

# Regional and international protection of human rights: a new prospective

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## A. Introduction: a historical approach

**1. During many centuries, the awareness of the political and legal importance of Human rights (“the HR”) did not even exist.**

It appeared relatively recently, two or three centuries ago, mainly in Western countries, and the protection of such rights, for a long time, was merely provided at a national level: in England, with in particular the Bill of rights (1689); in America, with the Declaration of independence of the 13 Colonies (1776), then with the first Amendments to the 1787 Constitution of the USA (1791); in France with the *Declaration des droits de l’homme et du citoyen* (1789), one of the first acts of the then starting French Revolution.

**2. International protection of Human rights (HR), which of course does complete, but does not replace the national protection (this one being usually provided for by national Constitutions –and most Constitutions, at least since 1945, have been including fundamental rights), developed just after the Second World War. Admittedly, after World War I, there had been a first attempt to organize the international world and to institute a mechanism in order to guarantee Peace in the world. But the *League of Nations*, created for that purpose by the Versailles Treaty in 1919, did not contain any reference to Human rights. Some social rights, such as workers’ rights, did show up with the creation of the International Labour Organization (ILO), also instituted by the Versailles Treaty, and which is still in existence; but that was the only exception.**

**3. The starting points of an international Human rights protection:**

- The creation of the United Nations Organization (UN) (1945), as a consequence of the failure of the League of Nations to safeguard peace and prevent war;

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- The adoption, on 10 December 1948 in Paris, by the General Assembly of the UN, one of the main permanent organs of the Organization (as provided for by the UN *Charter*), of the outstandingly important *Universal Declaration* of HR; the adoption of the text was quasi-unanimous, with 8 abstentions and no vote against; it must be noted, however, that at the time, in 1948, the UN had just less than 60 member States, to be compared with the current figure (193). The 8 abstaining States were six Eastern and Central European States (including USSR), plus South Africa and Saudi Arabia.

The genesis of the universal Declaration is interesting insofar as it is one of the first instruments agreed upon within UN : it was discussed and drafted within the UN HR Commission, presided by Eleanor Roosevelt (President Franklin Roosevelt's widow) and composed of 9 members, including the French René Cassin (eventually a Nobel Prize for Peace, in 1968); the Universal Declaration had and still has no legally binding effects, but it has been morally politically and extremely influential and important.

#### **4. The first regional mechanisms :**

In a sense, they did appear in order to compensate and/or remedy the lack of binding effect of the Universal Declaration – it must be observed that the UN has also a judicial institution, namely the International Court of Justice, another of the principal permanent organs of the Organization, which sits in The Hague; but its jurisdiction, though very important, is general, and not specialized in the field of rights and freedoms.

The Council of Europe (created in London in May, 1949), is the mother organization of the Convention for the Protection of human rights and fundamental freedoms, also called European Convention on HR (“the Convention”) (signed in Rome on 4 November 1950).

The Convention, an international, multilateral Treaty, the first Treaty prepared within the framework of the Council of Europe, contains both a list (or catalog), of rights and freedoms, and an institutional machinery.

The list spells out the rights and freedoms that the contracting States commit themselves to secure to the persons within their jurisdiction (either their nationals or other persons), and it inspires itself from the Universal Declaration, at least as far as the civil and political rights are concerned (the economic, social and cultural rights, also set up by the Declaration, will in Europe be later on covered by the European Social Charter, signed in Turin in 1961).

As for the organs, they were the European Commission of Human Rights (“the Commission”), a quasi-judicial organ, composed of members, the European Court of HR (“the Court”), composed of judges, and the Committee of Ministers of the Council of Europe (“the CM”), composed, by delegation, of the Ambassadors to the Council of Europe of the contracting States. All organs, like the Council itself, sit in Strasbourg.

**5. Comments** on these beginnings: they have been very speedy, if compared with the long absence of any international /regional protection, even if the first regional implementation has

been for a long time (and still remains) merely *European*.

Why is it so? Because of the more *homogeneous* character of the European continent, culturally and politically, due to the fact that European political leaders were very active in favor of re-building Europe, and of establishing strong interrelations between peace, democracy, the rule of law and human rights (Winston Churchill, Konrad Adenauer, Robert Schuman, Alcide De Gasperi, Paul-Henri Spaak, and others), finally because of the financial help of USA to Western Europe (the Marshall Plan), which was subject to the realization of political peace in Europe; but it must not be forgotten that Soviet Union and the so-called “popular democracies”, in Eastern and Central Europe, did not participate to the European construction, nor to the HR movement. Actually they joined much later, after the fall of the Berlin Wall (November 1989), and the dissolution of the Soviet Union (end of 1991).

### **B. First part : the evolution from the early sixties**

#### **1) At a worldwide level:**

Two main elements ought to be emphasized:

- a) The appearance of *general* international instruments, but with a quasi-judicial (and not strictly judicial) machinery: the UN *International Covenants* of 1966, both entered into force in 1976 (on social, economic and cultural rights, and on civil and political rights); they are the follow-up to the Universal Declaration, but they are legally binding, which of course represents a progress when compared to the Declaration itself;
- b) The development of *specific* (or specialized) international legal instruments, such as the UN Conventions on genocide (1948), on the status of refugees (1951), on slavery (1953), on racial discrimination (1965), on the elimination of discrimination against women (1979), against torture (1987), on the rights of the child (1989), on the rights of persons with disabilities (2006), on protection from enforced disappearance (2006), and so on...All those international instruments, which are submitted to ratification by the various States ( some of them have a wider membership due to the higher number of ratifying States, for instance the UN Convention on the rights of the child), are within the sphere of the United Nations.

In addition to that, one can remark that a common feature of both the general and the specific international instruments is that, generally speaking, the rights which they guarantee are protected by *quasi-judicial* committees (such as the Human rights Committee for the Covenant on civil and political rights, or more specialized committees for the specific Conventions), all operating under the umbrella of the UN, and more precisely of the UN High Commissioner for HR; in the case of the refugees (and asylum seekers, and Stateless people), there is no Committee, but a special UN organ, the UNHCR (High Commissioner for refugees). Quasi-judicial

means that they generally make recommendations, but no binding rulings.

## 2) At regional level :

Two very different periods have to be distinguished:

### a) First period : until the end of the eighties:

Practically the only regional mechanism is still *European*: the Convention enters into force in 1953, the European Commission of HR (the Commission) starts in 1954, and the European Court (the Court) starts to operate in 1959, delivering its first judgment (*Lawless v. Ireland*) in 1960;

- The European system will develop relatively quickly: from 10 member States to 23 (in 1989) to 47 now, practically the whole continent; the number of applications will be highly expanding; and even it becomes more complex: the *European Communities* (now the European Union –E.U.), which were created in 1951 (with 6 Member States – now 28), at the beginning with objectives principally focused on economy, free trade, free competition..., and which are completely distinct from the Council of Europe, have within their system a Court, too : the European Court of Justice (ECJ), which sits in Luxembourg. Under its dynamic case-law, the ECJ has included within its jurisdiction and field of competence the protection of fundamental rights, as a part of the “general legal principles” which, under the Treaties (the most recent one being the Lisbon Treaty, which entered into force on 1<sup>st</sup> December 2009) it has to guarantee (the first ECJ’s ruling, expressing that, is *Stauder, 1969*). There are links between the case-law of the ECJ and the case-law of the Strasbourg Court, and the relationship will develop, as it is to be seen later on.

### b) Second period: Since the end of the eighties or the early nineties:

- Other regional systems appear elsewhere than in Europe:

.The American Convention of HR was signed in 1969 (20 years after the European one), within the framework of the Organization of American States; it entered into force in 1978, and the Interamerican Court delivered its first judgment in 1988; the American system includes a Commission, which is located in Washington, and a Court which is located in San Jose (Costa Rica); currently, there are 23 member States (Venezuela just left), with the notable absence of the USA and Canada.

. the African Rights and Peoples’ Charter was signed in 1981 (30 years after the European Convention), and entered into force in 1986; and whilst the Commission (which sits in Banjul, Gambia) was created by the Charter and has taken many decisions since that, the Court itself, which sits in Arusha, Tanzania, was created only

in 2004 (by the Protocol of Ouagadougou); the Court has had a limited activity, giving a few judgments (the first one in 2009), and for the time being just one on the merits (the Commission has been more active). Moreover, it is foreseen under a new Protocol not yet in force that the Court will be transformed into a wider court, by merging with the African Union Court, which should include a HR section.

. The Arab Charter on Human Rights was signed in 2004 and entered into force in 2008; since 2009 the Arab committee for HR has been operating (however, there is not yet an Arab Court). There are 10 Member States for the time being. Very recently the press announced the creation in Bahrain of an Arab Human Rights Court, but no details are yet available.

. the ASEAN instruments:

ASEAN, the Association of South-East Asian nations, has now got 10 Member States (Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar (Burma), the Philippines, Singapore, Thailand and Vietnam). Since 2009, there has been an ASEAN intergovernmental Commission for HR functioning, and it has promoted the adoption in Phnom Penh in 2012 of an ASEAN Declaration of HR (which is not a Convention).

### **C. Second part: the present situation and the possible developments**

#### **1) Regionally:**

a) The European system remains by far the most far-stretched and powerful system, not only due to its seniority and eventual transformations, but finally also because of its strengthened role and influence, which extends beyond the borders of the European continent (it is significant that some non-European courts, such as the Canadian (and maybe now the Japanese) Supreme Courts, and others, are somewhat influenced by the Strasbourg Court's case-law.

- Its evolution: the reforms of the Court became necessary, particularly because of the increase in the number of the individual applications and the subsequently unavoidable growth of the Court's workload, and extension in the times for adjudicating cases.

*Protocols* 11, 14, and in the future 15 and 16, to the European Convention, are the main legal instruments that have modified (or will modify) the Convention, and have been (or are) aimed at increasing the efficiency of the protection system; a few details can be given about the various Protocols:

. Protocol 11, (whose entry into force dates back to 1 November 1998):

Its main provisions have been to the effect of suppressing the Commission and the judicial role of the Committee of Ministers (the CM), transforming the Court by

making it unique and permanent, with an obligation of residence and full time work for its judges, whose term of office was reduced from 9 to 6 years, and a new age-limit created (70 years); and of setting three different formations : 3-judge committees, 7-judge chambers, and a 17-judge Grand Chamber ( there are two ways to get up to the Grand Chamber : either through the relinquishment of a Chamber before any settling of the case, or a referral to the Grand Chamber, at the request of the applicant and/or the defending State, after a chamber judgment);

. Protocol 14 ( which entered into force on 1 June 2010, after a long delay, due to the previous refusal to ratify from the part of the Russian Federation): it has created a new *single-judge* formation ( in order to more expeditiously reject the very numerous manifestly inadmissible applications); set up new powers afforded to the 3-judge committees, now entitled to also adjudicating simple well-founded cases; it has changed the judges' term of office, from six years, renewable to a 9 year-term, not renewable; it has introduced a new inadmissibility criterion, and established the possibility for the CM to refer cases to the Court, either for the interpretation of a judgment of its, or for deciding whether a defending State has failed to abide by a final Court's judgment;

. Future Protocols 15 and 16: they are a follow-up to the Brighton Declaration, an outcome of the Brighton conference (April 2012), and are not yet in force; they should again increase the efficiency of the European system.

It must be stressed that the main problem of the Strasbourg court, its huge *backlog*, has been happily reduced by one third in the last two years, chiefly thanks to the single-judge procedure, as set up by Protocol 14;

-A new linkage between the Convention (and the Council of Europe) and the E.U.:

. the Lisbon Treaty, quoted above, has taken the important principle decision for the E.U. to adhere to the Convention, thus becoming in the future a 48<sup>th</sup> High contracting Party to it, jointly with the 47 States, and eventually Protocol 14 to the Convention has authorized the accession; however, concrete steps have still to be made in order to make the accession effective; in June 2013, a draft agreement between the Council and the E.U. has been adopted; it now requires an advisory opinion by the ECJ and the ratification by the 28 member States belonging to the E.U.;

. the Charter of fundamental rights of the E.U.: proclaimed at the Nice summit of the E.U. in December 2000, but without having legal binding force, the Charter (which looks like the Convention, but is nevertheless different from it), has acquired

it with the entry into force of the Lisbon Treaty; one of the issues will be to obtain a uniform interpretation of the Charter's and the Convention's provisions, which should be made easier with the accession of the E.U. to the Convention;

The relationship between Strasbourg and Luxembourg (and Brussels, the seat of the E.U. executive organs) will probably be facilitated by the accession (or accession) process, but at the same time there may be some psychological problems, the Strasbourg Court thus getting a sort of "primacy", at the end of the day, over the Luxembourg Court in the field of and in terms of HR;

b) The Interamerican system :

It is less strong than the European one.

The main reasons explaining that fact are, not only the absence of the USA, the most powerful American State (and of Canada, and some Caribbean countries); but also a certain lack of financial resources; the non-permanent, non-full time character of the American Commission and Court (like the European Commission and Court before 1998); and finally some political obstacles to the enforcement of a few Interamerican judgments (the recent withdrawal of Venezuela from the American Convention is not an encouraging signal);

- But it does well anyway;

It has developed a bold and influential case-law, frequently much in favor of the victims than the European one, by example in some fields such as disappearances, torture, the weighing of the burden of proof between the applicants and the defending State ; it has given some inspiration to the European system itself, the case-law of which is usually more prudent, trying to find out, or reach, a kind of European *consensus*, and being tempted to apply more often the *subsidiarity* principle and to leave a broader national *margin of appreciation* to the States (both subsidiarity and the margin of appreciation should be included in the Preamble of the Convention under the future Protocol 15 thereof) ;

c) On the African continent and in the Arab/Islamic world:

The development of their protection systems seems very slow.

The reasons are clearly political and cultural. There is much less homogeneity, or even more heterogeneity between the different States; many of them have authoritarian regimes, missing a tradition of judicial independence and Parliamentary democracy; they are not very keen on abiding by international rulings, and even on protecting HR at domestic level;

d) The increase and possible expansion of HR in South-East Asia

Even though they seem timid, the recent developments appear as encouraging, but it's

still too early to foresee the future of this sub-regional system;

e) In the rest of the World :

- There is no regional or sub-regional system of protection in North America (with the exception of Mexico), and in Asia (with the exception of ASEAN countries). The three most populated countries in the world, China, India and the USA, lack any international protection of HR as such, very probably because they prefer to be more “sovereign” from the International public law standpoint. Other important States, including Japan, are facing the same situation.

**2) At a worldwide level:**

-1) many interesting elements must be pointed out:

- The growing (and to me positive) influence of the *quasi-judicial* mechanisms, such as the UN Human rights Committee and some specialized committees (on torture, forced disappearance, the rights of the child...). As it is true, in general, for *soft law*, their “jurisprudence” is influential as regards courts, such as the European and Interamerican Courts: for instance, the Strasbourg Court in *Selmouni v. France*, an important Grand chamber judgment of 1999, modified its case-law, giving a new, more comprehensive, definition of torture than in its Interstate case dating back to 1978, *Ireland v. UK*, manifestly under the influence of the UN committee against torture; similarly, the Court inspired itself from the soft law constituted by the text of the Charter of fundamental rights of the E.U., not binding at the material time, when changing its previous jurisprudence and making a ruling in favour of the rights of the operated transsexuals( see *Christine Goodwin v. United Kingdom*, a judgment of 2002). There is a *cross-fertilization* between Courts, and more generally between legal international instruments. *Globalization* is not just economic and social; it has some legal aspects as well.

-Other international tribunals, not specialized in the field of HR, do participate to this movement (the ICJ itself, the international Criminal \_ courts, the International Tribunal on the Law of the Sea, and so on...)

- Generally speaking, some *serious problems*, however, are remaining: for instance, the Geneva Convention (1951), quoted above, does not suffice to effectively protect all refugees and asylum-seekers; the protection of those people reflects a political, human and legal problem, put into light by some dramas such as the “boat people” and the recent tragedies in Lampedusa, Italy, or by some humanitarian disasters such as the flow of refugees from Syria into neighboring countries;

- On the other hand, the increasing (and sometimes very positive) role played by NGOs, civil society, the Academic world, the Bar, the media (including Internet and

the “social networks”), does illustrate the ambiguous nature of HR protection: whilst there is clearly a *crisis* of HR in many parts of the world ( due to terrorism, the organized crime, the economic and social difficulties...), at the same time there is a growing need for, and development of, transparency and the fight against immunities and impunity.

### Conclusions:

- The *future* is very open and uncertain, as is the world itself .

Two questions can provide examples of this openness/uncertainty:

- The problem of the content of HR: are they *universal* (like the 1948 Declaration claims to be), in terms of the possible presence – or absence -, of some *common values* acceptable everywhere? Or are human rights condemned to be *relative* in the space and in the time?

- Could a country like Japan become a part of a regional or sub-regional system? My personal answer would be yes, but I am not sure to be well placed to give a realistic answer.

