its different iterations are characterized by the encounter with radical otherness and the crisis of representation this generated. One such iteration was the contact between Europeans and Ameríndians in the (European) sixteenth century and the way the cognitive crisis it generated was processed by, amongst others, Iberian scholastics in and around the ‘School of Salamanca’.⁴⁷ The Salamancans’ response to this crisis has, of course, become one of the most referenced moments in (post/de-)colonial historiography for the role it played in the formation of international law, not least because of its re-appropriation of the language of natural rights as a means to articulate the relationship between human beings and the incipient state system. Like with the moment of decolonization, its historiography has also been deeply contested, with a conventional position that has seen the use of natural rights as mitigating the colonizing universality of the incipient *ius gentium*, and a strongly revisionist position that has viewed these same natural rights as

⁴⁶ See A Tucker, *A Companion to the Philosophy of History and Historiography* (Hoboken Wiley 2011).

⁴⁷ As nomenclature varies across different regions in the Americas, the common (anthropological) denomination *Amerindian* shall be used here; and in relation to the School of Salamanca, we shall, despite the significant differences between the authors commonly counted as belonging to the School, refer to them collectively as the ‘Salamancans’ on the basis of the assumption that there is a broad core of shared ideas that unite all of its exponents; see, inter alia, M Koskenniemi, ‘Colonization of the ‘Indies’ - The Origin of International Law’ (2009) talk at the University of Zaragoza (available at <http://www.helsinki.fi/eci/Publications/Koskenniemi/Zaragoza-10final.pdf>); M Koskenniemi ‘Vitoria and Us. Thoughts on Critical Histories of International Law’ (2014) 22 *Rechtsgeschichte-Legal History* 119-138.

instruments of colonial domination.⁴⁸ Yet -and arguably-, this debate has mostly focussed on the impact of Salamancan thought on the European history of ideas and it has tended to leave the latter's significance as a response to the experience of radical alterity vis-à-vis the Amerindian encounter (relatively) underexplored. While this focus on European reception history remains crucial for understanding the deep coloniality of the international legal project, it is bound to underestimate the extent to which the Salamancans' resort to rights language was *also* their particular way of coming to grips with the experience of radical alterity -in the form of Ameríndia- from within their existing (scholastic) framework of reference. As shall (very) briefly be outlined below, if seen in this light, certain aspects of Salamancan natural rights theory come to the fore that highlight the power of (re-)signification that the language of human rights has had at another foundational moment.

On the face of it, this is, of course, a counterfactual contention. As Giuliano Gliozzi has argued in a seminal piece on the birth of anthropology as colonial ideology, the 16th century literature on the 'conquest' has tended to be simplified to a reading in which the West constructs itself and its others through stylized colonial binaries, such as good versus bad savage, civility versus barbarism, rationality versus bestiality.⁴⁹ Indeed, in a sense, 16th century conquest studies are a case in point for the (Western) conflation of philosophy, history and anthropology, for the modern history of ideas is necessarily traversed by the historicity of the American conquest. For one of the principle aspects that characterize this period is the series of contradictions and theoretical divisions that emerge in and through the historical encounter of European metaphysics with its Amerindian other. One of this encounter's effects has been the triggering of a deep engagement with the question of how radical alterity can be dealt with from within a pre-existing cognitive framework. As shall be seen, this engagement partly cross cuts the contemporary interpretative portfolio which only allows for either straightforward (Kantian or Hegelian) universalism or for (pluricultural) relativism. What, instead, marks out the Salamancan literature is a deep ambivalence flowing from their quest to render their experience of radical alterity consistent with their scholastic mindset while preserving the latter's original premise of (European) epistemic supremacy and its corollaries for the formation of international law.⁵⁰ The outcome, paradoxical as it is, can nonetheless be seen as one of the first genuine comparative ethnographic operations in early modernity.⁵¹ The deep otherness of Amerindian populations and the concomitant need to engage with a radically diverse symbolic universe posed an enormous intellectual challenge to those attempting to translate indigenous categories into the scholastic rationality of contemporary Catholic Christianity.⁵² And natural rights were

⁴⁸ For the first position, see P Zapatero, 'Legal Imagination in Vitoria. The Power of Ideas' (2009) 11 *Journal of the History of International Law* 221–271; and G Cavallar, Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?' (2008) 10 *Journal of the History of International Law* 181–209; for the latter position, see *Imperialism* (n 3) 13; and JM Barreto, *Human Rights from a Third World Perspective: Critique, History and International Law* (Newcastle Cambridge Scholars Publishing 2013); see generally 'Vitoria and Us' (n 47).

⁴⁹ See, G. Gliozzi, *Adam et le Nouveau Monde – La naissance de l'anthropologie idéologie colonial: des genealogies bibliques aux theories raciales (1500-1700)* (Théète éditions 2000); see also T. Todorov, *The Conquest of America - The problem of the other* (Oklahoma University Press Oklahoma City 1999).

⁵⁰ See, inter alia, *Imperialism* (n 3) 23; *Vitoria and Us* (n 47) 121; and P Fitzpatrick, 'The Revolutionary Past: Decolonizing Law and Human Rights' (2014) 2 *Metodo. International Studies in Phenomenology and Philosophy* 117-133 at 118; M Garcia-Salmones Rovira and L Eslava, 'Jurisdictional Colonization in the Spanish and British Empires: Some Reflections on a Global Public Order and the Sacred' in H Ruiz Fabri, R Wolfrum and J Gogolin (eds), *Select Proceedings of the European Society of International Law, Vol. 2* (Hart Publishing Oxford 2010) 53-81.

⁵¹ *Adam* (n 49).

⁵² See: G Tosi, 'Sins Against Nature as Reasons for a "Just War": Sepúlveda, Vitoria And Las Casas' in A Culleton and RH Pich (eds), *Right and Nature in the First and Second Scholasticism* (Brepolis Publishers Turnhout 2014) 199-239.

one of the lines of attack the Salamancans pursued in order to refute the pretense of conquest sovereignty and to deny its legitimacy. For in their struggle to square the static Aristotelian category of humanity with the historical facticity of cultural difference they observed in Ameríndia, the (Second) Scholastics of the Salamanca School resorted to the earlier concepts of *ius naturale* and *ius gentium* and referenced these to the long-standing discussion on the rationality of nature and of the soul.⁵³

By contrast with secular dissident treatments of the question, such as and notoriously Michel de Montaigne's *Des Cannibales*, this move locks the School clearly into a universalist-Eurocentric mindset.⁵⁴ However, seen in historical context, this is a reductive reading of the challenge the Salamancans saw before them. For not only was the secular language of Montaigne simply not available to them, but their objective was different, notably to make sense of the Amerindian universe from within the Catholic missionary setting that formed the horizon of their practical experience.⁵⁵ They, thus, re-appropriated the Roman law categories of *ius naturale*, *ius gentium*, and *ius civile* and grafted them onto the scholastic dichotomy between divine law and human law.⁵⁶ On one side was divine law, that is, the reason that was deemed to govern the whole universe and that (only) existed in the divine mind. It was, in turn, divided into natural divine law and positive divine law. The former connoted the participation of all humans in the divine law by virtue of the social and rational capacity to spontaneously comprehend common principles. The latter consisted of human law, which, even though derived from natural law, was created by humans and reflected the singularity of each community. It was, in turn, sub-divided into a *ius gentium* and a *ius civile*, with the former also deemed to derive from natural law and concerning the laws governing the peaceful coexistence of sociable subjects, and the latter incorporating the precepts of civil law. With the *ius gentium*, thus, set between divine natural law and human positive law it became a conceptual staging ground for the encounter between nature and culture in and through contact with Ameríndia.⁵⁷

To understand the specific take the Salamancans had on natural law and the *ius gentium*, an originally patristic distinction, later taken up by Thomas Aquinas, between paganism and Christianity has to be considered.⁵⁸ It presumed the pre-existence of two epochs in world history: an age of innocence (the golden age before the Fall), which the Salamancans identified with the Amerindian universe and which was deemed to be governed by natural law; and an age of sin (the iron age after the Fall) governed by the law of nations (*ius gentium*). This distinction implied, of course, that the law of Amerindian populations had to be considered as originary, received prior to the law of nations, and, thus, necessarily a form of (Amerindian) *ius*

⁵³ See A Pagden, *The Fall of Natural Man* (Cambridge University Press Cambridge 1982).

⁵⁴ See M de Montaigne, *The Complete Essays* (trans MA Screech) (London Penguin 2004).

⁵⁵ For early accounts of this see, for instance, RW Carlyle, *A history of Medieval Political Theory in the West* (1903) and O Gierke, *Natural Law and the Theory of Society (1500-1800)*; see also K Haakonsen, *Natural Law and Moral Philosophy – From Grotius to the Scottish Enlightenment* (Cambridge University Press Cambridge 1999) and R Tuck, *The Rights of War and Peace. Political Thought and the International Order from Grotius to Kant* (Oxford University Press Oxford 1999).

⁵⁶ See, inter alia, K Tuori, 'The Reception of Ancient Legal Thought in Early Modern International Law' in B Fassbender and A Peters, *The Oxford Handbook of the History of International Law* (Oxford University Press Oxford 2012) 1012-1033 at 1016; and R Lesaffer, *Peace Treaties and International Law in European History* (Cambridge University Press Cambridge 2004) 225.

⁵⁷ See: CB Trelles, 'Francisco Suarez (1548-1617)' (1933) 43 *Recueil des cours de l'Academie de Droit International de la Hague* 386-502 at 426.

⁵⁸ See Adam et le Nouveau Monde (n 50); and S Loureiro, 'By What Right? The Contributions of the Peninsular School of Peace for the Basis of International Law of Indigenous Peoples' (2013) 5 *Goettingen Journal of International Law* 9-39; see also P Calafate and S Loureiro, 'A Escola Peninsular da Paz: a contribuição da vertente portuguesa em prol da construção de um novo direito das gentes para o século XXI' (2013) 13 *Revista do Instituto Brasileiro de Direitos Humanos* 262-283.

naturale. As Sílvia Loureiro has shown, several conclusions derived from this premise became important conceptual tools for dealing with the Amerindian ‘problem’.⁵⁹ Firstly, the original sovereigns of the people of the New World were legitimate -they had both ownership of the land and authority of its people (*dominium jurisdictionis vel auctoritatis*); secondly the enslavement of gentile peoples was incompatible with the contemporary legitimation of slavery, as it was forbidden to subject a previously free and peaceful people without just cause and without any (purported) benefit to those enslaved.⁶⁰ Thirdly, based on Thomas Aquinas, the doctrine of property ensured that in the state of nature all things were deemed to have been common and the possession of property (*dominium proprietatis*) was a natural right.⁶¹ Hence, for the Salamancans, both Amerindian *dominium jurisdictionis vel auctoritatis* and *dominium proprietatis* were rooted in natural law and natural right(s). As such, the correlation between *ius gentium* and *ius naturale* was more ambiguous than is commonly assumed and it led to a more complex and paradoxical conception of the relationship between nature and culture, for the postulate of the existence of an Amerindian *ius gentium* required the assumption that the *ius naturale* was mediated by the *ius gentium*, that is, by the natural common sense of each people and of each culture. On the basis of this construct it then became possible to see Amerindian title as an original right and, thus, as prior to the law of nations – a notion that amounts to a sort of Amerindian jusnaturalism.⁶²

One aspect of this rather peculiar conception of natural law has generated significant discussion and is particularly relevant here, notably the implications it has for the idea of the innate rationality of the soul which was, of course, a key component of the debate about the conception of humanity. Hence, in his seminal Sermon on the Fourth Sunday of Advent of 1511, Antonio de Montesinos, referring to Amerindians, asked whether they “are not men and do they not have rational souls? Are you not obliged to love them as yourselves?”⁶³ There were, of course, three possible answers to these questions: either the Amerindians were deemed to be endowed with rational souls and, therefore, as fully capable of enjoying rights; or, although human, they were deemed *amentes* (literally ‘de-mented’) and, thus, incapable of self-government; or they were deemed the equivalent brute animals devoid of reason and humanity. Thus, Mateus Nogueira, in answer to Gonçalo Álvares’s query –“do those ‘barbarians’ have a soul like us ?,” notoriously stated that “this is clear, for the soul has three powers, namely understanding, memory, and will, which we all have.”⁶⁴ Likewise, Francisco de Vitória, in the first part of his *Relectio de Indis*, responded that in relation to their evident social organization, Amerindians had to be deemed to have reason because they were capable of properly ordering their lives, including the maintenance of social and affective relations, material exchanges, and religion.⁶⁵ He,

⁵⁹ ‘By What Right’ (n 58) 17.

⁶⁰ The Salamancans did not, notoriously, apply this logic to the enslavement of Africans, which puts the present reflection in perspective and impels a comparative approach which, however, goes beyond the confines of this text; see generally W Mignolo, ‘The Many Faces of Cosmo-polis: Border Thinking and Critical Cosmopolitanism’ (2000) 12 *Public Culture* 721-748; and A Bohrer, ‘Just wars of accumulation: the Salamanca School, race and colonial capitalism’ (2017) *Race & Class*.

⁶¹ P Calafate, *Da Origem Popular do Poder ao Direito de Resistência: doutrinas políticas no século XVII em Portugal* (Esfera do Caos Editores Lisboa 2012).

⁶² For this notion, see A Velasco Gómez, ‘Las ideas republicanas para una nación multicultural de Alonso de la Veracruz’ in C Ponce (ed) *Innovación y tradición en fray Alonso de la Veracruz* (FFyL UNAM Mexico 2007) 67-77.

⁶³ Cited in P Calafate (ed.) *A Escola Ibérica da Paz nas Universidades de Coimbra e Évora (século XVI)* (Almedina Lisboa 2015); see also P Calafate and REM Gutiérrez (eds.) *A Escola Ibérica da Paz: a consciência crítica da conquista e colonização da América - Escuela Ibérica de la Paz: la conciencia crítica de la conquista y colonización de América: 1511 – 1694* (Editora da Universidade da Cantábria Santander 2014).

⁶⁴ *A Escola Ibérica da Paz* (n 62).

⁶⁵ F de Vitória, *Relectio de Indis o Libertad de los Indios* (Consejo Superior de Investigaciones Científicas Madrid 1967); see also SJ Anaya, *Indigenous Peoples in International Law* (2nd ed) (Oxford University Press

thereby, effectively disassociated indigenous ontology from the sliding scale that the presumption of their semi-rationality had established and, instead, assigned to it a historical space in which Amerindians had the same rights of intellectual change as any other human subject.⁶⁶ Hence, by framing intellectual capacity as linear and evolutionary, he simultaneously affirmed the irreducible culturality of Amerindians and established a civilizational progress scale on which Europeans remained superior. Likewise, Vitoria at once affirmed the superiority of the colonizers yet argued that this did not justify either the conquest of Amerindian lands or the enslavement of its population.

This ambivalence also extended to the Salamancans' conception of reason itself, for while it remained their ultimate measure for humanity, the experience of the radical alterity of Amerindia forced them to historicize and pluralize that conception in a significant departure from the abstract transcendental category that would dominate the European history of ideas; instead, reason is deemed to be evidenced by the capacity to organize all spheres of life and, as such, denotes the subject's participation in eternal law. The crucial point is that even though universal human nature is not conceived as cultural but as deriving from *ratio*, that *ratio* is itself sculpted by culture. Thus, reason is cultural – in the Amerindian case a culture marked by, from the Salamancans' perspective, pure otherness. In addition, this culturalist (re-)reading of reason has, of course, implications for the way the human rights of Amerindians are theorized. For the attribution of rights to Amerindian populations, including in relation to their (own) political and social organization, derives from the fact that they inhabited the new world before the arrival of the *ius gentium*. For that reason, Amerindian original rights must necessarily be grounded in natural law, which, in turn, means both that natural law is capable of accommodating cultural diversity, and that the subsequent *ius gentium*, as a derivative of natural law, must also be premised on this diversity.

Pedro Calafate, amongst others, has drawn attention to this entanglement of universal principles with a conception of radical plurality. It represents, to him, the essence of a baroque form of thinking that is symbolized by the labyrinth which transgresses, compromises and dispenses with abstract rationality.⁶⁷ Indeed, the discussion around natural law did not take place around a set of purely speculative and abstract principles, but instead focused on a realist conception of natural rights founded on the consonance with 'reason' but on the backdrop of a radical openness to historical otherness.⁶⁸ Hence, the very complexity of the Salamancan argument on natural rights is due to their attempt to situate it within historical time as opposed to within a (mere) abstract universality. As such, the *ius gentium* becomes effectively the historical expression of natural law, with the latter's conception of rationality being tied to the concreteness of the Amerindian experience. That experience, then, opened up, within the shell of late scholastic universalist realism, the space to think its opposite, notably a realist universalism based on the factual plurality of the human and justified not by abstract principle but by cultural particularity.

The Salamancans' conception of natural law can, then, be read to amount, to use Ambrosio Gomez' expression, to a *multicultural jusnaturalism*, and it is this that demarcates, to them, the real challenge of thinking humanism.⁶⁹ However, and importantly, this pluralist jusnaturalism is not meant as a recognition of a cultural relativism that is inscribed, a posteriori, into the *ius gentium*. Rather, it expresses a shared access to the universal which ties together the *ius naturale*

Oxford 2004) 16.

⁶⁶ *The Fall of Natural Man* (n 55) 99.

⁶⁷ 'A Escola Ibérica da Paz' (n 62).

⁶⁸ 'Las ideas republicanas' (n 61).

⁶⁹ *Ibid.*

and the *ius gentium*. At the heart of this reading lies the contention that the universalization of *ius naturale* on account of reason can only be thought historically and empirically, notably through the concreteness of the factual experiences of the other, which, in the case of the Salamancans, came in form of the Amerindian world. If Vitoria recognized this only tentatively and reluctantly, Bartolomeu de La Casas went all the way when he directly engaged with what at the time was considered to be a primary sign of the radical otherness of Amerindians, namely cannibalism. In fact, not only did he mount a culturalist defense of the practice, but he sought to invert its connotation, showing it to be culturally superior to the Spanish conquistadors and thereby rendering the latter as the true barbarians.⁷⁰

As Enrique Dussel has recently argued, with this move, Las Casas, the intricacies of whose position have largely been ignored in the subsequent (European) history of ideas, makes a highly innovative contribution to at least two of the core themes of his times, namely how to deal with radical otherness and whether that otherness could, by right, be conquered.⁷¹ Unlike some of the more influential Salamancans such as Vitoria, Las Casas was immersed in the Amerindian world and felt compelled to think about the epistemological consequences of the encounter with radical alterity from within this context, even if still in an essentially European mental frame. It, thus, represents one of the first attempts to articulate a universal demand for truth compatible with the dissent of (an)other, that is, with the material negativity of that other. For to Las Casas, Amerindians had a right to such dissent including a defense of that right through armed force. To Dussel, Las Casas had thereby brought to the fore several relevant challenges early modern philosophy has systematically ignored and neglected, notably that all human beings have reason, that that reason, however, is, by nature, plural and makes sense of the world in different ways, that this also implies the plurality of truth claims made on account of reason, and that, therefore, a relation of equivalence exists that enables the recognition of difference and dissent, and that, lastly, either side, including the Amerindian side, is, by right, free to accept or reject the propositions of the other.

Although most subsequent Aristotelian re-readings of the Second Scholastic literature have centered on either the well-known defense of natural bondage by Sepulveda or on the Salamancan defense of rationality as a (mere) prerequisite for conversion, the new figure of the natural-cultural Amerindian that emerged from this debate brought out a series of contradictions in either argument.⁷² In this vein, Anthony Pagden has argued that the Salamancans, in order to avoid both Montaignean relativism and Sepulveda's denial of the humanity of Amerindians, ended up concocting a new doctrine on the universality of natural law.⁷³ Indeed, one might even venture to go a step further and read the Salamancans' pluricultural jusnaturalism in light of what Eduardo Viveiros de Castro has termed Amerindian 'multinaturalism', that is, the inversion of the (Eurocentric) presumption of the plurality of culture and the universality of

⁷⁰ See 'Sins against Nature' (n 52) and Q Skinner, *Foundations of Western Political Thought* (Cambridge University Press, Cambridge 2004) 170; and B Las Casas, *Apologia Vol 9* (A Losada ed) (Madrid 1988).

⁷¹ E Dussel, 'Modernidad y alteridad. Las Casas, Vitoria y Suárez: 1514-1617' in *Actas del Primer Simposio Internacional del Pensamiento Iberoamericano* (Salamanca 2002).

⁷² For the former debates, see classically L. Hanke, *All Mankind is One: A Study of the Disputation Between Bartolomé de las Casas and Juan Ginés de Sepúlveda in 1550 on the Intellectual and Religious Capacity of the American Indians* (Northern Illinois University Press DeKalb 1994).

⁷³ See *Apologia* (n 65): *As Montaigne pointed out, the fact that some people turned their back as a sign of greeting and ate their parents as an act of devotion was surely sufficient to disturb any faith one might have in universally binding laws. But if the natural law was not, as most of those discussed in this book insisted it was, supra-cultural, what safeguard could there be against truly unnatural behavior – cannibalism, for instance, or human sacrifice? [...] there might, of course, exist a wide variety of local customs (the jus gentium or law of nations was a record of such customs); but they had all to conform to a body of meta-laws, the law of nature, the ius naturae itself; see also The Fall of Natural Man (n 53).*

nature to one where culture is universal but nature(s) are plural.⁷⁴ From this perspectivist viewpoint, the Salamancan attempt to pluralize the *ius naturale* in order to ground Amerindian *ius gentium* might amount to a (tentative) recognition of radically different Amerindian cosmologies which, in turn, implies a recognition of the plurality of reason -derivative, as it is for the Salamancans, from nature- within a multinaturalist conception of natural law. This, to modern (Eurocentric) eyes, paradoxical effort to decode and defend indigenous culture without giving up the notion of natural law has a bearing on the deadlocked contemporary dispute between abstract universalism and pure cultural relativism. Seen from this perspective and despite its irreducible entanglement with colonial violence, the Salamancans can be read as developing a new multinaturalistic vocabulary that does not only challenge the particular rationality of (European) modernity but also incorporates an archaic perspectivism based on the historically contingent experience of Ameríndia which, in turn, opens up a new comparative ethnography of the relationship between reason and nature.⁷⁵

IV. Beyond the Battle: The Post-/De-Colonial Predicament of Human Rights (in the Decolonization Era)

By using this -albeit here merely stenographic- (re-)reading of the colonial encounter in the Americas as a gloss to the battle over the historiography of human rights during the decolonization period, several features of human rights as an idea in history and of history as a way to grasp human rights move into focus. For in at least some ways, the colonization and the decolonization experiences are both about the encounter with something outside of the established epistemic horizon, something genuinely ‘other’ which challenges the integrity of these horizons and which, therefore, provokes a response. In both cases, the established epistemic horizon is the European mode of governmentality as it emerged between the periods of colonization and of decolonization, a mode inherently premised on colonialism as a form not just of control over people and territory but also and primarily of epistemic domination. It involves a particular rationality that constitutes the specific techniques of power that the ordering of people and space in what would become the Westphalian world requires, a rationality that would come to be epitomized in sovereign statehood and that is articulated by what would eventually be called international law.⁷⁶ The latter is much more than a set of rules devised by states to regulate relations amongst each other with a view to (thereby) control access to sovereignty as the key to their hegemony. It is, in the Foucauldian sense, a discourse, that is, a specific configuration of power/knowledge that constitutes an epistemic horizon, a mental map by which people know and act in the world.⁷⁷ This map of uniform states and nationalities divided by clear-cut borders did not, of course, emerge as a representation of the world ‘out there’ which, in the 16th century as much as during the 1960s, consisted of many and much

⁷⁴ See E Viveiros de Castro, *The Inconstancy of the Indian Soul: The Encounter of Catholics and Cannibals in 16th-century Brazil* (Prickly Paradigm Press Chicago 2011) and

⁷⁵ See E Viveiros de Castro, *Cannibal Metaphysics* (Univocal Publishing Minneapolis 2014); for a broader reflection of some of the repercussions of this logic on the conception of subjectivity, see B Assy, ‘Insurgent Subjectivities and the Political Empowerment of the Streets’ (2014) 7 *Revista di Pratica Filosofica e Scienza Umame* 118-124; and B Assy, ‘Injusticia Social, Empoderamiento Político e Subjetivación’ in P Roseni Pinheiro et al (eds), *Cultura do Cuidado e o Cuidado na cultura: dilemas, desafios e avanços para efetivação da integralidade em saúde no MERCOSUL*. UERJ/IMS /CEPESC/ LAPPIS/ABRASCO Rio de Janeiro 2015) 14-25.

⁷⁶ See F Hoffmann, ‘Discourse’ in J d’Aspremont and S Singh, *Fundamental Concepts of International Law* (Elgar Cheltenham forthcoming).

⁷⁷ See, inter alia, T Lemke, ‘Foucault, Governmentality, and Critique’ (2002) 14 *Rethinking Marxism* 49-64; NM Rajkovic, ‘“Global Law” and Governmentality: Reconceptualizing the “Rule of Law” as Rule “through” law’ (2012) 18 *European Journal of International Relations* 29-52; B Golder, ‘Foucault and the Incompletion of Law’ (2008) 21 *Leiden Journal of International Law* 747-763.

more than the forms on the map. It was always merely a simulacrum of the world, superimposed over its raw plurality to produce a stratified order privileging those purporting to be at its top. Over time -notably in the period during which the parochial and contingent European map was forcibly imposed on everyone and everything across the globe- it merged with truth itself and became one of the mythological foundations of the modern world.

However, as with all hegemonic forms, international law never went unchallenged; in fact, its evolution was driven by the sequential crises generated by the encounter with its other(s), those outside or underneath the map whose existence threatened the integrity of the myth.⁷⁸ The latter could only be (re-)generated in light of these crises by a paradoxical mixture of absorption and rejection of the outside. Hence, international law -or rather the historical articulators of international law- would at once draw in the outside through the universalization of the inside and reaffirm the inside through a particularistic differentiation against the outside. The other is, hence, transcribed into the language and categories of the inside, yet it simultaneously serves as the indicator for an exterior that is framed as the inside's opposite. It is, arguably, this paradoxical move that characterises the specific imperialism of international law and, indeed, of modernity itself, a continuous oscillation between inclusion and exclusion, recognition and rejection, universalization and particularization.

This ambivalence and in-betweenness has come to be embodied in certain (legal) concepts such as human rights, for they at once express an abstraction from individual humans in the name of a (Eurocentrically defined) humanity and a recognition of individual dignity on account of that humanity. The Salamancan resort to human rights in their effort to recognize Amerindians as (other) humans while at the same time allowing for the incorporation of their world into the European map is a case in point. For human rights are here rendered polyvalent by the application of their universalist logic to a scenario outside of it, the result being both contradictory and coherent, hegemonizing and self-relativizing. Hence, while Salamancan thought is clearly woven into the colonialist fabric of what would become international law, it cannot be reduced to it, in the same vein as the idea of human rights applied to Amerindians cannot be reduced to epistemic imperialism. The complex repercussions that the Salamancan position generated beyond the European debate, notably in the Americas itself, and the ways in which human rights ended up being semantically re-appropriated by different interlocutors across the (colonial) board shows that, as a discourse, they are fundamentally marked by semantic indeterminacy and openness.

Human rights, thus, escape even history, or, rather, their historiographical fixture, as the inconclusive debate on their role in the decolonization process shows. Indeed, it might be argued that human rights were resorted to precisely because of the epistemic crisis decolonization represented to all sides, a crisis occasioned by the very otherness of a world beyond colonialism.⁷⁹ It is, then, during moments of crisis that human rights unfold their power of signification, a power that is not grounded in concrete universalities or absolute semantic determination, but in the diverse discursive practices of people here and elsewhere.

⁷⁸ See A Orford (ed), *International Law and its Others* (Cambridge University Press Cambridge 2006).

⁷⁹ See F Hoffmann, 'International Legalism and International Politics,' in A Orford and F Hoffmann (ed.) *Oxford Handbook of the Theory of International Law* (Oxford University Press Oxford 2016) 954-984 at 964; and William Scheuerman, 'International Law as Historical Myth' (2004) 11 *Constellations* 537-550.