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CORE ANALYSIS

European public law after empires

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Abstract

This article seeks to remedy a fundamental flaw in the debate about European integration and European Union (EU) law: the almost complete absence of a reckoning with the legacy of empire and imperialism. The article shows that the significance of EU law can be understood only against the background of the historical transformation of the European public law order with the decline of the European empires. European integration is an integral part of a new European public law order that finally replaced the public law order of the European empires – *Droit Public de l'Europe* or *Jus Publicum Europaeum* – in which the European states held a privileged place as the only 'civilised', and hence, sovereign states in the world. The post-World War II European public law order entailed a new vision for domestic public law, but also constituted intra-European relations anew, and established a new set of external relations between Europe and its former colonies. With the shift from 'European' international law to 'universal' international law in the twentieth century, European integration helped carve out a space for 'Europe' in a world where Europe was no longer the centre of gravity.

Keywords: empire; Droit Public de l'Europe; post-colonialism; European integration; Eurafrica; value order constitutionalism; post-sovereignty

1. The founding myth of EU law

Empire and decolonisation are conspicuous mostly for their absence in the academic study as well as the public debate over the origins and nature of European integration and European Union (EU) law. The end of empire and decolonisation are among the most significant legal and political developments of the twentieth century, yet lawyers, political scientists as well as historians who study EU law and European integration have paid surprisingly little attention to the question of the end of empire and the broader transformation of the European states that followed.[1]

For example, one of the most prominent political scientists writing on European integration, Andrew Moravcsik, describes empire and decolonisation – almost in passing together with other geopolitical interests – as of secondary relevance for the study of European integration.[2]

[1]For important exceptions to this general rule, see Peo Hansen and Stefan Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (Bloomsbury Publishing Plc 2014); Giuliano Garavini, *After Empires: European Integration, Decolonization, and the Challenge from the Global South, 1957–1985* (Oxford University Press 2012); Kalypso Nicolaïdis et al, *Echoes of Empire: Memory, Identity and Colonial Legacies* (IB Tauris 2014) pt III: From Imperial to Normative Power: the EU Project in a Post-Colonial World; Rebecca Adler-Nissen and Ulrik Pram Gad, *European Integration and Postcolonial Sovereignty Games: The EU Overseas Countries and Territories* (Routledge 2013).

[2]Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press 1998) 121 writes: 'In sum, the preponderance of evidence – cross-issue variations in positions, timing, domestic cleavages, and political rhetoric – suggests the priority of economic over geopolitical motivations. The geopolitical concerns cited in most accounts (Suez and decolonization, the German problem, atomic energy) played modest roles; on balance these considerations probably mitigated against the Treaty [of Rome].'

The 'choice for Europe', Moravcsik maintains, was about 'commercial interest' rather than 'glory'.[3] In this way, Moravcsik (indirectly) perpetuates the old and widely discredited idea that somehow empire was not about the 'economy' or 'commercial interest'.[4] As has been demonstrated by countless historians and social scientists, a central motivation fuelling imperialism was access to larger internal markets,[5] natural resources, cheap/slave labour and soldiers,[6] and a safety-valve for European overpopulation and land-hunger.[7] As Eric Hobsbawm put it: 'Whatever the official rhetoric, the function of colonies and informal dependencies was to complement metropolitan economies and not to compete with them'.[8]

Most scholarship on European integration, however, does not even consider empire. Instead, the academic study of European integration and EU law, as well as the official narrative put forward by EU institutions, overwhelmingly starts with a mythical story of European history that goes something like this:[9] for centuries, the European nation-states were in more or less constant war with each other. This culminated in the greatest nationalist war of all times where atrocities yet unheard of in history were committed. After the war, this led the European nation-states to come together in one of the greatest peace projects of all time, namely the project of European integration. A new and unique legal and political community was created that, over the years, emerged as a rival centre of governmental authority to the nation-states.

At this point, the story diverges in two directions, depending on whether scholars give priority to the European institutions or to the Member States, which more often than not are seen as competitors in a zero-sum game. This leads respectively to the theories, on the one hand, of functionalism, neofunctionalism, cosmopolitanism and constitutionalism beyond the state, and, on the other hand, theories of (liberal) intergovernmentalism, realism and the EU as administrative or international law.[10] Whereas the former tend to look on the EU with admiration and excitement as a unique project that has finally managed to transcend the horrors of the nation-state, the latter for the most part maintain that, notwithstanding the significance of the

[3]Ibid 2, see also 103–4, 107ff.

[4]The classical argument about an inherent contradiction between capitalism and empire was put forward by Joseph A Schumpeter, *Imperialism and Social Classes* (Basil Blackwell 1951).

[5]Eric Hobsbawm, *The Age of Empire, 1875–1914* (Abacus 1994) 66.

[6]The British war effort in World War One and World War Two would not have been possible had it not been for the British empire. In World War One, roughly half of the British forces, approximately five million people, came from the colonies and the dominions, Jane Burbank and Frederick Cooper, *Empires in World History: Power and the Politics of Difference* (Princeton University Press 2010) 407. For a discussion of the extent to which the European powers relied on men and materials from empire during World War One, see ibid 375–6.

[7]David K Fieldhouse, *The Colonial Empires: A Comparative Survey from the Eighteenth Century* (Macmillan Press 1982) 5, 24–6; Michael Doyle, *Empires* (Cornell University Press 1986) 111ff; Walter Rodney, *How Europe Underdeveloped Africa* (Verso 2018).

[8]Hobsbawm, *The Age of Empire* 65. Because of the multi-layered and interconnected nature of empire, however, it is not always straightforward to 'calculate' the gains of empire. Burbank and Cooper, *Empires in World History* 447, express this succinctly when they write: 'American silver paid for many of Europe's empire wars and fostered its financial service business; it allowed Europeans to purchase commodities they sought in Asia. Slaves bought in Africa produced sugar on plantations in the Caribbean that fed people in Europe, including by the eighteenth century workers who were making England's industrial revolution and providing goods that people around the world wanted to buy'.

[9]This mythical story was sustained by professional European historians after the war. For a discussion, see Jan Ifversen, 'Myth and History in European Post-War History Writing' in Michael J Wintle and M Spiering (eds), *European identity and the Second World War* (Palgrave Macmillan 2011).

[10]For an overview of legal theories of European integration, see Joseph Weiler and Marlene Wind, *European Constitutionalism beyond the State* (Cambridge University Press 2003); Gráinne de Búrca and Joseph Weiler, *The Worlds of European Constitutionalism* (Cambridge University Press 2012); Matej Avbelj and Jan Komárek, *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012). For an introduction to theories of European integration within political science, see Ben Rosamond, *Theories of European Integration* (Macmillan 2000). For a more recent discussion, see Liesbet Hooghe and Gary Marks, 'Grand Theories of European Integration in the Twenty-First Century' 26 (2019) Journal of European Public Policy 1113.

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project of European integration and globalisation more broadly, the nation-state remains the most important political unit.

There are, therefore, significant differences between these two clusters of theories and narratives, most importantly whether the nation-state is 'withering away' (and whether that is something to be celebrated or not). Nevertheless, these theories all share the same underlying account of European history centred on the nation-state as the dominant, if not the only, form of political association. We must reject this story; not least because it ignores the significance of empire in European history.

The argument set out in this article is that European integration and EU law must be understood against the backdrop of the decline of the European empires and the transformation of the European public law order that underpinned them: *Droit Public de l'Europe* or *Jus Publicum Europaeum*. With the demise of the public law order of the European empires, European integration emerged as an integral part of a new European public law order in tandem with decolonisation. The post-World War II European public law order contained a new vision for domestic public law based on human dignity; a new form of European interstate relations based on the limitation of sovereignty; as well as a new relationship between Europe and the (former) colonial world importantly through the realisation of the project of 'Eurafrica'. In this way, European integration emerged as part of the solution to the problem of 'Europe' in a world where Europe had been irrevocably deprived of its status as the only place of 'civilisation', and hence, sovereignty. European public law, both domestic constitutional law and the international law regulating interstate conduct between European states, has always been shaped by the 'colonial encounter' with societies outside Europe. If we are to understand the nature and significance of European integration and EU law, we must start thinking about the legacy of empire in the history of European public law.

2. The legacy of empire

The mainstream narrative about the origins of European integration takes its point of departure in a flawed, or at least incomplete, diagnosis of World War II as a purely 'nationalist' war. By focusing on the 'excesses' of (German) nationalism, it is obscured that the territorial expansion of Nazi Germany into Eastern Europe in a quest for *Lebensraum* was an imperialist project and the techniques employed were honed from colonial practices previously employed outside Europe.[11] The Third Reich was arguably the last 'grand' attempt to preserve the old world of European empires that sought to substitute oversees colonies by imperial expansion within Europe itself and thereby 'make the great spaces of Eastern Europe into Germany's equivalent of the [British] Raj'.[12]

The misrepresentation of World War Two is symptomatic of a broader tendency to ignore the legacy of empire and focus exclusively on the nation-state as the relevant unit of analysis. Notwithstanding the turn towards transnational history starting in the 1990s, the dominant European historical narratives, at least outside history departments, remain anchored in *national* history (eg, French, German and British history).[13] Yet from a historical perspective, the dominant

[11]Timothy Snyder, *Bloodlands: Europe between Hitler and Stalin* (Basic Books 2010); Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Inc 1994). The imperial aspects of Nazism are discussed further below. That World War II, at least in part, was an imperial war does not mean that it did not have distinct characteristics that sets it apart from other imperial wars, see Burbank and Cooper, *Empires in World History* 370.

[12]Murray Forsyth, *Union of States: The Theory and Practice of Confederations* (Leicester University Press 1981) 175. See also Felix Lange, 'The Dream of a Völkisch Colonial Empire: International Law and Colonial Law during the National Socialist Era' 5 (2017) London Review of International Law 343.

[13]For important contributions to transnational European history of the twentieth century see, for example, Tony Judt, *Postwar: A History of Europe since 1945* (Vintage Books 2005); Mark Mazower, *Dark Continent: Europe's Twentieth Century* (Penguin 1999); Snyder, *Bloodlands*. For transnational histories of European integration, see Wolfram Kaiser and Peter Starie, *Transnational European Union: Towards a Common Political Space* (Taylor & Francis Group 2005); Wolfram Kaiser, Brigitte Leucht and Michael Gehler, *Transnational Networks in Regional Integration: Governing Europe 1945–83* (Palgrave Macmillan 2010).

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form of political association is arguably not the nation-state. For most of political modernity, the European states were, as a rule, *empires*.[14] The great land empires that collapsed after World War I were unions of several relatively autonomous juridical, political and territorial entities that ruled over several 'peoples' speaking multiple languages and belonging to multiple religious denominations.[15] Within the maritime empires that held on a few decades longer, the European metropoles were for the most part dwarfed by the number and size of their oversees subjects and territories.[16] The metropolitan European 'people' was generally a minority compared to the colonial population also governed, directly or indirectly, by the European states, albeit by different laws and with fewer rights.[17] Until the end of the 'age of empire' with World War I, European nation-states – one people, one territory, one ruling authority – were the exception rather than the rule.[18] It was only after the 'Great War' that proper nation-states were created on a large scale in Eastern Europe in the lands of the now former Habsburg Empire, Ottoman Empire and German Empire. These new nation-states, however, only survived for roughly two decades before they were annexed during the imperial conquests of Nazi Germany and the Soviet Union.[19] With the exception of Austria, all the Central and Eastern European nation-states that had been created after World War I did not emerge as 'sovereign' states after World War II but were rather under the more or less direct rule of the Soviet Union.

In contrast to nation-states, empires are composite legal and political entities that combine or transcend aspects of domestic and international law and politics.[20] What this means is that composite legal and political entities are the historical *default*, not unitary, sovereign nation-states. If we take into account that political modernity has been overwhelmingly shaped by the political form of the *empire*, the notion that Europe is today governed by a legal and political system that does not conform to the model of the sovereign nation-state already appears less unique. If we accept that composite legal and political entities are not exceptional, we are forced to conclude that if the EU is unique, it is not because it is a composite legal and political entity.[21]

However, within the study of European integration and EU law, it is generally maintained that the EU is unique exactly because its constitutional nature calls into question the principles of

[14]As Gurminder K Bhambra, 'The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism' 23 (2017) European Law Journal 395, 404 put it: '[M]ost European states were imperial states as much as they were national states – and often prior to or alongside becoming national states – and so the political community of the state was much wider and more stratified than is usually acknowledged'. See also Gary Wilder, *The French Imperial Nation-State: Negritude and Colonial Humanism between the Two World Wars* (University of Chicago Press 2005).

[15]Pieter M Judson, *The Habsburg Empire: A New History* (The Belknap Press of Harvard University Press 2016); Timothy Snyder, *The Reconstruction of Nations: Poland, Ukraine, Lithuania, Belarus, 1569–1999* (Yale University Press 2003); Burbank and Cooper, *Empires in World History* ch 11.

[16]For a global history of empire, see Burbank and Cooper *Empires in World History*. For a *long durée* history of European maritime empires, see David B Abernethy, *The Dynamics of Global Dominance: European Overseas Empires, 1415–1980* (Yale University Press 2000). See also Fieldhouse, *The Colonial Empires*.

[17]Unlike federations, Michael Doyle, *Empires* 36 writes, empires 'are not organized on the basis of political equality among societies or individuals. The domain of empire is a people subject to unequal rule. One nation's government determines who rules another society's political life'. See also Bhambra, 'The Current Crisis of Europe' 401.

[18]Andreas Wimmer and Brian Min, 'From Empire to Nation-State: Explaining Wars in the Modern World, 1816–2001' 71 (2006) American Sociological Review 867, 870.

[19]Timothy Snyder, 'Integration and Disintegration: Europe, Ukraine, and the World' 74 (2015) Slavic Review 695; Mazower, *Dark Continent*; Odd Arne Westad, *The Cold War: A World History* (Allen Lane 2017) 39–41; Burbank and Cooper, *Empires in World History* 450–1.

[20]Olivier Beaud, 'Federation and Empire: About a Conceptual Distinction of Political Forms' in Amnon Lev (ed), *The Federal Idea: Public Law between Governance and Political Life* (Hart Publishing 2016); Olivier Beaud, 'Propos Introductifs' 14 (2015) Jus Politicum [http://juspoliticum.com/article/Propos-introductifs-970.html]; Doyle, *Empires* 34–6.

[21]For two different arguments to that effect, see Signe Rehling Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021); Jan Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (Oxford University Press 2006).

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international law.[22] Within the international legal community, states are sovereign and equal. By introducing the principles of supremacy and direct effect, the argument goes, EU law, and especially the case law of the European Court of Justice (ECJ), has introduced a legal revolution that has taken EU law beyond the realm of 'normal' international law.[23] The EU rather constitutes a new legal order that eludes traditional concepts of international law. The EU has led to an erosion of sovereignty that scholars look on either with grim concern as an undemocratic force or else as a promise for a new form of cosmopolitanism that ought to be replicated all over the world.[24]

There is no doubt that EU law is distinct from the general workings of international law and arguing otherwise remains a minority position within EU law scholarship for good reasons.[25] Nevertheless, the comparison made in the literature tends to lack historical depth, and for that reason it misses the real significance of EU law. This is because the narrative of the EU's *sui generis* nature through the comparison with international law tends to ignore the historical development of the European public law order, including 'European' international law, as well as the role played by European empires within it. The 'ordinary' international legal order that EU law is compared to tends to be a universal international legal order where political communities, as a rule, are recognised as sovereign states. In today's world, where more or less the entire globe is parcelled into nation-states, the EU appears as an exception and a mystery; somehow 'more' than an international organisation yet 'less' than a new sovereign state.

Yet this global legal order is, in historical terms, recent. For most of modernity, European jurists would have found it absurd to think of political communities outside Europe in terms of sovereignty.[26] Sovereignty only pertained to the world of 'civilised', that is, 'European' states. This view continued in some form until the 1960s,[27] when non-Western political communities at large were included in the family of sovereign nations as part of decolonisation.[28] The 'universal'

[22]The literature is too extensive to cite in full. For the most influential accounts, see Joseph Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' And Other Essays on European Integration* (Cambridge University Press 1999); Joseph Weiler, 'Federalism Without Constitutionalism: Europe's Sonderweg' in Kalypso Nicolaïdis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press 2001). See also the debates about constitutional pluralism and multilevel constitutionalism, Avbelj and Komárek *Constitutional Pluralism*; Ingolf Pernice, 'Multilevel Constitutionalism in the European Union' 27 (2002) European Law Review 511.

[23]For accounts of the ECJ's role in the 'constitutionalisation' of EU law, see Joseph Weiler, 'A Quiet Revolution: "The European Court of Justice and Its Interlocutors"' 26 (1994) Comparative Political Studies 510; Anne-Marie Slaughter, Alec Stone Sweet and Joseph Weiler, *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart Publishing 1998); Alec Stone Sweet and James A Caporaso, 'From Free Trade to Supranational Polity: The European Court and Integration' in Wayne Sandholtz and Alec Stone Sweet (eds), *European Integration and Supranational Governance* (Oxford University Press 1998); Christiaan Timmermans, 'The Constitutionalization of the European Union' 21 (2001) Yearbook of European Law 1.

[24]Martin Loughlin, 'The Erosion of Sovereignty' 45 (2016) Netherlands Journal of Legal Philosophy 57; Dieter Grimm, 'The Constitution in the Process of Denationalization' 12 (2005) Constellations 447; Dieter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (Columbia University Press 2015); Fritz W Scharpf, *Governing in Europe – Effective and Democratic?* (Oxford University Press 1999). *Cf* Jürgen Habermas, *The Crisis of the European Union: A Response* (Polity Press 2012); Jürgen Habermas, *The Postnational Constellation: Political Essays* (Polity in association with Blackwell Publishing 2001); Mattias Kumm, 'Beyond Golf Clubs and the Judicialization of Politics: Why Europe Has a Constitution Properly so Called' 54 (2006) The American Journal of Comparative Law 505.

[25]The main advocate for the 'international' interpretation of the EU is Bruno de Witte, 'The EU as an International Legal Experiment' in Joseph Weiler and Gráinne de Búrca (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2012). A more recent interpretation of the EU as international law is Pavlos Eleftheriadis, *A Union of Peoples* (Oxford University Press 2020).

[26]Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001) 127.

[27]For example, several of Europe's 'founding fathers', including Konrad Adenauer, were not merely of the belief that western civilisation was superior to all other, but that it would be utterly inconceivable 'that Africa, as a black continent, could be independent alongside the other continents', as cited by Hansen and Jonsson, *Eurafrica* 161.

[28]For a comparative study of decolonisation, see Martin Shipway, *Decolonization and Its Impact: A Comparative Approach to the End of the Colonial Empires* (Blackwell Publishing 2008).

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international law that the EU is contrasted with, where the default option is that political communities on a global scale are recognised as sovereign states, only came into existence as a consequence of the collapse of the global legal order of European empires. Moreover, as Jane Burbank and Frederick Cooper have demonstrated, the adoption of the nation-state as the alternative to empire was by no means a foregone conclusion.[29] Within the academic study of EU law, however, this is widely ignored or forgotten, and the EU is compared to a world where the 'normal' situation is assumed to be sovereign nation-states that precede international law.

3. Empire and European international law

International law is in its origins Eurocentric. For centuries, 'European' international law was a constitutive part of the public law order of European empires: *Droit Public de l'Europe* or *Jus Publicum Europaeum*.[30] Described as the 'external' aspects of the European public law order, European international law regulated the relationship between 'civilised' European states.[31] This public law order of European empires, founded on land appropriation in the new world and consolidated and formalised in the nineteenth century, was one of the casualties of World War II.[32] The foundations of *Droit Public de l'Europe*, however, were already undermined with World War I that destroyed the European land empires, exposed the weakness of the British Empire, while revealing the strength of the United States.[33] Nevertheless, the old European international legal order was not replaced by a new international legal order in the interwar period.[34] Until the demise of the European maritime empires, European international law regulated the relationships between the European states, as well as their relationships with the 'uncivilised' world outside Europe.[35]

Within the legal order of *Droit Public de l'Europe*, 'Europe' had a special status as the community of civilised, and hence, sovereign and equal nations.[36] Only the civilised nations in Europe, and later former white settler colonies ruled by people of European descent, were included in the community of 'civilised nations' that could be considered sovereign.[37] The 'civilised' world

[29]It is important to remember that it was not a given that the nation-state would emerge as the dominant form of political association after World War Two. For example, the French West Africans' campaign for federation among their territories into an African Federal Union had horizontal aspiration that went beyond the political form of the nation-state, see Burbank and Cooper, *Empires in World History*. See also Gary Wilder, *Freedom Time: Negritude, Decolonization, and the Future of the World* (Duke University Press 2015).

[30]Carl Schmitt, *The Nomos of the Earth: In the International Law of the* Jus Publicum Europaeum (GL Ulmen ed) (Telos Press 2006) 228.

[31]For example, Hegel distinguished between internal and external aspects of public law: 'innere Staatsrecht' (internal public law/state law/constitutional law) and 'äußere Statsrecht' (external public law/state law/international law), George Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse* (Friedrich Frommann Verlag 1964) 337ff, 440ff. Wheaton, similarly, distinguishes between 'droit public interne' and 'droit public externe', see Henry Wheaton, *Elements of International Law* (Stevens & Sons 1878) 29. For a discussion, see Martti Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism' [2011] Rechtsgeschichte – Legal History; Koskenniemi, *The Gentle Civilizer of Nations* 31.

[32]Schmitt, *The Nomos of the Earth* 101.

[33]Westad, *The Cold War* 21; Burbank and Cooper, *Empires in World History* ch 12.

[34]In Carl Schmitt's view, the first challenge to Eurocentric international law was the rise of the 'Western Hemisphere' with the American War of Independence; however, the effects of this challenge only started to manifest themselves in earnest in the nineteenth century, and they only developed fully in the twentieth century with the rise of the United States, see Schmitt, *The Nomos of the Earth* 100, 281–94.

[35]Koskenniemi, *The Gentle Civilizer of Nations* ch 1.

[36]Schmitt, *The Nomos of the Earth* 86. See also, Koskenniemi, 'Histories of International Law'.

[37]In the years leading up to World War One, however, a number of non-European communities became included in the 'family of nations' and recognised as sovereign states. European jurists had started to accept that some non-European societies could live up to the 'standard of civilisation' and therefore be included as members of the international society. Writing in the early twentieth century, Lassa Oppenheim maintained that the family of nations no longer only included its original members,

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ordained with sovereignty was qualitatively distinct from the 'uncivilised' world outside Europe where political communities, at best, could be recognised as partly or half sovereign.[38] This legal order was based on a fundamental separation between the principles that governed and structured the relationship between the European metropoles as sovereign and equal states, and the laws and principles that regulated the 'colonial encounter' with the 'uncivilised world' outside Europe.[39] The fundamental spatial distinction underlying *Droit Public de l'Europe* was between, on the one hand, the lawful order of Europe that 'bracketed war' among European states by subjecting war to legal rule and, on the other hand, the relative lawlessness of the 'free and empty spaces' in the New World, where land appropriation knew no bounds and only the law of the strongest prevailed.[40] The New World was an area 'where force could be used freely and ruthlessly'.[41]

The world of *Droit Public de l'Europe*, therefore, was global but not universal. On a global scale, two different sets of rules applied: those regulating conduct among 'civilised' states in Europe, and those regulating conduct in the 'uncivilised' world.[42] Since the non-European world in the eyes of Europeans did not live up to the European standard of 'civilisation' they did not exert sovereign authority over their lands. For that reason, in the eyes of Europeans, and European jurists,[43] the world beyond Europe could be legally and legitimately subjected to the imperial control of the sovereign European states by a variety of different means ranging from conquest to cession.[44] Even in cases of cession, however, non-Europeans were at best regarded as having private law ownership of land; never sovereign control over territory.[45] The colonial title to territory was always seen as original.[46] Whether the non-European territory was inhabited or not, it was in the eyes of Europeans a 'free space' that was 'open to European occupation and expansion'.[47] With the shift from informal to formal empire between the last two decades of the nineteenth century and World War One, the entire globe was partitioned into territories under the formal rule of a small number of, predominantly, European states.[48]

ie, the 'old Christian states of Western Europe', but also the former colonies in the Americas, as well as 'the two Christian Negro Republics of Liberia in West Africa and of Haiti' together with Turkey and Japan, see Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green and Co 1920) 33–4. For a discussion, see Benedict Kingsbury, 'Sovereignty and Inequality' in Andrew Hurrell and Ngaire Woods (eds), *Inequality, Globalization, and World Politics* (Oxford University Press 1999). See also Hobsbawm, *The Age of Empire* 23.

[38]Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 52ff.

[39]Ibid 5. See also, Abernethy, *The Dynamics of Global Dominance* 34; Koskenniemi, *The Gentle Civilizer of Nations* 85–6, 114–6.

[40]In *The Nomos of the Earth*, Schmitt maintains that another spatial distinction in addition to the one between the Old World and the New World underpinned the concrete order of *Jus Publicum Europaeum*, namely, the antithesis between *land* and *sea* each with 'its own concept of enemy, war, booty, and freedom', see Schmitt, *The Nomos of the Earth* 172. The concrete link that connected the orders of land and sea was England (ibid ch 3). For Schmitt's diagram of *Jus Publicum Europaeum* with its two constitutive distinctions between (1) land and sea and (2) European lands and non-European lands, see ibid 184.

[41]Schmitt, *The Nomos of the Earth* 140, emphasis added.

[42]The Old World of Europe was separated from the 'New World' by an Amity line. Schmitt, *The Nomos of the Earth* 93–4 writes: 'At this "line", Europe ended and the "New World" began. Consequently, so too did the bracketing of war achieved by traditional European international law, meaning that there the struggle of land-appropriations knew no bounds. Beyond the line was an "overseas" zone in which, for want of any legal limits to war, only the law of the stronger applied.'

[43]For an overview of the legal discourse of international law that legitimised colonial expansion into non-European territories, see Koskenniemi, *The Gentle Civilizer of Nations* ch 2.

[44]For a legal 'manual' on the different methods for colonial expansion, see Mark Frank Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (Longmans, Green and Co 1926). See also Koskenniemi, *The Gentle Civilizer of Nations* 129ff; Schmitt, *The Nomos of the Earth* 215–6.

[45]Koskenniemi, *The Gentle Civilizer of Nations* 113–4, 126–8; Schmitt, *The Nomos of the Earth* 198–9.

[46]Schmitt, *The Nomos of the Earth* 136.

[47]Ibid 87.

[48]For a discussion of the 'demise' of informal empire, see Koskenniemi, *The Gentle Civilizer of Nations* 116ff. See also, Doyle, *Empires* pt II; Schmitt, *The Nomos of the Earth* 220. Hobsbawm, *The Age of Empire* 57–8.

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Within positivist traditions, sovereignty is in general seen as the foundational concept of international law. As demonstrated by scholars such as Antony Anghie and Martti Koskenniemi but before them also Carl Schmitt, such an analysis is flawed since few political communities beyond Europe were recognised as sovereign states under 'European' international law.[49] Within 'European' international law, sovereignty was reserved for the society of 'civilised nations' and law only prevailed among its members.[50] 'Civilisation' and 'society', therefore must be included as co-constitutive concepts of 'European' international law because they determined which political communities were to be included as sovereign states and which communities were 'outside' the world of European international law.[51] *Droit Public de l'Europe* is therefore not merely constituted on the basis of sovereign equality but also on the basis of the *inequality* between 'civilised' and 'uncivilised' peoples; the difference between Europe and its 'other'.[52] The European princes could recognise each other as equals exactly because they saw themselves collectively as distinct from and superior to non-Europeans.

In this way, 'Europe' had a special legal and political status as distinct from the rest of the world within *Droit Public de l'Europe*: 'Even in the absence of a common sovereign, Europe was a political society and international law an inextricable part of its organization.'[53] What the Europeans shared with each other, which in their own eyes distinguished them from everyone else and made them capable of 'discovering' and 'civilising' the rest of the world, was a distinctive kind of consciousness or conscience.[54] According to Koskenniemi:

> the founding conception of late nineteenth-century international law was not sovereignty but a collective (European) *conscience* – understood always as ambivalently either consciousness or conscience, that is, in alternatively rationalistic or ethical ways.[55]

The interstate character of 'European' international law can be understood only if the spatial order that underpinned it is acknowledged. The Old World of Europe, where states recognised each other as sovereign equals, relied on its differentiation from the New World where, for most of political modernity, no communities were recognised as sovereign and where the law of 'civilisation' did not apply.[56] It was this fundamental *difference* set out by a Eurocentric spatial global order that gave meaning to *Droit Public de l'Europe*.[57] Following Schmitt, it was land

[49]Anghie, *Imperialism, Sovereignty and the Making of International Law* 99; Koskenniemi, *The Gentle Civilizer of Nations* 127ff; Schmitt, *The Nomos of the Earth* 147–8.

[50]Anghie, *Imperialism, Sovereignty and the Making of International Law* 100.

[51]As Anghie, *Imperialism, Sovereignty and the Making of International Law* 99 put it: 'Positivists focused on sovereignty, but at least with respect to the European–non-European distinction, the powerful and defining idea that sovereignty was the exclusive preserve of Europe was enabled by an elaboration of the concept of "society". Law properly prevailed only among the members of society. Consequently, for the positivists, the concept of law was intimately connected with the concept of society, rather than that of sovereignty.' See also Koskenniemi, *The Gentle Civilizer of Nations* 51.

[52]Notwithstanding that late nineteenth century European jurists, such as Rolin, Bluntschli and Westlake, discussed colonialism in various different ways, Koskenniemi, *The Gentle Civilizer of Nations* 127 argues, 'their discourse provides a uniform logic of exclusion-inclusion in which cultural arguments intersect with humanitarian ones so as to allow a variety of positions while at every point guaranteeing the controlling superiority of "Europe"'. For a more general debate about the ideas informing colonial administration, see Edward W Said, *Orientalism* (Penguin Books 2003).

[53]Koskenniemi, *The Gentle Civilizer of Nations* 51.

[54]Ibid 1. Schmitt, *The Nomos of the Earth* 132 alludes to the centrality of conscience/consciousness when he writes: 'From the standpoint of the discovered, discovery as such was never legal. Neither Columbus nor any other discoverer appeared with an entry visa issued by the discovered princes. Discoveries were made without prior permission of the discovered. Thus, legal title to discoveries lay in a higher legitimacy. They could be made only by peoples intellectually and historically advanced enough to apprehend the discovered by superior knowledge and consciousness.'

[55]Koskenniemi, *The Gentle Civilizer of Nations* 51.

[56]Schmitt, *The Nomos of the Earth* 189, see also 210.

[57]International law, Anghie, *Imperialism, Sovereignty and the Making of International Law*, 274 argues, 'is created in part through its confrontation with the violent and barbaric non-European "other"'. 'Continental European international law since

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appropriation of the New World that '*made possible* a new European international law among states: an interstate structure'.[58] The Eurocentric spatial order of *Jus Publicum Europaeum*, in Schmitt's view, started to decline towards the end of the nineteenth century when the fundamental distinction between European and non-European soil was abandoned.[59] Empire, therefore, is not incidental to 'European' international law; the law between European sovereign states. It is a constitutive feature.

4. The collapse of Droit Public de l'Europe

During the interwar period, European colonial rule was starting to fray at the edges with growing demands for self-determination and constitutional reform in places as different as Ireland, India and across the African colonies.[60] The French and the British had relied heavily on their empires for the war effort, and as the colonial troops returned to the colonies from the battle for the empires' mother countries, they could not understand why they should be denied the freedoms they had fought to secure for people in Europe.[61] Yet while World War One and the interwar period exposed the weakness and instability of the old world of European empires, they did not lead to the creation of a new stable legal, political and economic order that could replace it.[62] On the contrary, the interwar period saw a new level of chaos in a world where empires and proper nation-states existed alongside one another for the first time on a grand scale.

The age of extremes spelled the economic, political and constitutional collapse of the European states, which left them incapable of securing their most basic aims of territorial defence, repression of civil war and the aversion of hunger. The most prominent example is the Weimar Republic, which never managed to realise a stable form of government. This resulted in the widespread use of emergency decrees that ultimately brought the Nazis to power with the project of turning Eastern Europe into the colonial territory of the Third Reich.[63] Without overseas colonies to sustain the state, Nazi Germany brought the practice of colonial exploitation home to 'Europe' in the quest for raw materials, slave labour and *Lebensraum*.[64] The racial violence of colonialism, including slavery and genocide, that previously had taken place territorially outside the 'civilised' world in the colonies was thus for the first time in history forced upon Europeans by Europeans on European soil.[65] In this way, the foundational distinction of 'European' international law between what passed as legitimate action in the 'civilised world' and what were legitimate acts in the 'uncivilised world' outside Europe was eradicated.

With the conclusion of World War II and in the following decades, it became increasingly clear that 'Europe' was no longer the centre of gravity for the world order; nor was it likely to become so again. Not only had the imperial control of the colonies been lost or weakened, but the

the 16th century, the *Jus Publicum Europaeum*, originally and essentially was a law among *states*, among European sovereigns', Schmitt, *The Nomos of the Earth* 127 writes: 'The European core determined the *nomos* of the rest of the earth. "Statehood" is not a universal concept, valid for all time and all peoples.'

[58]Schmitt, *The Nomos of the Earth* 140, emphasis added.

[59]Schmitt, *The Nomos of the Earth* 223 ff.

[60]Burbank and Cooper, *Empires in World History* 389ff.

[61]Hansen and Jonsson, *Eurafrica* 19.

[62]Burbank and Cooper, *Empires in World History* 369, 389ff. See also Hobsbawm, *The Age of Empire* 18ff; Schmitt, *The Nomos of the Earth* 192, 233–4, 240–1.

[63]Ernst Frankel, *The Dual State: A Contribution to the Theory of Dictatorship* (Oxford University Press 1941).

[64]Snyder, *Bloodlands*; Timothy Snyder, *Black Earth: The Holocaust as History and Warning* (Tim Duggan Books 2015); Burbank and Cooper, *Empires in World History* 398–400, 405ff.

[65]For an account of colonial violence, see Frantz Fanon, *The Wretched of the Earth* (Penguin 1967). For an account of the legacy of imperial violence and genocide for Nazism in particular, see David Olusoga, *The Kaiser's Holocaust: Germany's Forgotten Genocide and the Colonial Roots of Nazism* (Faber 2010); Shelley Baranowski, *Nazi Empire: German Colonialism and Imperialism from Bismarck to Hitler* (Cambridge University Press 2011). See also A Dirk Moses, *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History* (Berghahn Books 2008).

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constitutional regimes in *Europe*, in the imperial metropoles, had largely collapsed. After the war, Europe was a region of more or less failed states in the outskirts of the two 'super-powers' of the new world order, the Soviet Union and the United States.[66] With a few significant exceptions – the United Kingdom, Switzerland and to some extent the Scandinavian states – the European constitutional regimes as well as the faith in the international order that underpinned them had been destroyed.[67]

World War II led to the 'fall' of 'European' international law and the emergence of a new global order, a 'universal' international law, with a number of new significant international institutions such as the United Nations (UN), the General Agreement on Tariffs and Trade, the World Bank and the International Monetary Fund.[68] An important aim of these institutions was to facilitate the transformation of colonial territories into sovereign states as well as to control and manage the new 'Third World'.[69] The members of this new 'community of nations' were no longer separated into 'civilised' and 'uncivilised' nations but rather 'developed' and 'underdeveloped' countries as the old 'civilising mission' was replaced by a project of 'modernisation'.[70]

5. Decolonisation and the transformation of Europe

With the end of the 'age of extremes', *Droit Public de l'Europe* was finally drawing to a close, even though decolonisation was yet to happen in earnest. The German and Italian projects of fascist imperialism had been quashed and it became clear that the foundations for the new world order would not be built on the old world of European empires. Nevertheless, for the first two decades after World War Two, the European metropoles attempted desperately to cling on to their imperial possessions by relying on a mixed strategy of imperial constitutional reform and violent repression.[71] The most ambitious constitutional reforms projected a vision of the transformation of the British, French and Dutch empires into Federal Unions or Commonwealths based on the extension of imperial citizenship and other constitutional rights.[72] However, when these projects failed or turned out to be stillborn, the European states attempted, and failed, to hold on to empire through violent coercion, for example during the Indochina War/Anti-French Resistance War (1946–54); the Indonesian War of Independence (1945–49); the Malayan Emergency/the Anti-British National Liberation War (1948–60); the Mau Mau Uprising/the Kenya Emergency (1952–60); the Algerian War of Independence (1954–62); and the 1956 Suez crisis.[73]

[66]See, for example, Judt, *Postwar* ch 1; Westad, *The Cold War* ch 1.

[67]Eric J Hobsbawm, *Age of Extremes: The Short Twentieth Century, 1914–1991* (Abacus 1994); Westad, *The Cold War* ch 1.

[68]For a discussion of the imperial roots of the UN, see Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press 2009).

[69]This process, however, already started after World War One with the establishment of the Mandate System of the League of Nations that placed the former colonies of the Ottoman Empires and the German Empires under a 'system of international tutelage', see Anghie, *Imperialism, Sovereignty and the Making of International Law* ch 3. On the Bretton Woods institutions as the successors to the Mandate System, see specifically 190ff. See also Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011).

[70]For a classic work on modernisation theory, see, for example, Lucian W Pye and Sidney Verba (eds), *Political Culture and Political Development* (Princeton University Press 1965). For a history of modernisation theory, see Nils Gilman, *Mandarins of the Future: Modernization Theory in Cold War America* (Johns Hopkins University Press 2004). See also Joseph Morgan Hodge, 'Writing the History of Development (Part 1: The First Wave)' 6 (2015) Humanity 429.

[71]'Even after the end of the Second World War, the European nations that had not lost the conflict clung tightly to their colonial possessions, which they considered an extension of the metropole, a central component of their prestige and national identity, and vital economic "living space," not to mention a strategic reserve of cheap labour', see Garavini, *After Empires* 8. See also Shipway, *Decolonization and Its Impact*; William Roger Louis, *Ends of British Imperialism: The Scramble for Empire, Suez and Decolonization: Collected Essays* (IB Tauris 2006).

[72]Frederick Cooper, *Citizenship between Empire and Nation: Remaking France and French Africa, 1945–1960* (Princeton University Press 2014); Burbank and Cooper, *Empires in World History* 415ff.

[73]For a comparative history of decolonisation in the British, French and Dutch empires, see Martin Thomas, Bob Moore and Larry J Butler, *Crises of Empire: Decolonization and Europe's Imperial States, 1918–1975* (Bloomsbury Publishing 2010).

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Decolonisation led to a fundamental transformation of the former colonies, now termed the 'developing world'.[74] Over the past few decades, post-colonial scholarship in international law has examined the role played by international law in facilitating and reforming Western rule in the colonial world, as well as the Global South more broadly, both before and after decolonisation.[75] However, empire was not merely an appendix that could be removed without significantly *transforming Europe* and the former metropoles as well. The end of empire dealt a blow to the legal, political, and economic foundations on which the European state system rested. This, however, remains under-researched; perhaps because the European strategy to deal publicly with the legacy of empire has, for the most part, been to 'forget' that it ever existed or to treat it as something that happened somewhere else, 'overseas'.

A strategy of 'forgetting', however, could not provide a solution to the fundamental problem of 'Europe' that was posed with increasing urgency during the interwar period and after World War II. What were the implications for Europe when 'non-European states and nations from all sides now took their place in the family or house of European nations and states?'[76] With the reconfiguration of the global order after the decline and eventual collapse of the global order anchored in European imperialism, what would happen to 'Europe' and the imperial metropoles? After the 'humiliation' of decolonisation when Europe lost its treasured symbols of economic, political, and moral superiority, how would 'Europe' as a political existence and identity survive?[77]

After World War II, the spatial order and ideological orientation of European international law had been destroyed. In the new international legal order that emerged, 'Europe' did not have a privileged status in terms of European territory or in terms of European 'consciousness' or 'civilisation'. Many intellectuals at the time, therefore, talked about a crisis of European spirit or consciousness.[78] Shortly after World War II, Europe – the centre of the old world order of *Droit Public de l'Europe* – was effectively partitioned into the two spheres of influence of the United States and the Soviet Union.[79] For centuries, through formal and informal practices of empire and colonialism, Europeans had determined the political fate of peoples and communities in much, if not most, of the rest of the world. Yet with the end of World War II, Europeans were no longer in charge of Europe's own destiny.[80] To add insult to injury, both these new imperial superpowers laid claim to being the political forces that would finally complete the project of the enlightenment that the Europeans had failed at. In that sense, they both claimed to be a better, more superior version, of 'Europe'.[81]

European integration emerged as an integral part of the answer to this question by carving out a new space for Europe in the world in tandem with decolonisation. In this way, European

See also, Mark Mazower et al, *Post-War Reconstruction in Europe: International Perspectives, 1945–1949* (Oxford University Press 2011) pt 4: Empire. For a discussion of the Portuguese Empire's attempt to hold on to its African colonies after World War Two, see Thomas, Moore and Butler, *Crises of Empire* ch 16.

[74]Raymond F Betts, *Decolonization* (Routledge 1998); Jan C Jansen and Jürgen Osterhammel, *Decolonization: A Short History* (Jeremiah Riemer tr) (Princeton University Press 2017).

[75]See, for example, Turan Kayaoglu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge University Press 2010); Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (Cambridge University Press 2014); Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013); Umut Özsu, *Formalizing Displacement: International Law and Population Transfers* (Oxford University Press 2015); Pahuja, *Decolonising International Law*. See also Martti Koskenniemi, 'Expanding Histories of International Law' 56 (2016) American Journal of Legal History 104.

[76]Schmitt, *The Nomos of the Earth* 237.

[77]Michael J Wintle and M Spiering (eds), *European Identity and the Second World War* (Palgrave Macmillan 2011) 4.

[78]For example, see the writings of Karl Jaspers and Paul Valéry. For a discussion, see Ifversen, 'Myth and History in European Post-War History Writing'.

[79]Westad, *The Cold War* ch 2.

[80]'[I]n a moment unique in Europe's modern history', Westad ibid 66 writes 'most of the continent was reduced to a supine waiting on events outside its control'.

[81]Ibid 18.

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integration is a significant part of a broader project of reconfiguring the global order after the decline and eventual collapse of European imperialism.[82] That being said, European integration is distinct from other legal and economic institutions set up to govern the post-World War II order such as the Bretton Woods institutions or the UN. The reason for that is not merely that European integration was never meant to be a 'global' institution in the sense that it only includes 'European' states. Equally important is the fact that European integration created a new legal and political order for *Europe*; the former world of the 'civilised' and hence sovereign states. In a global order no longer centred on *European interests* guised in the language of universalism, European integration emerged in order to secure European autonomy and European interests as distinct from the hegemonic forces of the new world order. In a new world, where sovereignty became for the first time in history the default for *all* politically organised communities rather than merely European states and where Europe was no longer the centre of gravity, European integration sought to secure a place for Europe, and European states, in the world.[83]

After World War II, a double movement took place in the European public law order. While the core principle of the old world of European international law, namely state sovereignty, was extended en masse to the 'uncivilised' (now 'developing') world, many of the former imperial metropoles turned away from this principle within *Europe*. Just when sovereignty was no longer something that predominantly belonged to European states, a new vision for the explicit *limitation* of sovereignty emerged in Europe.[84] In this vision, European integration was from the very beginning conceived as an integral part of this new European public law order, which, in contrast to the old world of *Droit Public de l'Europe*, was founded on the view that sovereignty had to be restrained both within domestic public law and with regard to intra-European relations. Yet, in contrast to what is often maintained in the literature, the new European public law order was not merely a response to a fear of nationalism and fascism – or so it will be argued.

To anticipate the argument put forward in the remainder of the article, the turn away from sovereignty *within* Europe, both with regard to domestic public law as well as intra-European relations, was instrumental for the reassertion of European interests and European autonomy in the post-World War II global order where 'Europe' had lost its privileged place. The new European public law order sought to protect the autonomy and interests of Europe, not merely vis-à-vis the hegemonic superpowers of the post-World War II order but also vis-à-vis the 'developing world'. Crucially, the new European public law order asserted European interests in the former colonies and laid the foundations that would allow Europe to continue its 'civilising mission' abroad.

6. A new European public law order

After World War II, *Droit Public de l'Europe* was slowly replaced with a new European public law order. As was the case for *Droit Public de l'Europe*, this legal order consisted of both 'external' aspects regulating the relationship between European states and 'internal' aspects regulating domestic public law. European law – European Community (EC)/EU law and European Convention on Human Rights (ECHR) law – as well as domestic constitutional law emerged as interdependent constitutive parts of this new European public law. This new public law order was founded on the wish to limit or even transcend the master principle of *Droit Public de l'Europe*, namely, sovereignty.[85] In the words of the German Constitutional Court, the 1949

[82]Jan Nederveen Pieterse, 'Europe, Traveling Light: Europeanization and Globalization' 4 (1999) The European Legacy 3.

[83]For a debate on whether the formal transfer of sovereignty amounted to a transfer of sovereignty in any material sense, see Robert H Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge University Press 1991). See also Koskenniemi, *The Gentle Civilizer of Nations* 175.

[84]Alexander Somek and Michael A Wilkinson, 'Unpopular Sovereignty?' 83 (2020) Modern Law Review 955.

[85]For a similar argument, see Michael A Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021).

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German Basic Law 'abandons a self-serving and self-glorifying concept of sovereign statehood and returns to a view of the state authority of the individual state which regards sovereignty as "freedom that is organised by international law and committed to it"'.[86]

Within this new vision of European public law, the internal aspects of state sovereignty, above all else popular sovereignty, were seen as something dangerous, which, if not properly constrained, would lead to the destruction of the European constitutional regimes and possibly a new European civil war. The post-World War II European constitutional imagination was founded on a fundamental 'fear of the people'.[87] Legal and political stability in the form of 'moderate government' could only be achieved if the will of the people was constrained. At the pinnacle of the post-World War II European public law order is human dignity; not popular sovereignty.[88] This signifies a shift from constituent power to constitutional rights.[89]

Within the new European public law order, the most lethal and dangerous enemy was understood to be internal to the old world of *Droit Public de l'Europe*, namely unconstrained sovereign power that allowed for the rise of a destructive and unbounded, 'totalitarian' order.[90] In response to this internal threat to the stability of the European public law order, the new vision for constitutional government aimed to entrench a set of constitutional values against 'ordinary politics'.[91] The new European public law order was meant to insulate certain aspects of political decision-making from ordinary politics in the hope that this would prevent the rise of totalitarianism.[92]

Constitutional courts were given a new prominent role as guardians of 'constitutional values'.[93] Other independent institutions and agencies, however, were also granted new powers in the hope that they could ensure stable and moderate government.[94] In West Germany, for example, the central bank took on a powerful new role as the guardian of monetary stability. The government of money could not be left in the hands of elected politicians because this threatened to create hyperinflation, which again would lead to the erosion of the ethical foundations of society.[95] In the new European public law order, the most important aspects of political life were no longer understood as being within the scope of what could legitimately be decided by the people or their representatives. They rather had to be entrenched constitutionally and monitored and defended by independent institutions such as constitutional courts, central banks and competition authorities.[96]

[86]BVerfG, case 2 BvE 2/08 et al, judgement of 30 June 2009, BVerfGE 123, 267, 346, para 223 (*Lisbon Judgement*).

[87]Christoph Möllers, '"We Are (Afraid of) the People": Constituent Power in German Constitutionalism' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008); Jan-Werner Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (Yale University Press 2011).

[88]Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014).

[89]Somek and Wilkinson, 'Unpopular Sovereignty?'.

[90]For the most influential account of totalitarianism, see Arendt, *The Origins of Totalitarianism*. See also Carl J Friedrich, *Totalitarianism* (Harvard University Press 1954).

[91]Möllers, "We Are (Afraid of) the People'. For an introduction to the Italian Constitution as a post-fascist constitution 'born from resistance' and 'forged to reject totalitarian experiences', see Giuseppe Martinico, Barbara Guastaferro and Oreste Pollicino, 'The Constitution of Italy: Axiological Continuity Between the Domestic and International Levels of Governance?' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Springer Open 2019).

[92]Somek, *The Cosmopolitan Constitution* ch 2, describes this project as 'constitutionalism 2.0'.

[93]For an account of rise of the idea of the constitution as an order of values, see Martin Loughlin, 'The Silences of Constitutions' 16 (2018) International Journal of Constitutional Law 922.

[94]Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Arthur Goldhammer tr) (Princeton University Press 2011).

[95]Hjalte Lokdam, 'Banking on Sovereignty: The Political Theory of Central Bank Independence and the European Central Bank' (PhD, London School of Economics and Political Science 2020).

[96]For a discussion, see David J Gerber, 'Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe' 42 (1994) The American Journal of Comparative Law 25.

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The new European public law order that emerged, however, not merely presented a new vision for domestic constitutional law but also a new way of regulating interstate relations within Europe. With the collapse of the European maritime empires, European international law came to an end, yet the new 'universal' international law was insufficient to stabilise interstate relations within Europe. This was the view not merely of the Americans but also the elites that came to dominate Western Europe and shape its post-World War II reconstruction, namely, the Christian Democratic parties.[97] Although there were always tensions between the views of the Americans and the European Christian Democrats, the project of reconstituting Europe proceeded from an underlying consensus that Europe had to be reconstituted with new forms of interstate as well domestic constitutional relations.[98] The alternative they reached for was not the new world order of universal international law but rather what had always been the viable alternative to empire, namely, federation.[99] What the Americans as well as the Christian Democratic European elites could agree on was that European interstate relations could not be reconstituted on the old idea of the balance of power that had always relied on imperial expansion outside Europe.[100] Rather, European interstate relations had to be governed by a new federal union. Europe needed to create 'peace by federation', in the words of Beveridge.[101]

In the decades after World War II, 'Europe' became the core project that the transnational Christian Democratic elites rallied around.[102] Of crucial importance was the common European market, which provided the material conditions for rebuilding the European states, and thereby stabilising them.[103] 'Economic security' was seen as essential not just in providing the material foundations of military defence against a communist invasion but perhaps more significantly to win 'the battle for reconstruction' against communism.[104] To many people in post-war Western Europe, communism represented technological advancement and material prosperity rather than authoritarianism and dictatorship.[105] The project of European integration, both the European Economic Community (EEC) and the ECHR, was in this way a part of a centre-right political project of guarding Western Europe against a revolution through the voting booth.[106] The creation of an economically prosperous European common market was to be the foundation for a new 'anti-totalitarian' reconstitution of Europe. The EEC was understood as a means to promote the material reconstruction and welfare that would allow the Member States to defend themselves from the 'totalitarian threat' of communism.[107] Within the new

[97]Wolfram Kaiser, *Christian Democracy and the Origins of European Union* (Cambridge University Press 2007).

[98]Marc Trachtenberg, *Between Empire and Alliance: America and Europe during the Cold War* (Rowman & Littlefield 2003). See especially the introduction by Marc Trachtenberg as well as chapter 4 by Wolfram Kaiser: 'Trigger-happy Protestant Materialists? The European Christian Democrats and the United States'.

[99]Antonin Cohen, 'Constitutionalism without Constitution: Transnational Elites between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s–1960s)' 32 (2007) Law and Social Inquiry 109; Larsen, *The Constitutional Theory of the Federation and the European Union* ch 2.

[100]Cohen, 'Constitutionalism without Constitution'; Larsen, *The Constitutional Theory of the Federation and the European Union* ch 2.

[101]Sir William H Beveridge, *Peace by Federation* (Federal Union 1940).

[102]Kaiser, *Christian Democracy and the Origins of European Union* 188–9.

[103]Alan S Milward, *The European Rescue of the Nation-State* (Routledge 1992) famously described this in terms of the 'European rescue of the nation-state'.

[104]Ibid 173–4.

[105]Kaiser, *Christian Democracy and the Origins of European Union* 199; Judt, *Postwar* 88.

[106]For conservatives, Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press 2017) 3 argues, the 'new supranational mechanisms were indeed required to protect the "West" against communism and fascism'. Moreover, it was a means to overcoming domestic opposition to conservative policies, especially in Britain and France.

[107]Mark Gilbert, *European Integration: A Concise History* (Rowman & Littlefield Publishers 2011) 12; Kaiser, *Christian Democracy and the Origins of European Union* 199.

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European public law order, 'Europe' came to represent a promise of saving the European peoples from themselves.[108]

This constitutional vision of Europe is expressed in the German Basic Law, which opens with the German people's consciousness of their 'responsibility before God and man' as well as their 'determination to promote world peace as an equal partner in a united Europe'.[109] It is this responsibility and determination, it seems, which conveys authority upon the German constituent power and justifies the German people in giving themselves a new constitution.[110] In this way, as the German Constitutional Court put it in the *Lisbon judgement*, 'the Basic Law calls for European integration'.[111] Declarations of 'open statehood' towards international law, although somewhat vaguer in tone, are also present in several other post-World War II constitutions.[112] This constitutional 'openness' or 'friendliness' to European law is a core feature of domestic constitutions within the new European public law order.[113] By entrenching the constitutional regimes of the Member States, the EEC and the ECHR emerged as integral to a new vision of stable constitutional regimes in Europe.

By creating a European order of 'post-sovereign' states, European integration and EU law made up a core part of a new European public law order that could finally replace the unviable world order of *Droit Public de l'Europe*.[114] The new European public law order expressed a vision of domestic public law based on the limitation of sovereignty and regulated interstate relations as a matter not of international law but of European law – EEC and ECHR law. But European law was also crucial to the reconstitution of Europe's relationship to the (former) colonial world. The Community established with the Treaty of Rome included not merely 'the six' but also their Overseas Countries and Territories (OCT); albeit with a different status within the new Community.[115] In Part IV of the Treaty of Rome, an association was established between the EEC and the predominantly African colonies of France, Italy, Belgium and the Netherlands.[116]

European integration and EU law were in this way not only integral to governing the relationships between European states, but also to the reconstitution of Europe's relationship to the outside world. This applied to the world's two superpowers, but also to the (former) colonies. The new European public law order, in other words, did not merely reconstitute the 'internal' and 'external' aspects of *Droit Public de l'Europe* (constitutional law and international law between 'civilised' nations). In an attempt to protect Europe's privileged place in the post-World War II era, it also recreated the 'dynamic of difference'[117] between coloniser and colonised, between

[108]Signe Rehling Larsen, 'The European Union as "Militant Democracy"?' in Jan Komárek (ed), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press forthcoming).

[109]The German Basic Law, 23 May 1949, last amended on 28 March 2019 <https://www.btg-bestellservice.de/pdf/80201000.pdf> accessed 27 May 2020.

[110]According to Somek, *The Cosmopolitan Constitution* 84–5 post-World War Two constitutionalism – 'constitutionalism 2.0' – signifies a shift from liberty to dignity, and with that, there is a 'remarkable alteration in the nature of the constituent power'.

[111]BVerfG, Judgement of the Second Senate of 30 June 2009 – 2 BvE 2/08 (*Lisbon Ruling*), para 225.

[112]In the Preamble to the French Constitution of 1946, it is declared that 'subject to reciprocity, France consents to limitations of sovereignty necessary for the realisation and the defence of peace'. The Italian Constitution of 1948 contains a similar statement: 'Italy may consent, on equal terms with other States, to limitations of sovereignty necessary to establish an order ensuring peace and justice among nations.'

[113]For a discussion of 'constitutional openness', see Giuseppe Martinico, 'Constitutionalism, Resistance, and Openness: Comparative Law Reflections on Constitutionalism in Postnational Governance' 35 (2016) Yearbook of European Law 318, 327 ff.

[114]Michael Wilkinson, 'Beyond the Post-Sovereign State?: The Past, Present, and Future of Constitutional Pluralism' 21 (2019) Cambridge Yearbook of European Legal Studies 6; Somek and Wilkinson, 'Unpopular Sovereignty?'.

[115]Hansen and Jonsson, *Eurafrica* 244. For a broader discussion of the legal and political relationship of the OCTs within the project of European integration, see Adler-Nissen and Gad, *European Integration and Postcolonial Sovereignty Games*.

[116]This was set out in Part IV of the Treaty of Rome, Articles 131–136. For a discussion, see Carol Ann Cosgrove, 'The Common Market and Its Colonial Heritage' 4 (1969) Journal of Contemporary History 73, 77.

[117]Anghie, *Imperialism, Sovereignty and the Making of International Law* 274.

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Europe and its non-European 'other', which had underpinned and given meaning to *Droit Public de l'Europe*.

7. Eurafrica

In the decades leading up to the signing of the Treaty of Rome in 1957, the project of European integration was envisioned as part of the solution to the problem of 'modernising' or 'reforming' colonialism. Failing that, European integration became integral to managing the process of decolonisation while securing privileged access to trade and natural resources after formal independence via the creation of 'special relationships' and a renewed commitment to a civilising mission now under the term 'development'.[118] The starkest example, as the rest of this article will demonstrate, is the realisation of the interwar project of *Eurafrica*, outlined in Part IV of the Treaty of Rome.[119] This project linked European integration, and a turn away from sovereignty within Europe, to the collective assertation of European interests abroad as well as the realisation of Europe's 'civilising mission' in Africa.

The idea of Eurafrica first emerged as a central part of the justification of imperialism and the 'civilising mission' in nineteenth-century colonial thought.[120] Eurafrica portrays the fate of Europe and Africa as inherently linked to one another. For both Europe and Africa to prosper, they must unite into a Eurafrican union, a commonwealth.[121] The Eurafrican union, however, was imagined not as a union of equals but rather as a body politic where Europe was the head and Africa the body.[122] The idea of Eurafrica was taken up by some of the interwar proposals for European integration as an integral part of the solution to the problem of Europe's declining geopolitical status after World War One. A prominent example is Richard Coudenhove-Kalergi's 1923 pamphlet *Paneuropa*, which launched the highly influential Pan-European Union Movement that was supported by intellectuals such as Heinrich and Thomas Mann and politicians such as Winston Churchill, Konrad Adenauer and Aristide Briand.[123] In interwar writings on Eurafrica, Europe and Africa are portrayed as interdependent but in a highly asymmetrical way: whereas Europe needs Africa's raw materials and vast spaces, Africa is in need of Europe's technology and capital.[124]

Throughout the interwar period, Eurafrica was portrayed as a 'new and higher form of colonialism', which replaced nationalist competition in a scramble for Africa with a new form of collective colonialism.[125] The European empires were no longer capable of controlling the colonial world as individual empires, but they would perhaps be able to control the colonial world

[118]On a trip to Congo in 1956, it became clear to Paul-Henry Spaak that an association between the project of European integration and African colonies 'could offer a viable alternative to violent decolonization', see Patrick Pasture, *Imagining European Unity since 1000 AD* (Palgrave Macmillan 2015) 190. For a broader discussion, see Hansen and Jonsson, *Eurafrica* 13–6; Kalypso Nicolaïdis, 'Southern Barbarians? A Post-Colonial Critique of EUniversalism' in Gabrielle Maas, Berny Sebe and Kalypso Nicolaïdis (eds), *Echoes of Empire: Memory, Identity and Colonial Legacies* (IB Tauris 2014); Guy Martin, 'Africa and the Ideology of Eurafrica: Neo-Colonialism or Pan-Africanism?' 20 (1982) The Journal of Modern African Studies 221, 230–1.

[119]As demonstrated by Peo Hansen and Stefan Jonsson, the project of European integration and Eurafrica were intimately connected from the interwar period until the late 1950s. Throughout this period, 'all of the visions, movements and concrete institutional arrangements working towards European integration made Africa's incorporation into the European enterprise a central objective', see Peo Hansen and Stefan Jonsson, 'Building Eurafrica: Reviving Colonialism through European Integration, 1920–6' in Kalypso Nicolaïdis, Berny Sèbe and Gabrielle Maas (eds), *Echoes of Empire: Memory, Identity and Colonial Legacies* (IB Tauris 2009).

[120]Martin, 'Africa and the Ideology of Eurafrica' 222.

[121]Hansen and Jonsson, *Eurafrica* 35.

[122]Hansen and Jonsson, 'Building Eurafrica' 211.

[123]Hansen and Jonsson, *Eurafrica* 26ff; Hansen and Jonsson, 'Building Eurafrica' 211.

[124]Hansen and Jonsson, *Eurafrica* ch 2.

[125]Ibid 33.

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collectively if they united.[126] This again would allow them to transcend interstate rivalries and provide them with the foundations for a European Union.[127] If the European states gave up on sovereign authority vis-à-vis one another, they could keep exercising sovereign authority in a collective capacity over the remaining colonies. In this way, European integration and the collective exploitation of Africa were inherently linked to one another.[128]

After World War II, the Eurafrican project was again debated as an important part of the reconstitution of Europe. At the 1948 Congress of Europe, the Union of European Federalists presented a Draft of a Federal Pact, where they argued that:

> Europe as an entity will be viable only if the links which unite it with countries and dependent territories ... are taken into account. The era of national ownership of colonial territories is past ... From now onwards a common European policy of development for certain regions of Africa should be taken in hand.[129]

The development of Africa also made an appearance in the 1950 Schuman Declaration that led to the creation of the European Coal and Steel Community, where Schuman stressed that 'with increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent'.[130]

From the interwar period to the 1950s, the idea of Eurafrica as a third geopolitical sphere in the Cold War was highly influential among European elites.[131] Africa was still exclusively under European control, and with its raw materials and vast spaces it held a powerful sway on the European imagination as a means to economic stability and energy self-sufficiency through joint colonial exploitation.[132] As demonstrated by Peo Hansen and Stefan Jonsson, the view was that this would provide Europe with geopolitical leverage.[133] Crucially, it could provide Europe with the material basis to reassert power against colonial uprisings as well as other challenges from the Global South such as the emerging non-aligned movement of former colonies not to mention projects for Pan-Africanism. In the eyes of European leaders such as the Dutch Foreign Minister and later NATO Secretary-General, Joseph Luns, the EEC would 'assure the conditions of an increasing prosperity to our old continent and permit the continuation of her grand and global civilizing mission'.[134] African leaders, however, saw this differently. Kwame Nkrumah, the first Prime Minister and President of Ghana, for example, looked upon the EEC as nothing 'but the economic and financial arm of neo-colonialism and the bastion of European economic

[126]A clear example for this is Alexandre Kojève's proposal for a 'Latin Union' that he put forward whilst working as a civil servant in France in the aftermath of World War Two. See Alexandre Kojève, 'Outline of a Doctrine of French Policy' (2004) Policy Review 3. For a discussion, see Robert Howse, 'Kojève's Latin Empire' (2004) Policy Review 41.

[127]Hansen and Jonsson, 'Building Eurafrica' 211–2.

[128]As Hansen and Jonsson, ibid 212 put it: 'The unification of Europe and a unified European effort to colonize Africa were two processes that presupposed one another.' See also, Hansen and Jonsson, *Eurafrica* 31.

[129]As cited by Pasture, *Imagining European Unity since 1000 AD* 189.

[130]'Declaration of 9th May 1950 Delivered by Robert Schuman' <https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-204-en.pdf> accessed 9 September 2021.

[131]Hansen and Jonsson, 'Building Eurafrica' 211; Hansen and Jonsson, *Eurafrica* 41ff, 267; Anne Deighton, 'Entente Neo-Coloniale?: Ernest Bevin and the Proposals for an Anglo-French Third World Power, 1945–1949' 17 (2006) Diplomacy and Statecraft 835; JM Palayret, '"Les Mouvements Proeuropéens et La Question de l'Eurafrique, Du Congrès de La Haye à La Convention de Yaoundé (1948–1963)"' in MT Bitsch and G Bossuat (eds), *L'Europe unie et l'Afrique: de l'idée d'Eurafrique à la convention de Lomé 1* (Bruylant 2005).

[132]Pasture, *Imagining European Unity since 1000 AD* 189.

[133]Peo Hansen and Stefan Jonsson, 'Another Colonialism: Africa in the History of European Integration' 27 (2014) Journal of Historical Sociology 442, 455. See also, Guy Martin, 'Dream of Unity: From the United States of Africa to the Federation of African States' 12 (2013) African and Asian studies 169; Martin, 'Africa and the Ideology of Eurafrica'.

[134]As cited by Pasture, *Imagining European Unity since 1000 AD* 192.

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imperialism in Africa';[135] a form of collective European colonialism 'which will be stronger and more dangerous than the old evils we are striving to liquidate'.[136]

The association agreement created with Part IV of the Treaty of Rome did not, for the most part, integrate the colonial territories into to the EEC but rather established association with them. Nevertheless, as a department of France, Algeria was almost fully integrated into the EEC.[137] Hence, when the Treaty of Rome came into effect with its promise of peace and prosperity, a violent war that claimed hundreds of thousands of lives was raging inside the Community. In one sense, Algerian Independence after the War in 1962 led to the end of the Eurafrican dream.[138] Yet the OCT regime outlived the Algerian War of Independence and Europe continued to exercise power over the former colonies through the Yaoundé Conventions (1964–75); the Lomé Conventions (1975–2000) and the ACP–EU Cotonou Partnership Agreement (2000–20),[139] which have continued to secure European economic interests in Africa.[140]

For some scholars, however, the lasting impact of Eurafrica as constituted by EEC-African association agreements is the part it played, as one actor among many, in foiling projects of establishing a genuine African Federation that held out the hope of preventing a Balkanisation of Africa.[141] That Africa emerged as a continent of sovereign nation-states from the 1960s, rather than as an African Federal Union, was not predestined. Yet the emergence of nominally sovereign African nation-states, rather than an African Federation, made it easier for the large Western trading blocs of the post-World War II era, including the EEC, to continue to exercise power over the Global South.[142] For some scholars, therefore, the very idea of state sovereignty, born, at least in part, out of the colonial encounter and a constitutive part of the old world of *Droit Public de l'Europe*, remains a poisoned chalice.[143]

[135]Kwame Nkruhmah as cited by Martin, 'Dream of Unity: From the United States of Africa to the Federation of African States' (n 133) 174.

[136]Kwame Nkruhmah as cited by Hansen and Jonsson, 'Another Colonialism' 457. See also, SKB Asante, 'Pan-Africanism and Regional Integration' in AA Mazrui (ed), *Africa since 1935*, vol 8 (Heinemann 1999) 740; Martin, 'Africa and the Ideology of Eurafrica' 229. A scholarly argument to that effect was put forward by a historian, Carol Anne Cosgrove (n 116) 78, already in the 1960s: 'In some respect the association of African territories with the EEC can be said to have produced a collective colonialism'.

[137]The special status of Algeria in the EEC was governed by Article 227 of the Treaty of Rome. One significant exception to the full integration of Algeria as a department of France into the EEC was that freedom of movement of workers within the EEC did not extend to Algerian French citizens. Whereas European workers enjoyed freedom of movement in Algeria the opposite did not apply. For a discussion, see Muriam Haleh Davis, 'The Sahara as the "Cornerstone" of Eurafrica: European Integration and Technical Sovereignty Seen from the Desert' 23 (2017) Journal of European Integration History 97.

[138]Pasture, *Imagining European Unity since 1000 AD* 191.

[139]A new agreement is currently under negotiation, see: 'Negotiated Agreement Text Initialled by the EU and OACPS Chief Negotiators on 15th April 2021: Partnership Agreement Between [The European Union/The European Union and Its Member States], of the One Part, and Members of the Organisation of African, Caribbean and Pacific States, of the Other Part' <https://ec.europa.eu/international-partnerships/system/files/negotiated-agreement-text-initialled-by-eu-oacps-chief-negotiators-20210415_en.pdf> accessed 14 December 2021.

[140]Mark Langan, 'Trade and Neo-Colonialism: The Case of Africa–EU Ties', *Neo-Colonialism and the Poverty of 'Development' in Africa* (Palgrave Macmillan 2018); Mark Langan and Sophia Price, 'Imperialisms Past and Present in EU Economic Relations with North Africa: Assessing the Deep and Comprehensive Free Trade Agreements' 22 (2020) Interventions 703; Hansen and Jonsson, 'Another Colonialism' (n 133) 456; Rafael Lima Sakr, 'From Colonialism to Regionalism: The Yaoundé Conventions (1963–1974)' 70 (2021) International and Comparative Law Quarterly 449; Martin, 'Africa and the Ideology of Eurafrica' 228ff; John Ravenhill, 'Asymmetrical Interdependence: Renegotiating the Lomé Convention' in Frank Long (ed), *The Political Economy of EEC Relations with African, Caribbean and Pacific States: Contributions to the Understanding of the Lomé Convention on North-South Relations* (Pergamon Press 1980); Cosgrove (n 116) 81–2, 85.

[141]Martin, 'Africa and the Ideology of Eurafrica' 227ff; Hansen and Jonsson, 'Building Eurafrica' 220–1; Hansen and Jonsson, *Eurafrica* 273–5.

[142]Hansen and Jonsson, *Eurafrica* 266ff.

[143]Anghie, *Imperialism, Sovereignty and the Making of International Law*.

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8. Conclusion

This article is an attempt to remedy a fundamental flaw in the debate about European integration and EU law: the almost complete absence of a reckoning with the legacy of empire and imperialism. The project of European integration was agreed among three rapidly declining maritime empires – the French, the Dutch and the Belgian – and two failed fascist empires, the German and the Italian. The decline of the European empires is one of the most profound changes that shaped the twentieth century and it led to a fundamental transformation of the European states and the public law order that underpinned them. Nevertheless, the debate about European integration and EU law, for the most part, proceeds as if empire never existed.

This article demonstrates that European integration was an integral part of a broader transformation of the global order after the collapse of European imperialism. The European empires were underpinned by the public law order of *Droit Public de l'Europe* or *Jus Publicum Europaeum*, which regulated the relationship between the 'civilised', and hence sovereign, European states, as well as their colonial encounter with the 'uncivilised' world where political communities could not be considered sovereign. With the decline and eventual collapse of European imperialism after World War Two, 'European' international law gave way to 'universal' international law. For the first time in history, more or less all political communities on a global scale were recognised as sovereign states.

Yet, decolonisation in the imperial periphery was not the only way in which the public law order was transformed as a product of imperial decline. The end of empire instigated a fundamental transformation of the public law order of the European metropoles as well. This article demonstrates that if decolonisation was the product of imperial decline in the former colonies, European integration was part of the response to imperial decline in the metropoles. The article shows that European integration was integral not merely to attempts to manage imperial decline but eventually also to replace the public law order of European empires. Post-World War Two European public law, of which European integration is part, has three central tenets. First, a new type of anti-totalitarian domestic constitutional law which aimed to constrain sovereign powers internally by insulating certain aspects of political decision-making from ordinary politics. Second, a new European legal order founded on the limitation of sovereign power, which set intra-European relations apart from 'normal' international law. Third, the reconstitution of Europe's relationship to its (former) colonies, importantly through the realisation of the interwar project of 'Eurafrica'. European integration was central to all three tenets of this new European public law order.

The article demonstrates that precisely at the moment in history where sovereignty was extended to non-European political communities, Europe turned away from this old master principle both with regard to domestic constitutional law and intra-European relations. Yet the turn away from sovereignty and the nation-state was not merely a response to a fear of nationalism, as the literature often maintains, but also an attempt to reassert European interests and geopolitical autonomy in a world where Europe no longer was the centre of gravity. When the European metropoles were no longer capable of asserting their domination as individual empires, European integration allowed them to assert their interest collectively vis-à-vis the new 'developing world'. By carving out a new space for Europe in the world in tandem with decolonisation, European integration emerged as part of the European solution to the 'humiliation' suffered by the end of empire. It is therefore not a coincidence that European integration was perceived as a neo-colonial project by many post-World War Two African leaders.

In contrast, the legacy of empire for the project of European integration is largely ignored or forgotten in Europe. This applies to public and scholarly debate as well as the official narrative of European integration. It is rarely mentioned that the backdrop to the project of European integration was not merely the decline of the maritime empires but also the attempt to reassert the old imperial privilege of Europe, importantly through a revival of the idea of 'Eurafrica'. Rather

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than a project of reasserting Europe's geopolitical interest, the story of European integration is for the most part told with few, if any, references to the legacy of imperialism. The relevant actors, or even competitors, are understood to be European institutions and nation-states, and the EU is rarely studied in comparison with the composite polities to which it bears striking resemblances, namely empires and federations. The official narrative about European integration has, furthermore, allowed its Member States to tell a comforting story about themselves that leaves out their tainted histories of colonialism and empire. As Kalypso Nicolaïdis puts it, Europe 'exorcized the demons of its Member States by helping to purge their past and its own present of signs that empires had mattered for many of its Member States, as well as all of them collectively, right up to the foundation of the EC and during its first few years.'[144] As scholars on European integration and EU law, however, we have a duty to question the founding myth of our discipline.

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[144]Nicolaïdis, 'Southern Barbarians?' 287.

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