

Anti-totalitarian Memory: Explaining the Presence of 'Rights Abuse' Clauses in International Human Rights Law

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Rights abuse clauses are provisions in the European Convention on Human Rights and the International Covenant on Civil and Political Rights which prevent individuals using rights to undermine the rights of others in society. They are most commonly used to restrict the free speech of extremist political groups. This paper argues that they are a reflection of an anti-totalitarian consensus behind both instruments. A critical examination of their history shows that these clauses are the products of a form of collective European memory which seeks to safeguard against a collective heritage of totalitarianism. Their substance seemingly privileges a complex historically contingent form of anti-racism and they can be used to justify seemingly far-reaching restrictions on free speech and freedom of association in order to prevent against totalitarianism. Rights abuse clauses, this paper concludes, are a form of collective juridical memory which has overshadowed the development of human rights law in certain areas

Introduction

Rights abuse clauses are provisions in a human rights instrument that prohibit the use of rights as a tool for removing rights from other people. For example, Article 17 of the European Convention on Human Rights (ECHR) prohibits any 'group or person any right to engage in any activity or perform any act aimed at the destruction of any of the

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rights and freedoms' contained in the ECHR.¹ In practice this means that extremist political parties that use the right to free speech to advance a racist political agenda that might undermine the rights of other individuals in society not to suffer discrimination can have their right to free speech restricted without that amounting to a violation of that political party's right to free speech under the ECHR.

Rights abuse clauses in international human rights instruments can be used by state parties to human rights instruments in two circumstances. Firstly, during the course of having their human rights performance reviewed by an international organisation, such as a treaty review body of an international human rights treaty, a state party may cite the obligation under a rights abuse clause as the justification for a law that restricts political rights in their state. For instance, they may argue that a law criminalising denial of the Holocaust is necessary to prevent extreme groups using their right to freedom of speech to destroy the rights and freedoms of individuals from religious and racial backgrounds that were persecuted in the Holocaust. Secondly, an international human rights court or review body can use a rights abuse clause to resist a petition from an individual who is complaining about the restriction of their rights under domestic law. For example the European Court of Human Rights (ECtHR) has used Article 17 of the ECHR as grounds for denying applications from fascist and racist groups claiming that laws restricting racist speech were a violation of the free speech protections contained under Article 10 of the ECHR. Restrictions on human rights contained within anti-racism laws are justified under a rights abuse clause framework by reasoning that acts of racist speech, or extremist political activities with racist undertones, are in some way outside of a human rights instrument and manifestations of behaviour that a human rights instrument was designed to prohibit. This reasoning, however, implicitly alludes to the existence of a broader anti-totalitarian consensus that seemingly defies the more liberal notion of free speech.

This article argues that rights abuse clauses are a reflection of a distinctly European concern about the emergence of totalitarianism. In the instruments that contain them, they reflect the dominant concern at the time of an instrument's drafting that legally enforceable human

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 17.

rights were necessary to guard against European style totalitarianism by denying rights to groups that threatened the very framework of rights. In this respect they represent what Stiina Loytomaki describes as the 'Europeanization' of memory when it comes to the purpose of human rights, as they seek to position rights as both under threat from and a remedy to an ever-present totalitarian threat.² Whilst the threat Western European democracies faced from totalitarian political parties was real in the 1940s and 1950s, over half a century later rights abuse clauses remain an operational component of some human rights instruments. In the post-Cold War world, rights abuse clauses have become what Jessica Auchter calls a sign of 'haunting' within the human rights instruments that contain them.³ Auchter's analysis of public memorials of national tragedies identifies how the politics of the memory of life and death 'signpost sites of memory' and consequently influence the political foundations at 'work in the contestation of the modern state.'⁴ In a similar way, the construction of a human rights instrument can be haunted by the politics of its foundations, and rights abuse clauses, as this article demonstrates, are a sign of an instrument's foundational politics.

Rights abuse clauses are distinctly European historical memories. The first section of this article, which discusses the history of the law, argues that they are interwoven with shared hopes and fears about the future of Western society. Their presence in 'living instruments' makes rights abuse clauses not just mere historical artefacts, but components of working legal regimes with the express purpose of protecting human rights. Whilst rights abuses clauses go some way to addressing the concern famously expressed by Hannah Arendt about the need to protect the 'right to have rights', in practice rights abuse clauses are unnecessary to address the actions of racist groups wishing to violate the rights of others. The final section of this paper argues that the historical reference within rights abuse clauses actually allows international human rights tribunals to make rulings about the restrictions on rights by national authorities, in particular the right to free speech, that are deeply illiberal and seemingly antithetical to the liberal foundations of human rights instruments.

² Stiina Loytomaki, *Law and the Politics of Memory: Confronting the Past* (Routledge 2014) 21-2.

³ Jessica Auchter, *The Politics of Haunting and Memory in International Relations* (Routledge 2014) 4.

⁴ *ibid* 6.

Significantly, the presence of these provisions, and their subsequent interpretation by tribunals, gives an insight into a distinct counter-history of the human rights instruments that possess them. Rather than being a collection of inherently liberal values, an international human rights instrument with a rights abuse clause is also an instrument that allows governments to heavily direct and control the exercise of certain rights.

The anti-totalitarian nature of rights abuse clauses

Article 30 of the 1948 Universal Declaration of Human Rights (UDHR) was the first rights abuse clause in an international human rights instrument. It denied a 'group or person any right to engage in any activity or ... perform any act aimed at the destruction of any ... rights and freedoms' contained within the UDHR.⁵ In a number of post-war constitutions in Western European states, similar provisions were adopted expressly to guard against the possibility of communist or fascist movements using the democratic process to gain power.⁶ There are only two rights abuse clauses currently in operation—Article 17 of the ECHR and Article 5 of the 1966 International Covenant on Civil and Political Rights (ICCPR)—although there are some equivalent provisions in other international instruments.⁷ The Convention on the Elimination of All forms of Racial Discrimination (CERD) has a number of different clauses that have a similar effect. Article 4 requires state parties to punish all 'dissemination of ideas based on racial superiority' and to 'prohibit organisations' that promote 'racial discrimination' which in practice acts as a rights abuse clause as it determines the parameters of certain rights, such as the freedom of speech and

⁵ Universal Declaration of Human Rights (UDHR) 10 December 1948, UN General Assembly 217 A (III), art 30.

⁶ Hannes Cannie and Dirk Voorhoof, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?' (2011) 29 NQHR 54.

⁷ International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

association.⁸ Whilst these CERD provisions have a degree of equivalence, they are based on principles of non-discrimination, which require a demonstration of the discriminatory effect of a particular social, political or economic process before legal restrictions or prohibitions limiting other rights can be justified.⁹ The justification for the limitation of participatory rights in anti-racist laws is less historically contingent under a prohibition of discrimination framework than under a rights abuse clause framework. Rights abuse clauses are often invoked by a supranational human rights tribunal or a state party by way of a collateral challenge at the admissibility stage of a tribunal's consideration of an individual petition, alleging an abuse of individual rights as a result of domestic laws limiting rights—such as incitement to racial hatred laws which prohibit certain forms of speech.

Neither the American Convention on Human Rights nor the African Charter on Human and Peoples' Rights (ACHPR) has a directly equivalent clause prohibiting and protecting against rights abuse. Article 61 of the ACHPR allows the African Commission on Human and Peoples' Rights (and now the African Court of Human Rights) to refer to international law in the interpretation of the Charter, making it theoretically possible for the Commission to utilise Article 5 of the ICCPR in relation to a decision on participatory rights.¹⁰ Article 5 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in a similar fashion to the ICCPR prohibits 'any act aimed at the destruction of any of the rights or freedoms' contained in the Covenant. Both the Committee on Economic, Social and Cultural Rights and state reports to the Committee have made scant reference to this provision, and its limited development reflects the fact that the majority of references to rights abuse has been in relation to forms of discrimination dealt with by other aspects of the Convention.¹¹ Neither the 1979 Convention on the Elimination of All Discrimination Against Women (CEDAW) nor the 1989 Convention on the Rights of the Child

⁸ International Convention on the Elimination of All Forms of Racial Discrimination (adopted December 21 1965) 660 UNTS 195, art 4.

⁹ For an outline the CERD and its processes see Patrick Thornberry, 'Confronting Racial Discrimination: A CERD Perspective' (2005) 5 HRL Rev 239.

¹⁰ The African Commission has previously done this in *Commission Nationale des Droits de l'Homme des Libertés v Chad*, Comm No. 74/92 (1995).

¹¹ M Magdalena Sepúlveda, 'The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights' (Intersentia 2003) 308-9.

(CRC) contain a rights abuse clause, even though there are provisions within both instruments that are capable being used to undermine other rights. As a consequence this paper focuses on the application of Article 17 of the ECHR and Article 5 of the ICCPR. Significantly, whilst Article 17 has a wider application against political movements, Article 5 has only been applied in petitions to the Human Rights Committee (the ICCPR's review body) that relate to the prohibition of fascism or communism.

Rights abuse clauses were not originally formulated as anti-racism provisions and the available historical evidence indicates they were provisions that were designed to prevent a repetition of the totalitarianism that occurred in Europe in the 1930s and 1940s. The discussion surrounding Article 30 of the UDHR centred on preventing fascist-like regimes gaining power by constitutional means and then destroying rights. Human rights treaties usually require a common political consensus behind them to give them operational legitimacy and in the context of the ECHR's formation in the late 1940s this common consensus was embodied in both the memory of Second World War and the ongoing fight against communism.¹² The foundational legitimacy of an organisation can also explain why states agree to be bound by an enforcement regime that may constrain their sovereignty in the future.¹³ The memory of Nazism and the Holocaust was able to provide this foundation because, as Daniel Levy and Natan Sznaider argue, the Holocaust's fact and imagery, from the early 1960s onwards, played a central role in fashioning a common European cultural memory, creating the popular assumption that international human rights law was a response to the Holocaust.¹⁴

Yet, the direct impact of this common European cultural memory on the ECHR is debatable and there are reasons for doubting histories drawing a direct link between the Holocaust and the creation of human rights instruments. As Daniel Cohen argues, in many ways the ECHR is a forward-looking instrument that seeks to 'generalize social democracy' and create a 'political consensus on the importance of

¹² Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *Intl Org* 217.

¹³ Moravcsik, 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe' (1995) 1 *EJIR* 157.

¹⁴ Daniel Levy and Natan Sznaider, 'Memory Unbound: The Holocaust and the Foundation of Cosmopolitan Memory' (2002) 5 *EJST* 87.

individual liberty in Europe.’¹⁵ Cohen also casts doubts on histories of the UDHR that attempt to read its formation and content as a direct response to the Holocaust.¹⁶ It is crucial to understand that the UDHR did not contain a victim-orientated conception of rights—human rights were not seen as a remedy to the atrocities of the Holocaust or as an insurance mechanism against future atrocities. As Samuel Moyn notes, in the 1940s discussions about human rights ‘centred on their welfarist meaning’ with the emphasis being on how human rights could shape society in a particular way.¹⁷ The discussions surrounding the formation of the ECHR envisaged an even narrower role for human rights, framing them as collective defence against totalitarianism. In 1949 the European Movement, a Brussels-based, think tank-like organisation, published a pamphlet justifying the creation of a legal human rights regime as a ‘system of collective security against tyranny and oppression.’¹⁸ Whilst attempting to frame either the ICCPR or the ECHR as a general response to the Holocaust is problematic, there are individual components of both documents that reflect the contemporary concerns of the drafters. Rights abuse clauses are one of these components, as the Travaux Préparatoires of both instruments illustrate, both Article 17 of the ECHR and Article 5 of the ICCPR were intended to be used against political organisations that might form totalitarian governments.

The discussion around the drafting of Article 17 reflected wider concerns at the time of the ECHR’s drafting that a democratic society needed to be able to defend itself from Nazism, fascism and communism. In the year prior to the creation of the ECHR, a number of countries had been taken over by Stalinist communist regimes, Berlin had just experienced a blockade by Soviet forces, and France was being destabilised by communist-led strikes. Western Europe was still economically devastated from Second World War and it is easy to forget the scale of Nazi collaboration that had occurred in France and Holland, both of which had been nominal democracies in the mid-

¹⁵ Daniel Cohen, ‘The Holocaust and the Human Rights Revolution: A Reassessment’ in Akira Iriye et al (eds), *The Human Rights Revolution: An International History* (OUP 2012) 63.

¹⁶ *ibid* 64.

¹⁷ Samuel Moyn, *Human Rights and the Uses of History* (Verso 2014) 89-91.

¹⁸ Michael Goldhaber, *A People’s History of the European Court of Human Rights* (Rutgers UP 2009) 4.

1930s.¹⁹ Therefore the idea that democracy could be taken over by totalitarian forces of the left or right was very real to the drafters of the ECHR. These concerns tapped into a wider historical phenomenon within post-war Europe, as the newly restored and surviving democratic governments found themselves caught in a crisis of legitimacy as their only source of legitimacy seemed to stem from military victory. This was ideologically problematic, as the historian Tony Judt rhetorically observed: ‘how were they [the democratic powers] better than the wartime fascist regimes themselves?’²⁰ This crisis of conceptual legitimacy was accompanied by a very real political crisis created by millions of displaced and stateless persons throughout Europe and very weak constitutional institutions, which meant that takeover by Stalinist communism was a real possibility in some states. In a speech to the Consultative Assembly of the Council of Europe in 1949, the French Minister of Information Pierre-Henri Teitgen warned that ‘democracies do not become Nazi countries in one day’: instead minorities ‘[removed] the levers of control’ making it ‘necessary to intervene before it is too late.’²¹ The British delegate to the Consultative Assembly, Lord MacNally, warned that any human rights instrument developed by the Council of Europe must be capable of resisting ‘attempts to undermine our democratic way of life from within or without’ and that such an instrument would have to ‘give Western Europe as a whole greater political stability.’²² Draft versions of the text show that Article 17 was expressly designated as an anti-totalitarian instrument; a draft report to the Committee of Ministers described the provision as necessary to prohibit ‘activities which threaten the preservation of democratic rights and freedoms themselves.’²³

¹⁹ Mark Mazower, *Hitler's Empire: Nazi Rule in Occupied Europe* (Penguin 2013) ch 13.

²⁰ Tony Judt, *Postwar: A History of Europe Since 1945* (Vintage 2007) 41.

²¹ AH Robertson and JG Merrills, *Human Rights in Europe: A Study of the European Convention on Human Rights* (2nd edn, MUP 1996) 4.

²² Collected Edition of the ‘Travaux Préparatoires of the European Convention on Human Rights’ Vol I, *Preparatory Commission of the Council of Europe Committee of Ministers Consultative Assembly 11 May–8 September 1949* (The Hague 1975) 30.

²³ *ibid*, Travaux Préparatoires, Vol IV, 26.

The Travaux Préparatoires of the ICCPR reveal similar concerns behind the formation of Article 5.²⁴ In a discussion on the text of Article 5 during the fifth and sixth sessions of the Commission on Human Rights, the Lebanese and Danish delegates argued that Article 5 ‘aimed at checking the growth of nascent Nazi, fascist or other totalitarian ideologies.’²⁵ The concern of the majority of delegates appeared to be ensuring that groups with totalitarian aims ‘could not invoke the covenants to justify their activities’.²⁶ As a consequence, a majority of states rejected a proposal that the text of Article 5 should be incorporated into Article 19—the provision protecting the right to free speech—as a limitation, as it was argued that it was important to prevent totalitarian groups from seeking the protection of the ‘rights to assembly and association.’²⁷ The need to tackle totalitarianism was used to assuage concerns by some states that Article 5 had the potential to justify far-reaching restrictions on free speech and expression. The prohibition on totalitarianism implicit in Article 5 has been referenced in some country reports to the Human Rights Committee: in its 1985 report West Germany referred to Article 5(1) in relation to its efforts ‘to counteract the growth of totalitarian ideologies.’²⁸

In the first judgment on the meaning of Article 17, the European Commission on Human Rights rejected the application of the German Communist Party, which had been formally disbanded by the German Federal Court. As the party had as their stated aim the establishment of an avowedly communist society via a proletarian revolution, the Commission held that they could not rely on the protection of Articles 9 of the ECHR (freedom of conscience/religion), Article 10 (free speech) or Article 11 (freedom of association).²⁹ This was because the creation of such a society would necessarily undermine and suspend a number of rights, which the Convention guaranteed. In another early case the

²⁴ Marc Bossuyt, *Guide to the ‘Travaux Préparatoires of the International Covenant on Civil and Political Rights’* (Martinus Nijhoff 1987) 103-6. This is a collection of all primary documents that comprise the Travaux Préparatoires of the ICCPR and direct quotes from these documents are referenced with respect to the relevant page numbers in this volume.

²⁵ *ibid* 105.

²⁶ *ibid* 106.

²⁷ *ibid*.

²⁸ UN Doc CCPR/C/28/Add.6, paras 36-37.

²⁹ *Parti Communiste v Federal Republic of Germany* (1957) 1 Yearbook 222, 224.

Commission held that the criminal conviction of a National Socialist for political activity was justified under the framework of rights restriction set out in Article 17.³⁰ Both of these early cases reflected the concerns presented during the drafting the ECHR about the need to guard against fascism and a potential communist takeover.

Most historians are relatively consistent in attributing general anti-totalitarian motivations to states' membership of the Council of Europe and their ratification of the ECHR, and the interpretation of Article 17 needs to be seen in this broader context. Stephen Greer notes that the British government supported creation of the Council of Europe because they were convinced that it would become 'one of the major weapons of the cold war' and that it could provide an ideological counterweight to communist societies.³¹ The British delegate to the drafting committee said that the ECHR had to combat the 'menace of totalitarianism' and act as a 'barrier between that totalitarianism and the peoples associated with this Council of Europe.'³² Ed Bates argues that one of the reasons that an agreement was reached on the creation of the ECtHR, was that states were concerned that there had to be a body which enforced rights and protected democracy as a last resort.³³ The European Movement justifying the Court's creation in 1949 argued that had it existed prior to 1932 it would have condemned the developments in Germany that paved the way for the rise of Hitler.³⁴

Anti-totalitarianism should be conceptually separated from a concern about victims of past injustice. As Stephen Hopgood and Samuel Moyn independently argue, the idea of the Holocaust and the use of international law to protect victims was a concept that gained currency in the early to mid-1960s.³⁵ The anti-totalitarian concern reflected in rights abuse clauses was teleological; it was concerned with protecting rights in a manner that would lead towards the construction of an anti-totalitarian society in the mode of Western

³⁰ *X v Austria* (1963) Appl. 1747/62 Yearbook VI 424.

³¹ Stephen Greer, *The European Convention on Human Rights: Achievements Problems and Prospects* (CUP 2006) 6-18.

³² Travaux Préparatoires (n 22) 27.

³³ Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 80-85.

³⁴ Goldhaber (n 18) 4.

³⁵ Stephen Hopgood, *The Endtimes of Human Rights* (Cornell UP 2013) 50-52.

European liberal democracy. Writing in 1991, Anthony Smith noted that in order to achieve a juridical sense of European unity, a distinct form of European heritage and mythology was necessary.³⁶ Fighting totalitarianism was part of that collective heritage which ossified over time creating a sense, Slavoj Žižek argued, that the fear of totalitarianism was being used to guarantee a 'liberal-democratic hegemony'.³⁷ Žižek's analysis was focused on the structure of political arguments, yet this has a direct application to an analysis of legal structures. In the ECtHR's Article 17 jurisprudence, it is possible to see distinct historical references in the Court's reasoning pointing towards a form of consensus about the past.

The Court has been relatively consistent in only applying Article 17 in relation to participatory rights—Articles 9-11 of the ECHR (respectively the right to freedom of conscience, speech and assembly) and Protocol 1 (the right to participate in elections). Rights abuse clauses do not justify the limitation of an individual's personal rights due to their political activities posing a potential danger to a human rights instrument. To take a hypothetical example: it is possible to limit someone's speech because they are a Nazi, as Nazis historically want to restrict rights, but it would not by the same token be possible to deny that individual Nazi a right to a fair trial.³⁸ In *Lawless v Ireland*, the ECtHR established that rights abuse clauses would allow general laws outlawing extremists using participatory rights so long as any such restrictions did not deprive people of fundamental individual rights, such as the right to a fair trial and freedom from unlawful detention.³⁹ During the Human Rights Commission's consideration of Article 5 it was stated it should only apply in cases where 'the destruction of rights' was to a 'greater extent than [the limitations] provided in the covenants' and that this was not to be read as restricting 'legitimate criticism' by political movements.⁴⁰ For example a political campaign advocating ECHR withdrawal, such as the campaign run by some on the

³⁶ Anthony Smith, *National Identity* (University of Nevada Press 1991).

³⁷ Slavoj Žižek, *Did Somebody Say Totalitarianism: Five Interventions in the (Mis)use of a Notion* (Verso 2001) 3.

³⁸ Phillip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 HRQ 156, 208.

³⁹ *Lawless v Ireland* (No 3) (1961) 1 EHRR 15.

⁴⁰ Bossuyt (n 24) 106.

political right in the UK, would be treated as legitimate criticism even though were it to be implemented 'the rights and freedoms' guaranteed by the ECHR would in a technical sense be undermined by withdrawal.⁴¹

This gives a very wide scope to states to determine what an abuse of rights is and justifies a range of laws restricting participatory rights under the general heading of preventing rights abuse. As Cannie and Vanhoof point out, Article 17 jurisprudence at the ECtHR has been expanded to apply to groups beyond those seeking to overthrow the rights protected in the ECHR, to a position that allows states to justify domestic laws criminalising a 'broad sphere of racial and religious discrimination.'⁴² This is problematic, as Cannie and Vanhoof argue elsewhere, as rights abuse clauses start to '[take] away some democratic guarantees from applicants seeking to safeguard their rights.'⁴³ Article 17 can be read as a symptom of a wider tension within the ECHR, of reconciling popular sovereignty with the protection of rights.⁴⁴ But Article 17, and all rights abuses clauses, explicitly rest on the idea that there is a wider existential threat to human rights instruments, which needs to be repelled, and cannot be reconciled through pluralist processes such as reason and debate. It is in this sense that the Auchter description of juridical forms as being 'haunted' is used here.⁴⁵ Rights abuse clauses are predicated on guarding against

⁴¹ No state has ever passed laws protecting the ECHR as a document and the fact that Article 58 of the ECHR allows for the Convention to be denounced by a state party would seem to indicate that it is the advocacy of removing specific rights from individuals or groups of individuals that will engage Article 17. For an example of the UK campaign against the ECHR see Nicole Stinson, 'Britain Must Leave European Convention on Human Rights SOON or Risk Problems Post-Brexit' *The Daily Express* (London, 28 April 2017) <<http://www.express.co.uk/news/uk/797654/General-Election-2017-Theresa-May-European-Convention-Human-Right-post-Brexit-Lord-Faulks>> accessed 5 June 2017.

⁴² Cannie and Vanhoof (n 6).

⁴³ Cannie and Voorhoof, 'The Abuse Clause in International Human Rights Law: An Expedient Remedy against Abuse of Power or an Instrument of Abuse Itself?' from KP Vanhoutte and Melanie Lang (eds), *Bullying and the Abuse of Power* (Interdisciplinary Press 2010) <<http://www.inter-disciplinary.net/critical-issues/>> accessed 5 June 2017, 117-24.

⁴⁴ Jana Peterman, 'Human Rights Between Sovereign Will and International Standards: A Comment' in European Commission for Democracy through Law (ed) *Definition and Development of Human Rights and Popular Sovereignty in Europe* (Council of Europe Publishing 2011) 132.

⁴⁵ Auchter (n 3) 5-6.

an existential threat of totalitarianism that was specific to the European justification for human rights. The reason for rights abuse clauses permeating into the ICCPR was in part due to the highly Eurocentric approach to human rights, which dominated the formation of early human rights instruments. The way that rights abuse clauses presuppose some kind of existential threat to human rights instruments is illustrated in the next two sections, which show how the anti-totalitarianism in rights abuse clauses has led to the construction of a specific form of anti-racism. As the final section argues, this helps explain why human rights tribunals when interpreting rights abuse clauses have often adopted a highly restrictive approach when considering laws that restrict the freedom of speech.

The ‘right to have rights’, rights abuse clauses and the construction of ‘historical-reference’ racism

Racism and racial discrimination were an important component of European totalitarian regimes; as Hannah Arendt noted, exclusionary ideas based on race were necessary for the creation of a totalitarian historical narrative.⁴⁶ Of particular concern to Arendt was the creation of states of ‘rightslessness’ which emerged from denying an individual the ‘right to have rights’ due to their racial origin.⁴⁷ Arendt outlined how the targeted destruction of the rights of particular racial groups by fascist regimes prior to the Second World War enabled them to invent categories of humanity that were effectively without rights—or ‘rightsless’. These individuals ‘suffered the loss of their homes ... [their] entire social texture’ which was facilitated by their ‘loss of government protection ... [and] legal status’ and eventually led to their loss of ‘life, liberty ... equality before the law and freedom of opinion.’⁴⁸ The removal and eventual abolition of rights was justified and eventually accepted by society at large due to the construction of a specific racist narrative about the rights holding capacity of certain individuals. What totalitarianism was able to do was provide an explanation of racial

⁴⁶ Hannah Arendt, ‘Race-Thinking Before Racism’ (1944) 6 Rev Pol 36.

⁴⁷ Hannah Arendt, *The Origins of Totalitarianism* (4th edn, Harcourt 1976) 296-7.

⁴⁸ *ibid* 293-5.

struggle within laws of historical and biological necessity making governments bound to historical or natural laws, rather than civil laws protecting rights.⁴⁹ Arendt's critique of the 'rights of man' was broad and sweeping and does not really relate to the regime of international human rights law that followed the Second World War. Yet, Arendt's description of the experience of refugees in the 1930s and their 'rightsless' condition is crucial for understanding the context within which the ECHR's and ICCPR's framers were operating.

The key function of rights abuse clauses, on a plain textual reading, is to prevent the facilitation of states of rightslessness such as those created by totalitarian regimes and both Article 17 and Article 5 clearly prohibit states from engaging in 'any act aimed at the destruction of any of the rights' contained in either the ICCPR or the ECHR.⁵⁰ Protecting the right to nationality, Eva Ersbøll argues, comes closest to addressing Arendt's concern about the creation of rightslessness as the nation state is the primary vehicle for rights protection, and in international law the duty holder is the nation state.⁵¹ Since 2005, Protocol 12 of the ECHR has effectively prohibited any removal of nationality on the basis that it is discriminatory. The European experience of totalitarianism was characterized by systematic racism and racist treatment through the creation of individuals without any rights. Therefore the implicit logic in the operation of rights abuse clauses is that the prohibition of totalitarian politics prevents racism. Therefore contrary to Ersbøll's conclusion it is actually Article 17 which is the provision of the ECHR that is the closest to a 'right to have rights', because the entire concept of the right to have rights in international law is an interlocking framework to protect a number of different rights, not just a simple right to nationality.⁵² Absent a right to emigrate, immigrate, equality, privacy and a family life—the right to nationality would not protect the ability

⁴⁹ Margret Canovan, 'Arendt's Theory of Totalitarianism: A Reassessment' in Dana Villa (eds), *The Cambridge Companion to Arendt* (CUP 2005) 28.

⁵⁰ The text of both the ICCPR and the ECHR are identical on this point.

⁵¹ Eva Ersbøll, 'The Right to a Nationality and the European Convention on Human Rights' in Stéphanie Lagoutte, Hans-Otto Sano and Peter Scharff Smith (eds), *Human Rights in Turmoil: Facing Threats Consolidating Achievements* (Koninklijke Brill 2007).

⁵² Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (OUP 2012) 17-23.

to possess rights and may even condemn individuals to having their rights permanently abused, in what Audrey Macklin termed the 'abyss' of the nation state.⁵³

In *Glimmerveen and Hagenbeek*, the European Commission on Human Rights dealt with an application from an extremist group who were advocating a policy that if implemented, would have led to the systematic removal of nationality for racial minorities and the creation of a state of rightslessness of the sort described by Arendt.⁵⁴ The applicant was the leader of the 'Nederlandse Volks Unie' (NVU), a political party formed in 1971, which advocated the creation of an ethnically homogenous society in the Netherlands. The applicants were convicted of racial discrimination under the Dutch penal code for distributing a leaflet addressed to 'white Dutch people' that called for 'undesired aliens to leave our country as soon as possible.'⁵⁵ The leaflet went on to say that if the NVU gained political power it would 'put order into business ... [and] remove Surinamers, Turks and other so called guest workers from the Netherlands'.⁵⁶ The majority of Surinamers residing in the Netherlands were Dutch citizens, so the leaflet was in effect a call for a mass stripping of citizenship from non-whites. This was the significant point for the Commission who held that as the applicants intended to 'remove all non-white people from the Netherlands' they were advocating a policy that was a violation of both Article 17 and Article 14 of the ECHR.⁵⁷

The applicants in *Glimmerveen* were challenging domestic laws designed to prevent the organisation of fascist or communist political groups and reflected an assumption that the politics of these groups would be the principle source of racism.⁵⁸ This can loosely be described as historical reference anti-racism, which, as outlined above, is distinct from anti-discrimination anti-racism in that it relies on preventing a historical set of circumstances that generated racism from reoccurring. Many racist political parties and movements in contemporary Europe

⁵³ Audrey Macklin, 'Who is the Citizen's Other? Considering the Heft of Citizenship' (2007) 8 *Theoretical Inquires in Law* 333.

⁵⁴ *Glimmerveen and Hagenbeek v The Netherlands* (1982) 4 EHRR 260.

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ *ibid*; *Le Pen v France* Appl no. 18788/09 (ECHR 7 Mar 2010).

have their origins within Europe's totalitarian past. Ann-Laura Stoler's study in the early 2000s of the National Front in France illustrates how modern-day racist reactions to immigration and multiculturalism had their roots in France's fascist past, under the Vichy government, and drew on colonial-era conceptions of individuals from France's former colonies.⁵⁹ The philosopher Étienne Balibar noted that the emergence of neo-racism in the early 2000s targeted foreign workers and immigrant communities, often from the 'ex-colonial or semi-colonial' world in a manner that had a long history within Western Europe.⁶⁰ This, Balibar argues, involves situating people of other races as 'insurmountable obstacles to [societies] living alongside each other' and that the individuals of other races were 'denaturing' European identities.⁶¹ What Balibar identified was the continuation of racist ideas within political structures from the totalitarian past. Politics was quite literally still haunted, to use Auchter's terminology, by the memory of totalitarianism.

Writing elsewhere Balibar describes neo-racism, which is concerned with protecting Europe from 'Third Worldisation', but still utilises the notion that underpinned historical racism of there being diametrically opposed peoples.⁶² Even though claims to biological supremacy were no longer part of racist discourse in modern extremist politics, Balibar argues, their claims as to the radical incommensurability of different peoples shows that they were the intellectual inheritors of the fascist racist tradition.⁶³ This kind of reasoning was seen in the Human Rights Committee's decision in *MA v Italy* where the applicant had been convicted under the Italian Law of 'involvement in reorganizing the dissolved fascist party'.⁶⁴ The applicant maintained that his conviction was a violation of his rights

⁵⁹ AL Stoler, 'Racist Visions for the Twenty-First Century: On the Cultural Politics of the French Radical Right' in David Goldber and Ato Quayson (eds), *Relocating Postcolonialism* (OUP 2002).

⁶⁰ Étienne Balibar, *Politics and the Other Scene* (Christine Jones et al tr, Verso 2011) 43.

⁶¹ *ibid.*

⁶² Etienne Balibar and Immanuel Wallerstein, *Race, Nation, Class: Ambiguous Identities* (2nd edn, Verso 2011) 24-7.

⁶³ *ibid.* 25.

⁶⁴ *MA v Italy*, Communication No. 117/1981 (21 September 1981), UN Doc Supp No 40 (A/39/40) (1984) 190.

under the ICCPR and the state party invoked Article 5 at the admissibility stage. Whilst the Committee concluded that the communication did potentially raise points under Articles 19 and 25 of the ICCPR, the acts 'were of a kind, which are removed from the protection of the Convention', seemingly indicating that totalitarianism was outside the scope of human rights protection.⁶⁵

It is not clear, however, that there exists a form of totalitarian threat of the sort experienced by European states in the 1940s from neo-racist organisations, and the European Court of Human Rights has in recent years become increasingly sceptical of Article 17 being interpreted in this way. In *Vona v Hungary*, the Court concluded that the dissolution of the Magyar Gárda organisation by the Hungarian authorities because of its racist actions towards Roma minorities was not a breach of Article 11 because the group posed a 'sufficiently imminent prejudice to the rights of others'.⁶⁶ The ban therefore fell within one of the stated grounds of restriction contained in the text of Article 11 that allowed freedom of association to be restricted in order to prevent disorder and protect the rights of others. It declined to apply Article 17 because the banned group did not 'propagate an ideology of oppression serving 'totalitarian groups'.⁶⁷ This was applied in relation to hate speech in the case of the former French National Front leader, Jean-Marie Le Pen, when he alleged that France's Muslim minority posed a threat to the country and was convicted under French law for 'incitement to discrimination'.⁶⁸ The Court held that Article 10 of the ECHR allows for proportionate restrictions, such as laws criminalising incitement to racial hatred and racial discrimination, to be placed on the right to free speech where the aim is to protect racial minorities.⁶⁹

The anti-discrimination approach to racism in the CERD attempts to decouple the combating of racism from the specific historical context of anti-fascism. The link between anti-racism and resisting fascism was opposed by some delegates during the CERD's

⁶⁵ *ibid.*

⁶⁶ *Vona v Hungary*, App no. 35943/10 (ECHR 9 July 2013) para 57.

⁶⁷ *ibid* para 37.

⁶⁸ Dirk Voorhoof, 'Hate Speech Decision on Le Pen' (*ECHR Blog*, 10 May 2010) <<http://echrblog.blogspot.co.uk/2010/05/hate-speech-decision-on-le-pen.html>> accessed 1 July 2016.

⁶⁹ *ibid.*

drafting process; the Saudi Arabian delegate argued that racism consisted of ‘countless isms’ and whilst the greatest ‘affliction of Europe had been Nazism, for the rest of the world it had ... been colonialism.’⁷⁰ Anti-racism in the CERD was framed in terms of preventing racial discrimination rather than prohibiting racist ideological groups and the Committee on the Elimination of Racial Discrimination has made only scant reference to fascism or other historical acts of racism.⁷¹ Article 1 of the CERD is framed to cover all potential victims and construes discrimination broadly, tackling ‘discrimination in effect as well as aim’, removing any requirement of intention behind racial discrimination.⁷² Article 5 of the CERD contains a list of different rights that state parties are obliged to ‘guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin’. This shifted the foundation of anti-racism from the ideological to the transactional. Anti-discrimination provisions contained in Protocol 12 of the ECHR and Article 26 of the ICCPR can also be used to tackle racial discrimination and to justify laws passed by the governments of state parties to tackle racism.⁷³ Rights abuse clauses are unnecessary to protect individuals against racism as both the application of qualifications stated within human rights instruments and also general anti-discrimination provisions would provide a sufficient legal basis for states to limit rights in order to prevent racial discrimination.

Rights abuse clauses and the right to free speech

One specific example of the dangers of anti-totalitarianism inherent within rights abuse clauses is that they can allow state governments to pass farreaching laws which restrict the freedom of speech. This has attracted some scholarly criticism because of the seemingly far reaching nature of such limitations. Yet this is simply a reflection of the anti-totalitarian consensus inherent to rights abuse clauses outlined in

⁷⁰ Michael Banton, *International Action Against Racial Discrimination* (OUP 1996) 61.

⁷¹ Patrick Thornberry (n 9) 250.

⁷² *ibid* 256.

⁷³ Jordan Paust, ‘Race-Based Affirmative Action and International Law’ (1996) 18 *Mich J Intl L* 659.

the first section and the caselaw in this area shows some evidence of such a consensus.

Societal consensus and restrictions on free speech

The choices about which restrictions to impose on the exercise of free speech are ultimately reflections of which interests society decides need protection. The First Amendment to the US Constitution contains a far-reaching free speech provision, yet the US Supreme Court has held that some political restrictions of free speech are justified. At the height of anti-communist scares in the early 1950s, the Court held that the arrest of the leader of Eugene Dennis, General Secretary of the Communist Party of the USA, under powers contained in the 1940 Alien Registration Act, did not violate the First Amendment.⁷⁴ As Colin Murray notes, the test in the US Supreme Court's judgment, which assesses whether the 'gravity of evil' justifies an invasion of free speech, is in effect a test that makes a political judgment about the potential of the government to be overthrown.⁷⁵ Subsequent judgments on free speech, Murray notes, have retreated from this extreme position, enshrining a 'finite capacity for legislation on a limited number of virtually absolute rights.'⁷⁶ This reflects a political culture within the US that venerates liberal participatory rights, only restricting them where there is a consensus about the gravity of particular emergency. Famously in *Brandenburg v Ohio* the Supreme Court required a direct link between the speech act and violence, not just the advocacy of potentially violent political causes.⁷⁷ This move towards a broad interpretation of free speech, which also imposed a high bar for any law restricting speech acts, is cited by some historians as being rooted in broad traditions of liberty and libertarianism.⁷⁸ Therefore just as the political consensus in the US has led the Supreme Court to only allow limited restrictions of free speech, rights abuse clauses reflect the

⁷⁴ *Dennis v United States*, 341 US 494 (1951).

⁷⁵ Colin Murray, 'Of Fortresses and Caltraps: National Security and Competing Models of Rights Protection' in Rob Dickinson et al (eds), *Examining Critical Perspectives on Human Rights* (CUP 2012) 110.

⁷⁶ *ibid* 126.

⁷⁷ *Brandenburg v Ohio*, 395 US 444 (1969).

⁷⁸ Mark Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (U California P 1991) 3-7.

political consensus that was dominant in Europe at the time, which was orientated towards preventing a resurgence of totalitarianism.

Early drafts of Article 29(3) of the UDHR contained references linking rights abuse clauses to its purposes and principles.⁷⁹ In 1950, less than two years after the signing of the UDHR, concerns were raised about the potential for rights abuse clauses to limit free speech. The US delegate on the committee drafting the ICCPR was so concerned by the potential of rights abuse clauses to create extensive limitations on freedom of speech that he proposed a motion to have the provision deleted in its entirety.⁸⁰ Although the proposal was defeated, wider concerns about the potential application of Article 5 persisted—in particular the capacity of states to exploit Article 5 to ‘legitimise actions which substantially run counter to [the Convention’s] purposes and general spirit.’⁸¹ Later that year similar concerns were raised in the Committee of Ministers of the Council of Europe about early drafts of Article 17 of the ECHR. The wording of the provision had been proposed by the Turkish delegate and replicated a Turkish domestic law designed to ‘[forbid] the diffusion of propaganda in favour of extremist ideas’.⁸² The delegate from the Netherlands asked for the deletion of the paragraph, fearing a contradiction between the right to free speech and the rights abuse clause.

In spite of these early concerns, both clauses made it into the final drafts of the ICCPR and the ECHR. The inclusion of rights abuse clauses in both instruments needs to be read in the light of a broader European consensus, of which anti-totalitarianism is an implicit component. The European consensus behind the ECHR was defined by Judge Colver of the ECtHR as a reflection of a ‘universal agreement’ by elites and citizens ‘on the core values of the Convention system’ which are ‘the most effective means of defending it [the ECHR]’ as a legal framework.⁸³ This consensus, by virtue of being a set of values, contains certain normative content. For example, in the case law on the

⁷⁹ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engle 1993) 95.

⁸⁰ *ibid* 96.

⁸¹ *ibid*.

⁸² *ibid*.

⁸³ Kanstantsin Dzehtsiarou, ‘Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights’ (2011) PL 534, 542.

application of the margin of appreciation doctrine, which has often been interpreted as permitting a wide degree of divergence on moral standards among states, there has, as Ian Leigh argues, been no real explanation offered as to why ‘more morally conservative states have not been permitted [by the ECtHR] to invoke the margin of appreciation on religious matters.’⁸⁴ This is just one indicative example of the presence of a consensus at the supranational level defining the limits of rights.

Restrictions of speech under rights abuse clauses

Rights abuse clauses are only used in a relatively small number of cases concerning the restricting of free speech, but they differ significantly from other cases as invocation of a rights abuse clause allows a tribunal to declare an application inadmissible, rather than have the tribunal investigate the substance of the restriction. The ECtHR has generally held that Holocaust denial is a legitimate reason for a state to limit the right to free speech and have allowed Article 17 to operate in these cases reasoning that denial of the Holocaust undermines the rights in the Convention more broadly. In *Witzsch*, the Court held that the purpose of Article 17 was to make it ‘impossible for individuals to take advantage of a right with the aim of promoting ideas contrary to the text and the spirit of the Convention.’⁸⁵ The denial of agreed facts about the Holocaust was held by the Court in another case to pose a threat to public order and justified the criminalisation of particular forms of speech.⁸⁶ Within this jurisprudence there seems to be a tendency to treat Holocaust denial or activity related to the Nazi party or fascist parties in Second World War as activity that in and of itself poses a threat to human rights instruments. The Human Rights Committee in *Faurisson v France* found that far-reaching laws criminalising Holocaust-denial were justified as Holocaust denial amounted to

⁸⁴ Ian Leigh, ‘Damned if They Do, Damned if They Don’t: The European Court of Human Rights and the Protection of Religion from Attack’ (2011) 17 *Res Publica* 55, 57.

⁸⁵ *Witzsch v Germany (Admissibility)* App no. 7485/03 (13 December 2005) para 3.

⁸⁶ *Garudy v France* App no. 65831/01 (24 June 2003).

'activities aimed at the destruction of rights.'⁸⁷ The ECtHR in *Kühnen* used a similar formulation, holding that even attempts to reconstitute or reform the Nazi party amounted to an attempt to undermine the rights protected in the Convention.⁸⁸

Yet the ECtHR has also been cautious about allowing states to engage in far-reaching restrictions of freedom of speech and association which fall short of Holocaust denial. This was the case in *Lehideux and Isorni*, when a French newspaper carried an advertisement presenting in a positive light certain acts of the government of Marshall Philippe Pétain.⁸⁹ This was prohibited as a form of collaboration under French criminal law, as it was thought to amount to an endorsement of the pro-Nazi puppet government that had ruled Vichy France between 1940 and 1944. The Court held that the criminalisation of speech in this manner was disproportionate, noting, 'the events referred to in the publication in issue had occurred more than forty years before', making it inappropriate to punish such actions with the 'same severity as ten or twenty years previously.'⁹⁰ The problem is that textually Article 17 and Article 5 are much more open-ended in scope than other provisions which allow states to limit free speech, in order to protect legitimate social aims.⁹¹ Steffan Sottiaux has argued that this has led to the creation of a 'bad tendency test' which allows 'the restriction of speech with the mere tendency to cause social harm.'⁹² The Court's consideration of restrictions justified under Article 10 focuses on the nature of the 'legitimate goals' of any laws restricting free speech, some of which, following the text of Article 10, can include 'disorder and protecting the reputation and rights of others'.⁹³ In Article 17 cases the ECtHR has been prepared to interpret

⁸⁷ *Robert Faurisson v France*, Comm No. 550/1993, UN Doc CCPR/C/58/D/550/1993 (1996) para 7.4.

⁸⁸ *Kühnen v Federal Republic of Germany*, App no. 12194/86 (12 May 1998).

⁸⁹ *Lehideux and Isorni v France* (2000) 30 EHRR 665.

⁹⁰ *ibid.*

⁹¹ See for example Articles 8-10 of the ECHR which require the state to demonstrate both the legitimacy and the proportionality of any restriction. This was upheld in *Handyside v UK*, (5493/72) [1976] ECHR 5.

⁹² Stefan Sottiaux, "'Bad Tendencies' in the ECtHR's 'Hate Speech' Jurisprudence" (2011) 7 EuConst 40.

⁹³ ECHR, art 10(2).

this broadly, ruling that it is legitimate for states to restrict speech to preserve ‘political stability’ and a ‘serene social climate.’⁹⁴

In *Norwood v UK* the applicant who was a member of the British National Party—an extremist political party which frequently deployed racist messages—was charged under the UK’s public order legislation for displaying a poster showing the September 11th attacks on the World Trade Center with the slogan ‘Islam out of Britain’.⁹⁵ He appealed his subsequent conviction on Article 10 grounds and when that was refused he applied to the ECtHR. The Court, declaring his application inadmissible, stated that because the Convention as a whole promoted values, ‘notably tolerance, social peace and non-discrimination’, the Court was entitled to use Article 17 to protect those values.⁹⁶ Whilst the content of the speech act was deeply inflammatory, the context and scope of the act were on the facts of the case very limited. As Steve Foster argues this is difficult to square with the Court’s approach in *Lehideux and Irsone* which required intent to undermine the Convention to be demonstrated before engaging Article 17.⁹⁷ The promotion of ‘tolerance’ and ‘social peace’ are wide ranging and seemingly open values which could be used to justify a wide range of laws criminalising speech, association, political participation and freedom of conscience. Furthermore as Foster notes it is highly questionable that a speech act ‘should be denied the basic principles’ of ‘proportionality just because [it is] racially motivated’ and by invoking Article 17 the state party had not been required to justify these restrictions ‘in line with the principles of legality and necessity’.⁹⁸ In order to address these inconsistencies, Paolo Lobba argues that Article 17 ought to be used in far more limited manner, such as complementing an analysis of Article 10, or as a mechanism for a substantive examination of offensive speech itself, rather than as a ‘guillotine’ benefiting the state party.⁹⁹ This, according to Lobba, would

⁹⁴ *Féret v Belgium*, ECtHR 16 July 2009, Case No. 15615/07 para 77.

⁹⁵ *Norwood v DPP* [2002] EWCH 1564, paras 2, 3 and 24.

⁹⁶ *Norwood v United Kingdom* (admissibility) (23131/03) (2005) 40 EHRR.

⁹⁷ Steve Foster, ‘Racist Speech and Article 10 and 17 of the European Convention on Human Rights’ (2005) 10 Cov LJ 91.

⁹⁸ *ibid* 94.

⁹⁹ Paolo Lobba, ‘Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime’ 26 EJIL 237.

result in a more consistent approach to the application of Article 17 alongside other mechanisms for limiting the right to free speech.

Anti-totalitarianism: Synthesising the current consensus on the limits of free expression under rights abuse clauses

Both Foster and Lobba conclude that Article 17, and by implication the regime of rights abuse clauses, are being interpreted too broadly and there is subsequent danger for the protection of free speech. This view misinterprets the role of the restrictions on free speech under rights abuse clauses—they represent the anti-totalitarian consensus behind human rights the instruments which contain them. An exclusionary consensus about the limits and ends of rights is incipient in the interpretation that the ECtHR and Human Rights Committee have placed upon rights abuse clauses in the ECHR and the ICCPR respectively—both instruments are ‘haunted’ by the possibility and potential of totalitarianism. In *Norwood* the Court repeated the common refrain that ‘the general purpose of Article 17 is to prevent individuals or groups with totalitarian aims’ which implicitly refers back to the historical consensus against totalitarianism at the time of the EHCR’s foundation.¹⁰⁰ Similar themes are seen in the Human Rights Committee’s jurisprudence and commentary on rights abuse clauses. Alex Conte in his analysis of Article 5 of the ICCPR argues that it attempts to ‘balance social freedoms’ in line with the principles set out in paragraph 5 of the preamble to the ICCPR which states that ‘everyone has duties ... in the social communities to which they belong’.¹⁰¹ This implied that rights abuse clauses were aimed at creating a unified community to resist against totalitarianism, making any attempt to engage in totalitarian-like activities a breach of an individual’s duties to their community and rendering political activities of the sort that mimicked or echoed historical totalitarian ideas outside of the protection of human rights instruments.

As they are instruments that reflect a common desire to prevent repetition or re-emergence of totalitarian politics, which has been

¹⁰⁰ *Norwood* (n 96).

¹⁰¹ Alex Conte and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Ashgate 2009) 56.

interpreted to mean that anyone who is by association connected with totalitarian politics is in effect outside the consensus about who and what they should protect. This consensus is also seen in state legislative practice. As Loytomaki notes, several ex-socialist Eastern European states have criminalised denial of the communist crimes, following the model of Western European states for criminalising Holocaust denial.¹⁰² This consensus towards criminalising the aspects of speech, and constructing a past, underscores the construction of a consensus about historical memory and the purpose of rights. The reflection of broad and exclusionary historical anti-totalitarian consensus by rights abuse clauses reflects a specific teleology of rights where, as Ilan rua Wall argues, human rights are read as ‘evidence of a hand of providence or progress’ which places ‘our contemporary selves at the end of history.’¹⁰³ This, Wall argues, creates ‘naturalness’ to human rights and attempts to render them ‘necessary’ by locating inevitable social progress towards increasing rights protection.¹⁰⁴ If a teleological narrative of human rights evolution, in a European context, is characterised by the prevention of totalitarianism, it therefore becomes natural for human rights to exclude those with any connection to historical forms of totalitarianism. All human rights instruments rely on some form of consensus over the rights to be protected and the victims of human rights abuses, but rights abuse clauses are evidence of what Anna Greer terms the ‘tilt’ of universality towards a Western conception of rights—or, more accurately in the case of rights abuses clauses, the Western European conception of rights restrictions.¹⁰⁵ The seemingly inconsistent approach of international tribunals on the specific issue of restrictions of free speech by rights abuses clauses is therefore not an inconsistency at all, but rather a reflection of a Western European anti-totalitarian consensus.

¹⁰² Loytomaki (n 2) 25.

¹⁰³ Ilan rua Wall, *Human Rights and Constituent Power: Without Model or Warranty* (Routledge 2012) 13.

¹⁰⁴ *ibid* 14.

¹⁰⁵ Anna Greer, ‘Framing the Project of International Human Rights Law: Reflections on the Dysfunctional “Family” of the Universal Declaration’ in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (CUP 2012) 29.

Conclusion

By implication, the very idea of a 'rights abuse' indicates that there is a proper or accepted use of rights, and this implicit rationale behind these provisions helps to explain how the provisions justify the extreme restrictions on freedom of speech and freedom of association. The rationale behind rights abuses clauses was that groups within a state could pose an ongoing threat to the human rights instrument and the protection of rights themselves. This was often strained in the process of interpretation, allowing the growth of restrictive interpretations of rights abuse clauses. In this respect, the ECtHR's clear restatement that Article 17 requires there to be an actual threat of overthrowing or undermining rights to be operative represents a curbing of these provisions as instruments of state power.¹⁰⁶ The continued presence of rights abuse clauses in the ECHR and ICCPR serves as a reminder that both instruments originated not out of a liberal project of natural rights, but out of a codification of civil rights as an instrument to use against specific political threats.

Rights abuse clauses have however performed one, often understated task—they have addressed the problem, first identified by Arendt, of protecting the right to have rights. This should not however be interpreted as a defence of rights abuse clauses. Even where they perform the function of protecting the right to have rights, they are relatively crude tools for combating racism when other provisions in human rights instruments do an equivalent and arguably superior job. Rights abuse clauses are an inevitable symptom of the attempt to construct a consensus necessary for the construction of a human rights instrument, and that if rights abuse clauses did not exist something else would simply take its place. This does not justify their continued presence within human rights instruments but their continued presence illustrates how human rights instruments can remain haunted by the politics of their foundations. To use Auchter's argument, rights abuse clauses are where it is possible to identify the 'hauntological' foundations of a human rights instrument allowing 'the claimed reality' in which that instrument operates to be 'called into question.'¹⁰⁷

¹⁰⁶ Vona (n 66).

¹⁰⁷ Auchter (n 3).

Understanding rights abuse clauses, to again deploy Autcher's terminology, almost as a memorial to the totalitarian past of Europe, where individuals quite literally lost the right to have rights, helps to understand why such a seemingly regressive provision still has a place within some contemporary human rights instruments. This however remains a distinctly Eurocentric memorial and one that, as indicated by the discussions surrounding the formation of the CERD, only serves to underscore the seemingly Western-centric nature of international human rights law. By treating them more as a passive memorial and less as an active provision on rights limitations, international tribunals may in the future be able to reserve their use for those exceedingly rare cases where there is a genuine danger of totalitarianism, and not use allow state parties to engage in seemingly open-ended restrictions of rights.