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EDITORIAL

FIFTY YEARS AFTER THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

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This article considers the historical, philosophical and juridical implications behind the widely-accepted notion of "fundamental human rights" and their gradual progression from natural law to positive law. Reference is made to a number of international instruments, particularly the Universal Declaration of Human Rights. Three forms of protection of human rights are mentioned: namely promotion and control which are meant to strengthen human rights within national jurisdictions and the development of superior forms of international jurisdiction to replace national jurisdiction where this is inadequate or non-existent. In this respect, the author links the fiftieth anniversary of the Universal Declaration of Human Rights to the recent signing in Rome of the Statute setting up a Permanent International Criminal Court, seeing this as a step towards the more effective enforcement of human rights. He retraces the controversies and difficulties encountered when drawing up the final draft of the statute of Rome and also reviews the principal contents of this statute; in particular the crimes in respect of which the International Criminal Court would be able to exercise jurisdiction. The obstacles which have to be overcome before the ICC starts to operate are also considered. These include, *inter alia*, obtaining sufficient ratifications for the statute to enter into force, the drafting of legal texts and regulations and the negative attitude adopted by certain influential states who have voted against the Statute of Rome.

1. The Universal Declaration of the 10th December 1948 is still the most modern, valid and widely accepted implementation of the concept of human rights. This fundamental concept has not only

survived but is asserting itself ever more firmly; in spite of the theoretical rebuttals (philosophical, political and juridical) that have been put forward in the nineteenth and twentieth century in the teachings of certain schools. In the legal field, this concept bridges natural law and positive law in a way which attempts to overcome all philosophical controversies by transferring human rights from that same natural law which had been the privileged field of culture to national positive rights and international law. Indeed international law not only constitutes the first and most important source of the positivity of human rights. It is also the decisive means –through the signing of declarations, undertakings and conventions– for introducing them into the legal systems of individual states. Perhaps this definition of human rights, which replaces that of 'natural rights' formerly in use, has been widely and easily accepted precisely because of the ease with which human rights can be translated into positive regulations. Moreover, the use of the terms 'inviolable rights' and 'fundamental rights' to define the same object, also helps to increase its recognition and use. The reference to 'inviolability' in this definition accentuates its reference to something which is higher than positive or legal rights; serving as a limit placed upon the latter and even placing human rights above national constitutions. Furthermore, the adjective 'fundamental' which has accompanied the expression 'human rights' ever since it was mentioned in the preamble of the United Nations Charter, stresses the basic and essential character that these rights now possess in various legal systems.

It is also clear by now that even though the articles of the Universal Declaration all refer to the individual, the protection afforded by human rights is extended to groups, considered as a sum of individuals. To mention only one example, the reference to a group as a passive subject of the most serious crimes against humanity is constant in the Convention for the Prevention And The Suppression Of Genocide (New York, 9th December 1948), which was drawn up at the same time as the Universal Declaration and originated from the same source.

2. Besides the proof of their theoretical validity –which can now be considered conclusive in the light of the experience of these fifty years and the constant development of international law towards their assertion– human rights have, since their inception, had to

face the severe test of enforceability. This is a double edged test: on the one hand it is necessary to create instruments binding the individual states and on the other to ensure the effectiveness of the final result. The latter can only be guaranteed by means of the ever deeper penetration of human rights into universal awareness and, where necessary, by the enforcement of effective and feasible sanctions.

In the first case enforceability has been achieved, mostly thanks to pacts and international conventions drawn up on the basis of the Universal Declaration. It is true that humanitarian conventions have been in existence since the last century and their rules are still referred to as an essential and positively valid point of reference in the international instruments drawn up in these last years. One of these international conventions is the United Nations Charter itself, which came into force on the 24th October 1945 and was to consolidate those principles and goals which were repeatedly mentioned in the same Declaration of 1948. This Charter actually came into being following an agreement between 49 governments drawn up in San Francisco between April and June of 1945, which was later signed by the governments of other states along the years, with the result that the number of member states of the United Nations rose to 185. In its introduction, faith in the: "fundamental human rights" is reasserted, and various articles refer to: "respect for human rights and fundamental freedoms" (articles 2, 55 and others).

Since 1948, while certain aspects of the Declaration of 1948 were being further developed in other declarations (for example in the Declaration of the Rights of the Child, 20th November 1959), the effort to achieve truly international instruments in order to secure states' commitment to the recognition and protection of human rights has continued uninterruptedly, in spite of difficulties of various kinds. The two fundamental international conventions, both very closely linked to the Universal Declaration of which they further develop all the aspects, are –as everybody knows– the Convention on Economic and Social Rights and the International Convention on Civil and Political Rights (which also created the Permanent Committee for Human Rights). They were both approved by the UN General Assembly in New York on the 16th December 1966 and were later followed by the ratification or adhesion of individual states. But even before achieving this wide-ranging project, the international organisation had to provide itself with more specific instruments in

fields which claimed special and urgent attention due to the development of new conditions and new crises, as well as in fields where the achievement of consensus appeared to be less difficult. Examples are the earlier cited Convention for the Prevention and Suppression of the Crime of Genocide (New York, 9th December 1948), the Geneva Conventions of the 12th August 1949 on the Protection of the Military and Civilian Victims of International Armed Conflicts (later followed by important additional protocols of the 12th December 1977), the Convention Concerning the Status of Refugees (Geneva, 28th July 1951), the Convention Concerning the Status of Stateless Persons (New York, 28th September 1954), the Convention for the Political Rights of Women (New York, 20th December 1952) and others. At the same rate there followed, in other continents or regions of the world, conventions inspired by the same principles of the Universal Declaration and which were intended to bind specifically the states which belonged to those regions. Examples are the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4th November 1950), followed by numerous additional protocols in the next decades, the American Convention on Human Rights (San José de Costarica, 22nd November 1969) and the African Charter of the Rights of Man and of Peoples (Nairobi, 27th June 1981).

These were not the only activities which, according to Bobbio's classic distinction[1] still belong to the phase of the promotion of human

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[1] N. Bobbio, *Presente e avvenire dei diritti dell'uomo*, in *La Comunità internazionale*, 1968, p. 3 ff. (published also in the book edited by SIOI, *L'Italia e l'anno internazionale dei diritti dell'uomo*, Padova, Cedam, 1969 and reprinted in another book by the same author, *L'età dei diritti*, Torino, Einaudi, 1992, p. 17 ff.). According to Bobbio, the activities carried out up to now by the international organisations for the protection of human rights can be considered under three aspects: promotion, control and guarantee. Here: "promotion means all those actions which are directed towards this double objective: a) to induce the States which do not have specific machinery to protect human rights to introduce such machinery; b) to induce those which already have it to develop it further both regarding substantive law (the number and quality of rights to be protected) as well as regarding procedures (the number and quality of jurisdictional controls." On the relationship between the protection of human rights and punitive measures meted out by the international Community see A. Cassese, *I diritti umani nel mondo contemporaneo*, Bari, Laterza, 1988.

rights. On the part of the United Nations, or under its aegis, there has been consistent supervisory activity. This has developed in tandem with the evolution of the concept of "non-interference in internal affairs" (article 2 n. 7 of the Charter) in favour of the protection of peace, security and the respect of human rights, which are objectives proclaimed by the same Charter[2]. The substantial analytical reports of the General Secretariat of the United Nations give an ample and detailed account of this kind of activity. This does not only entail vetting the communications and reports of various states, but also intervening in specific situations all over the world, often successfully, but sometimes unfortunately without the desired effect. On perusing these documents, one is occasionally shocked to discover that in spite of the constant organised efforts of the United Nations in every part of the world, one still encounters terrible situations, pockets of hatred and conflict, serious acts of aggression against the most fundamental human rights, against individuals as well as against groups. The walls erected by reigning dictatorships in countries which shamelessly sign treaties of peace and collaboration in the protection of human rights, the sporadically denounced insensitivity of governments, recurrent tribal, ethnic, religious and racial conflicts, continually jeopardise a task which is fundamentally praiseworthy, but which is often forced to stop or curtail its actions in order not to aggravate situations which are already very serious; to avoid wider conflicts and to smoothen the way for peacemaking. It is also because of this almost inherent lack of sufficient control that human rights have to be accompanied by guarantees: the third task of international organisations. In the study which has just been quoted, Bobbio writes that between guarantees and the first two forms of human rights protection, there lies a very clear distinction. While promotion and control are meant to improve or strengthen national systems of protection, the function of guarantees: "is aimed at the creation of a new and higher form of jurisdiction, the substitution of national guarantees by international guarantees when they are inadequate or simply do not exist." It is

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[2] On this matter see the interesting analysis of P. Mengozzi, *Diritti della persona umana e interventi umanitari nei rapporti internazionali*, in *Il diritto dell'economia*, 1995, p. 51 ff.

also clear that this international jurisdiction must be capable of imposing sanctions, as befits every jurisdiction.

When Bobbio wrote these words (thirty years ago), he had before his eyes as the only example of guarantees which had been set up till then by the international organisation resuscitated after the Second World War, solely the European Commission of Human Rights and the European Court of Human Rights. These were established by the Convention signed in Rome on the 4th November 1950 by all the member states of the Council of Europe. Bobbio must have focused particularly on the right of individual petition provided for by the optional clause of article 25 of this Convention, which meant that one could already speak of a: "guarantee afforded against the states." But then he realistically pointed out that the example of the European Convention showed that guarantees of this kind are more effective whenever states upholding the rule of law meet to create them. This happens to be the area where they are least needed, because the problem regards mostly those states where the rule of law is not given supremacy, whose citizens would require better international protection against their own state. We shall see that the new forms which have been partially implemented (like the International Criminal Court) and are occasionally set up (like the *ad hoc* courts which have already been in operation for years in certain situations) can of course be regarded as forms of guarantee against certain states. However these are systems which are above individual states and their aim is to prosecute the heads of state and government, the members of the government and parliament, state officers and agents, on the basis of their individual responsibilities. If these officials are found guilty of the grave crimes under consideration, their traditional immunity under municipal and international law will have no effect. In any case such tribunals offer a direct protection and while they would benefit from the co-operation or help of the states concerned, they are empowered to take direct action and can act with their own means. This is precisely the character of international criminal law, which is why it can be defined as the highest and most effective form of guarantee for human rights enforcement.

3. The international event of this 50th anniversary is undoubtedly linked to this objective of enforcing respect for the most fundamental human rights: the signing, on the 18th July 1998 in Rome, of the

final act of the Statute setting up a Permanent International Criminal Court with the aim of judging the gravest international crimes in the framework of the aims and principles of the United Nations Charter and by this means, as the introduction says: "to bring the impunity of these crimes to an end and to contribute in this way to the prevention of further crimes."

For human rights this event is so important that an Italian scholar has placed 1998 next to 1789 and 1795, the respective dates of the Declaration of Human Rights and of the Citizen and of the Philosophical Project of Immanuel Kant: "for perpetual peace." It is well known that Kant, when criticising the references to "fraternity" of the Declaration of 1789, explained that states naturally tend to fight amongst themselves, unless a superior legal authority is created which could oblige them all to respect human rights and eliminate those hostile acts –open or covert– which lead to war.[3] This quotation seems to me to be pertinent, since it is now clear that for the more serious violations of human rights there must be a superior international authority endowed with jurisdiction and executive powers to enforce its own decisions.

This is not the right occasion to remind readers of how old the project for an international criminal court is; the one that has now finally entered, as we all desire, its final phase of constitution. Neither should we insist on remembering how many obstacles it has found in its way. What I am here referring to is the project for a neutral and permanent court, which exists prior to the facts that it is called upon to judge and is guided by a previously drafted code of offences which has already come into force, together with rules on procedure and evidence. The history of humanity, ancient as well as contemporary, is full of *ad hoc* tribunals, created *ex post facto* to judge the enemy[4] or even the perpetrators of inhuman acts which are not always envisaged as offences in laws that are binding on

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[3] I. Mereu, *Tre date per i diritti dell'uomo*, in *Critica liberale*, vol. V, n. 42, giugno 1998.

[4] See the book by Alexander Demandt, *Macht und recht - Grosse Prozesse in der Geschichte* (the Italian translation *Processare il nemico*, Torino, Einaudi, 1990. This is a collection of articles by various authors (Demandt, K. Meyer, K. Rosen, H.Schutt, A de Zayas) edited by Demandt.

their perpetrators. These tribunals, including those of Nuremberg and Tokyo which judged huge and atrocious crimes, have left a sense of dissatisfaction and have given rise to criticism, mostly unjust, but occasionally pertinent. Even the tribunals established for the crimes committed in the territories of ex-Yugoslavia and of Rwanda[5], which were set up when the crimes were still in progress and which therefore, at least in part, could not be called retrospective, have their Achilles heel[6]. A truly international criminal court, able to guarantee the protection of the most important human rights in all substantive, procedural and systemic aspects, can only take root through an international agreement freely subscribed to by civilised countries, precisely like the one which was approved in Rome in July last year.

It was not coincidental that the "Statute of Rome" was the subject of long and controversial preparations. The first initiative taken for setting up an International Court of Criminal Justice, arising as an organ of the community of states, was modelled on the example of the International Court of Justice which already existed at the time of the League of Nations and was immediately created afresh

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[5] On the first of these tribunals the most complete work up to now is the book by Bassiouni (with the collaboration of P. Manikas), *The Law of the International Criminal Tribunal for the former Yugoslavia*, Transnational Publishers Inc., New York, 1996. By the same author on the crimes committed in the former Yugoslavia there is *La Commission des experts des Nations Unies établie par la Résolution 780 du Conseil de Sécurité (1992)*, in *Revue internationale de droit pénal*, Year 66, n.s., 1995, p. 193 ff. Among numerous other writings on the topic published in various countries see the ample study by Ch. L. Blakesley, *Comparing the ad hoc tribunal for Crimes against humanitarian law in the former Yugoslavia and the Project for an international criminal Court prepared by the International Law Commission*, in *Revue Internationale de droit pénal*, Year 67, n.s., 1997, p. 139 ff., as well as J.P. Getti and K. Lescure, *Historique du fonctionnement du Tribunal pénal international pour l'ex Yougoslavie, ibid., p. 233 ff.; and concerning the tribunal for crimes in Rwanda,* L.D. Johnson, *The International Tribunal for Rwanda*, ibid., p, 211 ff.

[6] Criticism of the juridical foundations of the said Tribunals (which were convened on the strength of the UN Security Council resolutions based on Section VII of the UN Charter) is discussed by, among others, G. Vassalli, *Il Tribunale internazionale per i crimini commessi nei territori dell'ex-Jugoslavia*, in *La legislazione penale*, 1994, p. 335 ff., reprinted in the collection *La giustizia internazionale penale*, Milano, Giuffré, 1995, p.149 ff.

in the framework of the United Nations (article 7 of the Charter). The historical origins of this court certainly do not stem from the "special tribunal" provided for by article 227 of the Treaty of Versailles to try William the Second, the Emperor of Germany; which from all angles is precisely the antithesis of the Court which has now been established. Its origins should rather be traced to the Convention for the Prevention and Punishment of Terrorism of the 16th November 1937 (which never came into force), which in a special attachment had provided for and regulated in detail an "International Criminal Court." This was to be a permanent court based in the Hague and intended to judge this kind of crime.[7] On the morrow of the formulation of the "principles of Nuremberg" (resolution 177 of the UNO General Assembly of the 21st November 1947), a similar initiative was taken by the Convention for Genocide of the 9th December 1948, which by article VI established punishment by an "International Criminal Court" for such crimes, as an alternative to the jurisdiction of the national courts.[8] However even this development was not followed up. Still, one must remember that on the same day, 9th December 1948, by resolution 260, the UN General Assembly entrusted the International Law Commission with the task of drawing up a study on the "desirability and possibility" of convening an "international judicial organ" to pass judgement on persons accused of genocide or other crimes defined on the basis of international conventions.

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[7] See the text in Bassiouni, *International Criminal Law Conventions and their penal provisions*, Transnational Publishers Inc., New York, 1997, p. 798 ff.

[8] The French text has *Cour*, while the English text has *Tribunal*. The terms Court and Tribunal were therefore used indifferently in the Italian version of this article. [However the translator has tried to follow English usage in referring to "Courts" when permanent and "Tribunals" when *ad hoc*.] During the following years other projects for setting up a permanent international criminal court for individual groups of "international crimes" can be found in the "Convention for the suppression and punishment of the crime of *Apartheid* of the 30th November 1973 (article XII) and in the motion put forward by a group of Caribbean and South American States for the suppression of crimes in drug trafficking. It was this last motion that induced the General Assembly to entrust the International Law Commission with a new task for the setting up of an International Criminal Court in general (*infra*, in the text).

The difficulties which frustrated the implementation of plans for a permanent International Court during the last fifty years are well known and have often been described.[9] There is therefore no use in speaking of them again here. What is certain is that in these last years, since one of the obstacles has disappeared (the years of the Cold War), work within the UN framework has been going on at a fast pace. This is especially the case since 1994, when the United Nations adopted the draft statute of the Court drawn up by the International Law Commission; which the General Assembly had already appointed specifically to focus on the Criminal Code in 1947 and the appointment of which it had renewed since 1982. The analysis

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[9] On this see the studies and reports by Bassiouni, contained in various writings *inter alia*, in the last years: *Draft Statute International Criminal Tribunal*, published by the Association Internationale de Droit Pénal, Érès, Siracusa, 1992; *Draft Statute International Tribunal*, 2nd enlarged edition in the collection *Nouvelles études pénales* of the A.I.D.P., Érès, Toulouse, 1993; "Establishing an international criminal Court: a historical survey;" in *Military Law Review*, Washington, 1995 (a book by various authors dedicated to the theme "Nuremberg and the rule of law: a fifty-year verdict"); "Recent United Nations Activities in connection with the establishment of a Permanent International Criminal Court and the role of the AIDP and of the ISISC", in *Revue Internationale de droit pénal*, Year 67, n.s., (a volume entitled *La Justice pénale internationale*, dedicated to the memory of the Dean Fernand Boulan), p. 127 ff.; "The International Criminal Court: observations and issues before the 1997-98 Preparatory Committee", in *Nouvelles études pénales*, Érès, Toulouse, 1997 (the volume also contains writings by other authors on the topic); "Observations on the Structure of the (Zutphen) Consolidated Text", in a collection of writings by other authors as well, *Observations on the consolidated ICC Text before the final session of the Preparatory Committee*, in *Nouvelles études pénales*, Érès, 1998, all of them containing an ample bibliography, texts and documents. Besides these one can finally see the book edited by L. Sadat Wexler and Ch. Bassiouni, written by various authors, *Model Draft Statute for the International Criminal Court based on the Preparatory Committee's Text to the Diplomatic Conference*, Rome, June 15 - July 17 1998, Érès, 1998. Among publications in Italian see the volume edited by P. Ungari and M.P. Pietrosanti Malintoppi, *Verso un Tribunale permanente internazionale sui crimini contro l'umanità. Precedenti storici e prospettive di introduzione* (Atti del Convegno internazionale di Roma presso la LUISS, 8-9 ottobre 1996), Roma, Euroma, 1998. One can also see, respectively up to 1995 and up to February 1998, G. Vassalli, *Verso una giustizia internazionale penale?* in the collection *La giustizia internazionale penale*, cit., p. 201 ff.; M. Fava, "Verso l'istituzione di una Corte penale internazionale permanente", in *I diritti dell'uomo*, 1997, p. 28 ff.

of this project, which was hotly debated, was first entrusted to an *ad hoc* committee of the UN (convened by a decision of the Assembly in December 1994) and then to a Preparatory Committee which in 1996 gave the final touches to its own report.[10] However, its work only ended on the 3rd of April of last year, in connection with the imminent convocation of the diplomatic conference of plenipotentiaries which the Assembly itself had already planned for the institution of the Court in the act of the institution of the Preparatory Committee (resolution of the 11th December 1995). This Conference was held in Rome between June and July 1998, with the participation of official representatives of 161 States (out of the 185 members of the United Nations), and its work was concluded with the approval of the 128 articles of the Statute by as many as 120 countries. An exceptional event, without precedent for the intensity of the commitment and the importance of the studies which had preceded it. As we say, it was only one step in a difficult walk towards justice, but it was also a milestone reached.

4. An examination, even cursory, of the contents of the Statute of Rome is definitely outside the scope of this short article. I only wish to point out that its ample composition summarises the experiences of the projects of these last years and follows its patterns, while also giving preliminary definitions of the points which were more controversial. In particular the permanent nature of the Court has been established, as well as its ties with the United Nations; the terms of which will be defined by a future agreement. Even its preamble establishes the complementary nature of its international criminal jurisdiction; which means that the Court will intervene when the state having jurisdiction of the case refuses to or is not in a position to carry out the inquiry or judicial action (article 17, paragraphs *a* and *b*). The jurisdiction of the Court is considered as

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[10] On this preparatory work see analytically the writings of Bassiouni quoted in the preceding footnote, and in Italian see the information contained in the two articles mentioned at the end of the same footnote, within the stated chronological limits. For a summary of the problems as they were on the eve of the diplomatic Conference of Rome see Bassiouni, "Verso una Corte penale internazionale", in *I diritti dell'uomo*, 1997, n. 3, p. 5 ff.

having been accepted by every state which becomes a party to the Statute, allowing for the possibility that other states can also accept the Court's jurisdiction for certain cases. Finally, observance of the principle of non retroactivity is strict from every possible angle.

The part dedicated to crimes falling within the competence of the Court is very important. This was drawn up taking into account the projects of codes of crimes against the peace and the security of humanity, which were prepared as long ago as 1947, when the UN Assembly conferred its first mandate upon the International Law Commission.

In the aforementioned 1996 project of the International Law Commission, the crimes for the judgement of which the permanent International Court was being set up were still defined as: "crimes against peace and the security of the human race". Besides, in that project (which was not adopted by the General Assembly), five precise groups of crimes were already shown as belonging to this category: aggression, genocide, crimes against humanity, crimes against the United Nations and the staff associated with it and war crimes. The fourth group has been dropped and so now the Statute provides for, in this order (articles 5 to 8): genocide, crimes against humanity, war crimes and crimes of aggression (which corresponds to what had been defined as crimes against the peace in the Statutes of Nuremberg and of Tokyo). This order shows an order of precedence in the coming into force of the Court's competence. In fact the definition of the crime of aggression (one of the oldest objects of debate, due both to intrinsic difficulties and the need for a link with chapter VII of the UN Charter which provides for the powers of the Security Council for a peaceful settlement of controversies) had to be postponed to a later conference. In the meantime, for war crimes, a transitory provision which was hotly debated and criticised, conferred upon the state-parties to the Statute, for seven years after the coming into force of the Statute in their regard, the power to declare their non-acceptance of the Court's competence when a crime has been committed on their territory or by their citizens (article 124)[11].

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[11] The delegate of the United States of America had proposed that this clause should be extended to cover the prosecution and suppression of crimes against humanity. This would have made it impossible for the Court to function for an unlimited period of time, limiting its competence to crimes of genocide.

The constitutive elements of genocide, which obviously repeat the definition already contained in the 1948 Convention, and of crimes against humanity and war crimes (which would include crimes committed in armed conflicts which are not international) are extremely specific.[12] However they must be complemented by the contents of the articles in the Statute dedicated to the psychological element and to the causes of exclusion from criminal responsibility and their limits (articles 30 to 33), as well as by the contents of the article dedicated to complicity and attempt (article 25). In general, one must say that the part dedicated to substantive criminal law is on the whole accurate and takes sufficient account of the differences among the various national legal systems in an effort to create a code which is comprehensible and applicable to all. Besides article 21 of the Statute, when establishing the law applicable by the Court, caters under subparagraph (c) for the hypothesis that no provision can be found in the Statute, in the regulations of procedure and of evidence, or in the treaties or rules of international law. In this case reference is to be made to: "the general principles of law extrapolated by the Court on the basis of national laws which represent the various juridical systems of the world, including, if need be, the national laws of the states under whose jurisdiction the crime falls, so long as such principles are not incompatible with the present Statute or with international law and recognised international rules and regulations".

At the same time the Statute endorses fundamental rules that are indispensable to render effective and credible the punishment of the gravest crimes against the human race (here it follows the "Principles of Nuremberg") and rules of civilisation which must be upheld even in trials for the most hateful crimes and against the most cruel criminals. Among the first of these, one must keep in

[12] Due to this extremely specific character, they contrast with the definitions contained in article 6 of the statute of the international Nuremberg Tribunal, from which most of them are actually derived. On crimes against humanity see the substantial study by Bassiouni, "Crimes against Humanity", in *International Criminal Law*, Martinus Nijhoff Publishers, Dordrecht-Boston-London, 1992. For their distinction from war crimes, especially with reference to the evolution of the first category after the Charter of London, see ibid., p. 176 ff.

mind the principle that any title conferred on the guilty person by the state to which he belongs becomes irrelevant, whether it be that of head of state or government or any other. There are also the rules on the responsibility of military heads or other hierarchical superiors; and the rule that with reference to hierarchies: "orders to commit genocide or crimes against humanity are manifestly illegal" and therefore do not allow exemption from criminal responsibility, not even to subalterns. These rules of civilisation can be summed up in compliance with the precepts *nullum crimen sine lege* and *nulla poena sine lege*, the principle of non-retroactivity, that of *ne bis in idem*, the exclusion from the Court's jurisdiction of those who at the time of the crime had not reached the age of 18 years and in the exclusion of the death penalty from the punishments meted out by the Court. Both groups of laws reveal in their formulation a long meditation on the horrors committed up to the present, on the experience of other trials, on the need for the effective prosecution and punishment aimed at adequate prevention and on the value of the principle of legality always and *erga omnes*.

On the level of procedural law (broadly speaking, also including the rules of evidence) the "Rule of procedure and evidence" still needs to be drafted (see the next number). However the Statute already contains various institutions on this matter and detailed rules and regulations. Apart from all the structural norms (concerning the composition of the Court, its organs, the office of the Attorney and so on) it is enough to mention the rules regarding submissions to the Court, the inquiry and the judicial action, the Court's acceptability to examine the case and the relative proceedings. One could also cite the rules relating to the warrant of arrest and of preventive custody, the rights of the accused during the stage of the inquiry, the hearing (in which the rule is in force which distinguishes between cases of admission of guilt by the defendant and cases of non admission), the defendant's rights and those of the victims, the presumption of innocence and the burden of evidence, the general principles on evidence, judgements, appeals and the revision of judgements (both of which, obviously before an Appeal Chamber of the same Court). Other significant chapters of the Statute concern penalties, compensation in its various forms, inter-state co-operation and judicial assistance as well as on the Assembly of the States which are a party to the Statute, which is entrusted with important tasks and in the framework of which each State carries only one vote.

On the whole the text suffers from a kind of disorder, which is due to the little time available for creating such an important institution and to the way in which the editorial committee received from time to time the reports of the plenary Commission of the Diplomatic Conference. Nevertheless the Statute of Rome is a very valuable landmark even from the technical-juridical point of view, from which learning and jurisprudence will one day (not too distant, we hope) benefit.

5. As stated above, the Statute of Rome constitutes simultaneously both a stage reached and a goal achieved. It is a stage, because it is clear that we still have to wait for some years before we see in action a permanent International Court which will be called to judge (beyond the still possible and prior ranking penal jurisdiction of the national states) defendants accused of genocide, crimes against humanity, war crimes or crimes of aggression (obviously those committed after its coming into force). We have already spoken of the time limit imposed by the Statute on the Court's jurisdiction regarding war crimes: within seven years from the Statute's coming into force with reference to each particular state, any state can declare that it does not accept the Court's jurisdiction (article 124). The period within which crimes of aggression can be judged is presumably still longer and in fact a satisfactory definition still has to be reached by the states which are called to participate in this international convention. Moreover, the search for such a definition, as well as of the conditions under which the Court will be competent, has been referred to a future: "conference of re-examination."

As regards other international crimes like terrorism and international illicit drug trafficking, which are considered as: "scourges whose persistence is a serious threat to peace and international security" by the Diplomatic Conference of Rome, it has only been possible up to now to formulate a recommendation that another conference could draw up a definition of these crimes which would be generally acceptable and would include them among those which fall within the Court's competence. Such an accomplishment still appears, considering the present regulations of the Statute of Rome, even further away than an adequate definition of crimes of aggression. However it is possible that this trend will be reversed. On the contrary, as regards the establishment of international jurisdiction on crimes against humanity and

genocide, the only problem, unless there are second thoughts (which we hope there won't be), is the procedure established for the coming into force of the Statute in general. For this we must keep in mind certain dates and certain clauses. On the 17th of July 1998 the Statute was approved by the representatives of 120 countries with 21 abstentions and 7 votes against. Unfortunately these negative votes were quite important ones: the United States of America, China, India, Israel, the Philippines, Sri Lanka and Turkey. On the last day of the meeting, the representatives of 3 states (Malta among them) had still not put their signature to the final act, while 23 others signed on the next day, the 18th of July in Rome's Capitol. The representatives of 19 other states signed on the 7th October at the Italian Ministry of Foreign Affairs, whose authorisation to accept signatures terminated on the 17th October. From that date onwards, the signatures of the states which are a party to the Statute as well as any prospective accessions must be deposited at the United Nations Organisation in New York by the 31st December 2000. By November 1998 the total number of these had already swelled to 59. However the date when the Statute will come into force has already been fixed (by article 126): not before the first day of the month after the sixtieth day following the date when the sixtieth ratification instrument has been deposited. Moreover, it does not seem that any Government has up to now succeeded in voting for such a ratification. On the other hand, this court is intended to function on a conventional basis, and the necessary time is that generally required by the most complex international treaties.

Additionally, for the efficient operation of this Court and apart from the obvious funds and other organisational tasks, a series of legal texts must still be prepared. These are: the already mentioned definition of the characteristics which distinguish the individual crimes, the regulations on procedure and evidence (these texts must be drafted before the 30th June 2000), as well as the agreements between the Court and the United Nations, between the Court and the host country (Holland), and the internal regulations of the "Assembly of the Member States/Signatories," provided for by article 112.

The final Act of the Rome Conference, in section F, established that a preparatory commission be set up, if need be, which must be convened at the earliest on a date to be fixed by the UN General Assembly and which will be composed of representatives who have

signed the Act itself and plenipotentiaries of the United Nations. Consequently, since the final Act is only a resolution paving the way for the UN Assembly; initially the competent committees of the Assembly itself must intervene (in which even the non-signatory states participate) to establish how the Preparatory Commission will operate. In fact it is estimated that, if everything goes according to plan, this Commission will not begin to function before the spring of 1999. It will have before it a lot of material consisting of proposals and reports and it will certainly work with competence and speed. However the work to be done is huge and there are certainly some problems which still need to be solved. Besides, since its objects are subject to international agreements and fall under the aegis of the United Nations, one cannot exclude developments which differ from those projected in Rome.

Nevertheless the most worrying aspect is the climate created by the attitude of those states which have voted against the Statute. On seeing which states these are, this attitude becomes more comprehensible. The remarkably adamant opposition of the United States is the stance which can be understood least. In fact, for the time being, the Court's competence over genocide and crimes against humanity has been limited. A whole series of legal guarantees in favour of the sovereignty of the individual states runs through every page of the Statute up to the previously mentioned supreme principle of the merely complementary nature of the Court's jurisdiction with respect to that of the individual national states (article 17, commas *a* and *b*). This guarantee is reinforced by the principle of *ne bis in idem* (article 20 in relation to article 17 section *c*). It is hard to believe that the United States of America will not exercise its own prior criminal jurisdiction in regard to such grave crimes. Besides, the President of the United States himself had expressed his adhesion to the institution of the International Criminal Court in a speech delivered not more than a year before the Rome Statute. Finally, to guarantee the achievement of peace in current conflicts, or in order to avoid even worse conflicts in the zones where the crimes were committed, there is the important clause contained in article 16, which empowers the Security Council, with reference to chapter 16 of the Charter, to suspend for twelve months (renewable) the opening of an investigation or legal action for crimes provided for in the Statute. In such a context it is not easy to understand the reasons for so much opposition. Perhaps this has now become merely a

question of principle, perhaps linked to the fear that an institution like the Court could be a step towards a "World Government." Still, a world government has already been in existence for some time and it is termed the United Nations. Indeed, the United States have been the principal promoters of this organisation during the years when the worst crimes against humanity were being perpetrated. For this reason, we hope that this hostile stance will in time change and become favourable to accession.

Besides being an important stage, the Statute of Rome is also a great goal achieved and this from the juridical, political and moral points of view. Firstly from the juridical viewpoint, important progress was registered through historical precedents long ago. In particular, one should recall the generic appeal of the Treaty of Versailles against transgressions of treaties and international morality, as well as the Statutes of Nuremberg and Tokyo themselves. The latter make significant advances in distinguishing the various categories of the gravest international crimes, affirming the responsibility of heads of government and eliminating immunity for the perpetrators of the most infamous crimes from both municipal and international law. For genocide as well as for crimes against humanity the elements of the offence have been drawn up, at least as a first draft. As for war crimes, the current body of internationally accepted conventional and customary norms have become the basis for a detailed and careful stipulation of the various legal elements. The principle of individual responsibility has triumphed and international law has acquired a new dimension, as a direct source of legal provisions.[13] Moreover, the judge has become truly impartial

[13] It is impossible not to mention here the extraordinary speech delivered by Pope Pius XII to the participants at the Sixth Congress of the International Association of Criminal Law on the 3rd October 1953 when he received them at the Vatican. He clearly affirmed the role that international law was called upon to play, after the tragic experiences of two world wars and of totalitarian systems, as a source of punitive law, on a conventional basis but with the authority of autonomous law; precisely as an "international criminal law," as it was repeatedly called. At the top of the list of punishable crimes, Pius XII placed unjust war as the most serious of them all, asserting that international criminal law had the duty to punish this crime heavily and observing that the perpetrators of this crime: "remain in any case guilty and punishable as the law provides for." Pius XII

and many laws have been drawn up effectively in his defence, at least in the intention of the new world legislator. The principles of legality of the substantive criminal law and of the law of procedure have been affirmed in all their possible aspects and the national law of states has been given its due consideration, albeit in the effort to achieve international justice. The work carried out for many decades by legal associations (foremost among which the *Association internationale de droit pénal*) and by scholars working in isolation has been rewarded, first by the aforementioned projects and secondly by the Statute of Rome. It may in future be profitably amended, but it will remain a text worthy of consideration by all scholars and students of legal matters.

From the political perspective, it seems superfluous to stress the value of the adhesion of such a vast grouping of states, achieved in absolute liberty of thought and action, after having overcome difficulties which have stood in the way for decades and decades and which spitefully reappeared even during the proceedings of the Conference of Rome.

Finally, from the moral point of view, the goal reached is a very elevated one; since the adoption of the Statute of Rome demonstrates the will to put an end to non-penalised injustices and to absolutely intolerable discrimination. This theme concerning the injustice of allowing the perpetrators of mass crimes and the most terrible "experiments" against humans to go unpunished had been dealt with by Pius XII in a famous speech; in which the Pope denounced the: "shortcomings of the law and the lack of protection shown towards human beings who were left at the mercy of arbitrary will and brutal force." He invoked: "the spontaneous human sense of justice" as the justification for relentlessly punishing such crimes.

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proceeded to emphasise the gravity of the crimes against humanity committed for reasons of race, of collective punishment by deportation, of manhunts, slavery, and war crimes, including retaliation and the shooting of hostages. He declared that these kinds of crimes: "must be tackled by international treaties which would be able to guarantee effective protection and which can be cited to indicate the crimes which deserve punishment and to describe their characteristics with juridical precision."

If we now reflect that in the fifty four years following the end of the Second World War, there have been 250 conflicts in the world in which 130 million people have lost their lives, it is difficult not to admit that the impunity enjoyed by these crimes has not only jeopardised any possibility of their adequate prevention, but has also offended the moral sentiment of justice.[14] The passage from disapproval, projects, warnings, preparatory commissions and conferences to binding statements like those contained in the introduction and individual articles of the Statute of Rome is undoubtedly a great and meritorious step towards transforming moral laws into juridical laws and towards ensuring effective respect of the most fundamental human rights.

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[14] The historical impunity enjoyed by crimes against humanity was the topic chosen for an important international conference held at the ISISC of Syracuse from the 17th to the 21st September 1997 (*Reining impunity for international crimes and serious violations of fundamental human rights*). See the proceedings in *Nouvelles études pénales*, Érès, Toulouse, 1998.

ARTICLES

THE CONSTITUTIONALISATION OF PRIVATE LAW IN ITALY

GUIDO ALPA

This article explores the impact of the Italian constitution, through its guarantees of fundamental human rights, on the legal relations between private persons which are the traditional subject of private law. A distinction is made between various modes of application of the constitutional rules and this is illustrated by reference to leading cases in which these constitutional rules were applied. Particular attention is focused on the role of constitutional argumentation in implementing the principle of non-discrimination, developing the rights of personality, constructing the concept of biological damage in personal injury cases and in specific parts of the law of obligations. It is concluded that the Italian system for applying constitutional norms is fairly coherent and differs from other systems inasmuch as it does not directly protect freedom of contract under the constitution. The boundaries between private and constitutional law are being redefined as a result of this process of constitutionalisation of private law.

1. Preliminary remarks

Before dealing with certain aspects of the constitutionalisation of private law, a few preliminary remarks are in order, for the benefit of those who are not familiar with the Italian legal system. The Italian system is based on a written Constitution (1948), on ordinary laws (including the codes and especially the Civil Code of 1942) and on special laws. Case-law has for only a few years been regarded as a source of law, secondary to actual legislation. The Constitution (1947-1948) consists of a bill of rights and legal rules on the organisation of the state and the constitutional authorities,

one of which is the Constitutional Court. Private law, in the strict sense, is the law governing relationships between private persons, and in the wider sense, the law governing private persons in civil and commercial contexts and in their relationships with public bodies. The bill of rights deals with the fundamental rights, or liberties.

The Constitutional Court (pursuant to Articles 134-137 of the Constitution) determines, *inter alia*, disputes relating to the constitutional legitimacy of laws and other enactments having the force of law, made by the state or by the regions. Application to the Court can only be made by an ordinary or administrative judge, who refers to it a matter which he has been asked to decide, either on its merits or with regard to its constitutional lawfulness. There is no provision for private persons to apply to the Court directly. This means that the Court does not revise the judgements of other courts, but makes a pronouncement as to the constitutionality of a legal provision which the referring judge is considering, with a view to applying it to the facts before him; but as to the constitutionality of which he has expressed reasonable doubts. For a long time it used to be argued that the provisions of the Constitution were directed *only* to the legislator; but for several decades now, it has been generally agreed, partly as a result of the evolution of the case law of the Constitutional Court, that the provisions are aimed at *everyone*. Thus, at least in part, wherever possible, they also apply to legal relations between private persons.

Generally, when one talks about the provisions of the Constitution applying to legal relations between private persons, one is making several assumptions:

(i) That the legislator, when attempting to regulate matters of private law, has complied with the Constitution.

(ii) That those provisions of the Constitution that relate to matters of private law apply to legal relations between private persons.

(iii) That legal interpretation must be carried out in accordance with the Constitution; that is, that legislation on private law is to be interpreted in the light of the rules of the Constitution. This is done on the basis of general principles such as in the case of the general terms "public order", "good practice", "honesty and good faith", "fairness", "unjust wrong", etc; and

by the use of general formulae, such as "the nature of things", "actual circumstances", and of standards of evaluation such as diligence, honesty, etc.

(iv) That private persons spontaneously comply with the rules of the Constitution in their dealings.

It is in these various meanings that we speak, in Italy, of the Constitution *directly* applying, or applying *indirectly* or by mediation; or of its *effects upon third parties*; or of its applying *vertically* or *horizontally*.

These are particularly significant questions in regard to the fundamental rights. Many of the fundamental rights relate to the legal relationships dealt with by private law. The Constitution elevates to the level of fundamental rights of persons, whether natural or legal, (*diritti soggettivi*), some of the interests (or values) relating to persons, such as equality, dignity, solidarity, health and work. It codifies some of the fundamental liberties, such as personal liberty, freedom of association, religious freedom, and so on. All of these are matters of private law in the wider meaning stated above. A further distinction is made, between those provisions of the Constitution that confer importance upon fundamental rights (as recognised and protected by the Constitution and in other binding legislation such as the EC Treaties or the international Declarations or Conventions on human rights) and those provisions of the Constitution that do not relate to such rights. In the Italian legal system, the so-called economic rights, such as the right of ownership, the right of the individual to carry on business, freedom of contract, the right to leave one's assets by will, etc. are not treated by the Constitution as fundamental rights but as limited by considerations of public policy.

On the basis of the above summary, we can state that:

(i) Any legal provision that conflicts with these values (or principles) can be declared to be unconstitutional. This means that the values (or principles) act as *prohibitions*, which the legislator must observe, and as *boundaries* within which the power to legislate must be exercised.

(ii) The judge, who is subject (only) to the law, must apply the rules of the Constitution, as it is the basis of the entire legal system. Thus he is not at liberty to discriminate between public and private legal relationships when deciding whether

to allow or exclude the application of the rules of the Constitution to them.

(iii) The question of compliance by private persons with the values (or principles) of the Constitution as expressed in its various provisions, in the regulation of inter-personal legal relations, is more complex and problematical.

One fundamental question is whether freedom of contract can be exercised in a way that ignores the Constitution or is actually in conflict with it. After all, private persons must comply with the law, and therefore also with the Constitution, when regulating the legal relations between them, and restrictions upon private persons are a matter of legal significance and have effect only to the extent that they are lawful. Consequently, in the event of non-compliance with the rules of the Constitution by private persons, it will be necessary to establish whether this non-compliance affects the validity of their legal relationship and whether the rules of the Constitution can supplement those purporting to govern their relationship. If a law that has permeated their legal relationship is held to be unconstitutional, the question is, whether it can be judged to be so by the ordinary judge, or whether it is only the Constitutional court, on the basis of the opinion of the competent ordinary judge in his referral to it, and on the basis of its own opinion, that can establish the unconstitutionality of the law and thus the application of the principle expressed in its judgement to the legal relationship between private persons, through the medium of the competent, ordinary judge.

One must also bear in mind that the expressions "directly apply" and "indirectly apply" are still clouded with ambiguity. The facts of many cases are classified either in the first or in the second category; and in the various legal systems, the nomenclature, the analysis of the system and the evaluation of the effects of interpretation (or application) of the Constitution are not uniform but very diverse. There are differences, in the various legal systems, between the concepts of direct application as dealt with in doctrinal writings and decided cases; and each legal system must be considered separately. A particular model is never simply transplanted from one system to another and this process will give rise to attitudes of rejection, or to a marginal and problematical acceptance, or substantial adaptations. Bearing this

in mind, there are at least three different models to which the Italian model can be compared: the German model, and, based upon it, the English[1] and the French. The Italian model is close, but not identical, to the German model. Although the two models have aspects in common, such as the structure of the system, the written nature of the Constitution (long and rigid) and a Constitutional Court; in the German model the private individual has direct access to the Court and the Court has powers to overturn the decisions of ordinary judges. These are features which the Italian model, as already stated, does not share. The French model is still under construction. The English, in view of the non-existence (so far) of a written Constitution, has fallen back on the fundamental rights recognised and protected by the European Convention on Human Rights and on the Human Rights Act of 1998.

2. The Italian model of *Drittwirkung*

The case law produced by the Italian Constitutional Court is vast, dating as it does from 1956, the year the Court was set up. It is not possible within these pages to run through the entire output of its decisions on matters relating to private law.[2] It is appropriate, therefore, to exclude from our consideration the Court's interventions in the vast areas of family, inheritance and property law, and to devote some time instead to some aspects of the Italian style of *Drittwirkung* in relation to the rights of the person and legal relationships of obligation. It is also appropriate to point out that at least since the Sixties, and particularly since the Seventies, even ordinary judges, whether deciding as to facts or as to lawfulness, have started to apply the provisions of the Constitution. This

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[1] See the introductory essays in Markesinis' collection *The Impact of the Human Rights Bill on English Law,* Oxford, 1998. On the bearing of the Constitution upon relationships between private persons, see Markesinis, *Comparative Law – A Subject in Search of an Audience*, in *Modern Law Review*, 1990, pp. 10 ff.

[2] A recognition effected egregiously by Cerri in *La Costituzione e il diritto privato* (The Constitution and private law) in *Trattato di diritto privato* (A Treatise on Private Law) directed by P. Rescigno, [Vol] I, Turin, 1987, pp. 47 ff; and [Vol] XXI, 1991, pp. 697 ff.

interpretative technique is easily apparent from the computer databases of court judgements.

2.1 *The status and principle of equality*

A fundamental principle of the Italian Constitution is the principle of equality (Article 3).[3] This principle has come to be established as a protected situation of the legal or natural person and it is possible to trace various applications of it in the case law relating to the Constitution. One of these specifically relates to the prohibition against discrimination and the concomitant right of the legal or natural person, to equal treatment in the like circumstances. When comparing circumstances, none of those qualities or distinguishing characteristics indicated, for the purpose of protecting the individual, in Article 3, clause 1 of the Constitution (sex, race, language, religion, political opinions, or personal and social circumstances) may be used as grounds for discrimination. Another application consists in perceiving equality as a limitation upon every aspect of the power to legislate: the power must be exercised according to the standards of coherence and reasonableness.[4] In the Italian legal system, as we shall show below, the principle of equality is held not to affect freedom of contract to the extent of making it legitimate to directly apply Article 3 of the Constitution to restore the balance between reciprocal prestations in a contract.[5]

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[3] "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic and social nature which, really limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country."

[4] In the legal culture of private law the pages dedicated by Pietro Rescigno to this problem are still without parallel. Among the vast, learned, output of this master, one may be permitted to refer to Chapter II of the first volume of the *Trattato di diritto privato* (Treatise on Private Law) edited [directed] by him, Turin, 1982.

[5] The declaration of nullity of terms imposed by the stronger party to the contract on the weaker party is dealt with in ordinary law. In the [context of the] rules of the Civil Code the individual - exceptional - circumstances are defined in which at the behest of one of the parties it is possible either to reduce the performances required by the contract to parity [equity] or to order rescission or termination [of the contract] on the grounds that it is excessively onerous. It is only since EC

However, this assumption does not always hold. The statutes by which people inaugurate corporations (or clubs) are also described as contracts. They are contracts of association; and even the rules or statutes by which the internal life of a society is regulated (its rules of membership) or by which individuals join it, are negotiated legal documents. Can these manifestations of private autonomy be affected, if they are in conflict with the provisions of the written Constitution? This problem has not been directly resolved, but it has been touched upon in a judgement of the Constitutional Court relating to the power given to the Jewish Communities to tax all their respective members, by the Royal Decree of 30th October 1930, no. 1731 (now amended by the Agreement between the Jewish Communities and the Italian State of the 27th February 1987). Membership of the Communities was obligatory, according to the then legislation, which has now been repealed,. The Communities were entitled to levy tax from any ethnically Jewish individual, even if he did not practise the Jewish religion or follow its precepts. The legislation was not discriminatory at the time it was introduced. On the contrary, it was the Communities themselves who requested it from the Italian state, so that they could have greater power to claim the payment of taxes from their registered members. The Constitutional Court, in its judgement of the 30th July 1984, no. 239[6] found, however, that this legislation was in conflict with Article 3 of the Constitution. This was because the obligation to pay the financial contribution depended on the fact of being Jewish and resident in the relevant territory. Thus, it constituted discrimination on the basis of race and religion. This legislation was also lambasted on the grounds that it ran contrary to the principle of freedom to form or join associations under Article 18 of the Constitution, inasmuch as that principle also implies the freedom *not* to join or belong to associations. To state this in the words of the Court:

> "to oblige a person to belong to a Community merely because he is Jewish and resides in the territory pertaining to that Community, when his membership is not accompanied by any manifestation of a wish to belong, is

[6] In *Foro Italiano* (Italian Forum), 1984, I, 2397, with a note by N. Colajanni.

> in breach of the freedom of association that is protected by Articles 2 and 18 of the Constitution."

The most frequent interventions of the Constitutional Court concern the application of the principle of equality at work, with particular regard to parity between the sexes and the protection of the working woman. Moreover, on the issue of economic or business activity carried on by private persons and its relationship with their status and citizenship, it is also worth noting the judgement of 30.12.1997 no. 443.[7] It declared the unconstitutionality of legislation which prohibited businesses having an establishment in Italy from using, in the manufacture and marketing of their products, ingredients that were permitted by EC law to businesses having establishments in other member states of the EC.

The foregoing examples are illustrations of *indirect* applicability: they indicate an acceptance that issues of constitutionality can have a bearing on a legal relationship that is normally governed by private law. There has as yet been no instance of *direct* application. A hypothetical example of this could be the question whether rules of membership could validly exclude a member of a society, on the basis of one of the criteria of discrimination listed in Article 3, clause 1 of the Constitution.[8] On those facts, no constitutional issue would arise, for submission to the Constitutional Court – unless one wished to impugn the rules of the Code, which in any case is silent on the freedom to make written rules of membership. Rather, the question would be one for submission to an ordinary judge, asking him to order that the clause in the rules of membership that contained a criterion of discrimination was null and void.

Another hypothetical question is whether discrimination may operate, not so much as against a person who already has the status of member, as against a potential member, that is, one who would like to belong to a society but does not possess the required characteristics, where these characteristics include discriminatory factors that are condemned by the Constitution. Here we see two

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[7] Judgement of 30.12.1997, no. 443, in *Foro Italiano*, 1998, 697, [note by] Cosentino.

[8] "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions [or] personal and social conditions."

values in conflict with each other. One is the right of the persons who are already members of a society freely to determine which rules are to govern the functioning of their society (Article 18). The other is the principle of equality and, if you will, the principle of free development of the personality in the context of social groups (Article 2).[9] In practice, the problem can be resolved by admitting to the society only individuals who have been co-opted, that is who have been invited to become members. But this solution cannot be said to be satisfactory: it evades the basic question rather than resolving it. A society that excluded one of its members for reasons conflicting with Article 3 would be committing an unlawful act. It is a different story in the case of a person wishing to become a member of a society, because a society cannot be compelled to accept everyone who wants to join. The matter has been addressed only in doctrinal writings and does not appear to have been submitted to the Constitutional Court.

2.2 *Human rights and the rights of personality*

As has happened in Germany and is happening in France, it is in the context of the rights of the personality that we see the highest incidence of application of the provisions of the Constitution. It is by applying these provisions that ordinary judges have created new rights, such as the right to privacy (Article 2 of the Constitution), the right to personal identity (Article 3 of the Constitution), the right to health (Article 32 of the Constitution),[10] and the right to enjoy a healthy environment (Articles 9[11] and 32 of the Constitution).

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9 "The Republic recognises and guarantees the inviolable rights of man, as an individual, and in the social groups where he expresses his personality, and demands the fulfilment of the inviolable duties of political, economic and social solidarity."

10 "The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent. No one may be obliged to undergo particular health treatment except under the provisions of the law. The law cannot under any circumstances violate the limits imposed by respect for the human person."

11 "The Republic promotes the development of culture and scientific and technical research. It safeguards the landscape and the historical and artistic heritage of the nation."

The Constitution has been applied in the field of civil liability: the breach of those rights that are founded directly on the commands of the Constitution leads to the grant of remedies to prevent such breaches, or remedies in damages, and is actionable by one private person against another. In recent years, many judgements of the Constitutional Court have defined and described these rights.

On the question of the right not to be deprived of one's name, there is an interesting judgement on the connection between Articles 22[12] and 2 of the Constitution. A person has a separately defined right to his name, which is a distinguishing means of assessing him. This right is linked to the right to personal identity (considered as physical identity, but also as an ideal or conceptual identity). The question considered by the Constitutional Court concerned Article 65 of the Royal Decree of 7 July 1939, no. 1238. This article was held to be unconstitutional as to the part which dealt with the possibility of rectification of the documents relating to civil status. There was no provision in the Decree for the right, held to be valid in the circumstances of the case, to retain a surname. A child had been given the surname of his supposed father; a subsequent judgement found that the natural father was a different person; according to the Decree there was no option for the child to retain his original surname even though that surname had already become an autonomous distinguishing sign of his personal identity. In this case, the Constitutional Court remarked that it is certainly true that among the rights irrevocably belonging to the person, Article 2 of the Constitution includes, recognises and safeguards the right to personal identity. The Court defined this right as:

> "the right to be oneself, which is the right to respect for one's image as a participant in social life, together with one's patrimony of acquired ideas and experiences, and those ideological, religious, moral and social convictions, that differentiate and at the same time define the individual...Personal identity thus constitutes an asset in itself, irrespective of the personal and social

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[12] "No one may be deprived, for political reasons, of legal status, citizenship [or] name."

circumstances of the person, or his virtues or defects, so that everyone is allowed to have the right to have his individuality preserved. Of the many forms it takes, the first and most immediate factor distinguishing a person's identity is obviously his name. It is separately stated to be an asset that is the subject of an autonomous right in the next article of the Constitution, Article 22. It acquires the character of a distinguishing and identifying sign of the person in his social relationships with others. Now, since the legal rules governing names are a product of needs having both a public and a private nature, the public interest in ensuring the accuracy of the register of births, marriages and deaths is satisfied when a document recognised to be untrue is rectified. Once a person's family relationships are verified and certain, it is of no consequence, for the purposes of the public interest, if he retains the name he previously bore, as does any other person of the same name."

Similarly on the question of rights in a name, the Constitutional Court has declared Article 262 of the Civil Code to be unconstitutional, because it did not allow for an illegitimate child to retain the name originally given to him by the official of the civil state, in circumstances where the (illegitimate) child had been subsequently recognised by his natural father and his original surname had become an autonomous distinguishing sign of his personal identity.[13]

In regard to *copyright*, the Constitutional Court has decided that the Italian Society of Authors and Publishers (S.I.A.E.) was not abusing a dominant position.[14] Article 180 of Law no. 633 of 1941 grants to the S.I.A.E. exclusive management of the rights to make commercial use of the works protected by copyright. The judgement, which has been much criticised, found that the enormous circulation of imaginative works make the mediating and protective activity of

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[13] Judgement of 23 July 1996 no. 297, in *Foro Italiano*, 1997, I, 11.

[14] Judgement of 15 May 1990, no. 241 in *Foro Italiano*, 1990, I, 2401, with a note by Nivarra.

the S.I.A.E. almost always indispensable in practice. This is especially true for foreign works, in respect of which permission for their commercial use can usually be obtained only through the S.I.A.E., which is linked to the foreign Societies of Authors by mutual agency contracts. The fact that its mediation is virtually irreplaceable means that the S.I.A.E., which is the exclusive owner of the right to mediate, exercises a virtual monopoly over the management of the rights to make commercial use of the works protected by copyright. This in turn means that it enjoys the power of controlling the users and the market in the manner characteristic of the holder of a monopoly. Moreover, since this is an exclusive right that is permitted by law, the Court stated that:

> "the S.I.A.E. must be held to be under an obligation to contract, and prohibited from arbitrary discrimination, as confirmed by Article 2597 of the Civil Code, with the consequences set out by law. Likewise, the appointment of the S.I.A.E. complained of, must be construed in the light of Article 41 para.2 of the Constitution, as intended to protect the user and the consumer against the abusive exercise of its power on the part of the holder of the monopoly".

On the other hand, the judgement concludes:

> "Since the reason for allowing the S.I.A.E. to have this exclusive right consists, not only in the protection of the rights of its authors, but also in its function of promoting culture and in the dissemination of original works of a creative nature, there is no doubt that the S.I.A.E. might fail to discharge its duties to the full, if it were not bound to contract with all users and to guarantee them equality of treatment in the like circumstances, not putting or allowing any of them to be placed in an advantageous or disadvantageous position."

The Court has also considered the hire of compact discs. The particular case concerned a complaint by authors, performers and producers against distributors and hirers. It turned on the prohibition which could be construed from the Law on Copyright (rights of

authors) but was then made plain in the Legislative Decree of the 16th November 1994, no. 985, which brought EC Directive100/1992 into force in Italy. The competing interests in question were, on the one hand, artistic and scientific freedom, copyright in intellectual property, and the rights to development of the human personality under Article 2 and of culture under Article 9 of the Constitution. On the other hand, there were the right to engage in a private business enterprise and freedom of contract. The judgement of the Constitutional Court had to balance these two interests. The Constitutional Court found that the former outweighed the latter, and therefore held that it was constitutionally lawful to prevent the hiring of a copy of a compact disk that had been lawfully acquired by a private person.[15]

2.3 Biological damage (personal injuries) and the right to health

The concept of *biological damage* has been constructed on the basis of Articles 3 and 32 of the Constitution. It was already appearing in the judgements of judges on questions of fact from 1974 onwards and is now a deciding factor in the assessment of damage to the person. As there are no detailed rules either in the Civil Code or in special legislation, to guide the judges' assessment of this damage, this is based on the principle of equitable evaluation [*equo apprezzamento*] (Article 2056 of the Civil Code). Recourse has therefore been had to the constitutional rules, in order to award compensation for damages arising from injury to the physical and psychological integrity of the person, independently of his capacity to earn and his capacity to work, whether general or specific. The application of the provisions of the Constitution (by constitutional argument) has become an essential means of justifying this new method of assessing personal injuries.[16] The cases on biological

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[15] Judgement of 6 April 1995, no. 108, in *Foro Italiano*, 1995, I, 1724, with a note by Caso.

[16] An exhaustive and well-set-out bibliography on the subject of biological damage [personal injuries] is contained in Bargagna-Busnelli's book, *The evaluation of damage to health*, Cedam, 1988; this is a bibliography edited by Ponzanelli, divided into two parts of which the first deals with the period from 1974 to 1985 and the second with the period from 1985 to 1987. Each of the two parts is divided into

damage constitute an interesting database of evidence, a sort of court laboratory providing the opportunity to engage in two types of, as it were, preliminary examination: of the uses of constitutional argumentation and of general principles in judicial reasoning. This examination makes it possible to trace the developments in the case law on civil liability, which has combined the general provision of Article 2043 of the Civil Code with the provisions of the Constitution.

This combination of Articles 3 and 32 of the Constitution and Article 2043 of the Civil Code has enabled judges to order the payment of compensation for a head of damage caused by accidents resulting in personal disablement, not only to claimants who have been actually earning an income, but also to others. In addition, it has led many courts to order payment of identical sums for identical personal injuries, without having regard to the victim's socio-economic category, but only his age and sex. A judgement of the Court of Cassation (the highest court of appeal in Italy) of the 11th February 1985, no. 1130, states the fundamental principle on this matter: "the right of every individual not to be physically or psychologically damaged is guaranteed and protected by our legal system as a primary and absolute right." The Court proceeds, in an *obiter dictum*, to specify that damage wrongfully caused to the physical and psychological integrity of the following must also be compensated: a new-born baby, an infant, a student, a housewife,

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three sections, dealing respectively with monographs, articles and notes on judgements. The following are particularly recommended: Alpa, *Biological damage*, Cedam, 1987 and Busnelli-Breccia, *The Protection of health and private law*, Giuffré, 1980, in addition to Bargagna-Busnelli, *op. cit.* Among the many commentaries on the judgement of the Constitutional Court no. 184/1986, see those by Ponzanelli and Monateri, published in *Foro Italiano,* 1986, I, 2053 ff. and 2976 respectively. Also see the note, signed A.F., published in *Giur. it.*, 1987, I, 1, 392. Finally see that of Alpa, 1986, I, 546 ff. On the subject of biological damage the following can be read: Cass. [Judgement of the Court of Cassation], 16.1.1985, no. 102 (note by Giusti) and Cass. 11.2.1985, no. 1130 (note by A.G.), at pages 385 and 377 respectively; in part II, also 1985, see Busnelli, *Damage to health* (197); in part I of 1986 are Trib. Verona [Judgement of the Court of Verona], 4.3.1986, with note by Alpa (525) and Cass., 14.7.1986, no. 184, with note by Alpa (534); see finally in part I of 1987, Cass., 11.11.1986, no. 6607, with note by Ferrando (343).

a pensioner, a convicted prisoner, a person in hospital, a person without legal capacity, a person incapable of work, and so on. This is because, from a biological point of view, the damage constitutes an impairment of the physical and psychological wholeness of the person. The evaluation of the biological head of damage is separated, in financial terms, from that of the victim's former and potential future earnings.

In the first decade since 1974, this new trend, which commenced with a judgement of the Court of First Instance of Genoa, excited a lively debate between those who insisted on equality and those who insisted on consideration of the surrounding circumstances as differentiating one victim from another. The Constitutional Court and the Court of Cassation have intervened several times in this field, with the result that the new method of evaluating damage has been upheld. Indeed the Constitutional Court took the opportunity, in its judgement of the 27th October, 1994, no. 372, to specify that nervous shock is admissible as a head of damage in our legal system, subject to certain limitations:

> "Biological damage, like any other wrongful damage, is recoverable only as a wrong actually caused by an injury. Secondly, in the particular circumstances under discussion, a narrow interpretation of Article 2059 of the Civil Code in conjunction with Article 185 of the Penal Code does not pass the test of the practical argument that it would be irrational to make a decision distinguishing, among the consequences of the psychological shock suffered by the (victim's) relative, that which is merely subjective damage to his morale from that which affects his health, so as to allow compensation only for the first...Damage to health, in these circumstances, is the final stage of a pathogenic process that was generated by the same disturbance of psychological equilibrium that is adduced as evidence of damage to morale. Rather than manifesting itself in a state of anxiety or obvious distress of mind, this pathogenic process can, in the case of people having a certain predisposition (such as a weak heart, weak nerves etc.) degenerate into a permanent physical or psychological trauma. The consequences of such a trauma must be measured in damages in terms of the loss of personality

> and not simply as *pretium doloris* (the price of pain) in strict terms."

In the evaluation of the damage to the person, Articles 3 and 32 of the Constitution therefore serve to delimit the area of damage for which compensation can be obtained. On some occasions, however, the Constitutional Court has also made use of Article 2 of the Constitution. This provision expresses the so-called personal principle. Our fundamental, written, Constitution chooses the person as the point of reference for its rules. In the context of the Constitution, the person is understood not so much as an individual whose right not to be physically injured must be protected by means of compensation in damages, but rather as a centre of interests and owner of rights, both as an individual and as a member of social groupings, which support and fulfil his personality, together with his political, economic and social functions.

The Constitutional Court has used Article 2 to state that the provisions in the Laws on air transport, passed in ratification of the Warsaw Convention of 1929 as amended by the Hague Protocol of 1955 (Laws no. 841 of 1932 and no. 1832 of 1962) are in conflict with the Constitution. The case concerned the quantitative limits to the recoverable damages following a finding of the liability of an air carrier. The judgement is based on a comparative evaluation of the interests involved. In the opinion of the Court, there must be a legislative solution:

> "[that is] apt to ensure an equitable satisfaction of the interests in question: and so, the [argument for the] limitation is supported on the one hand by the need to avoid unduly restricting the scope of the carrier's economic initiative, and on the other on the grounds that this limitation is based on criteria that, for the purposes of attributing liability or deciding whether the limitation under discussion exists, include suitable specific safeguards of the entitlement claimed by the person suffering the damage."

The Court states that the rules of the Convention are out of date. Where they limit recoverable damages, they appear to have become inconsistent with the new system of values introduced by the Constitution:

> "in the terms in which it is put, the rule which in the face of personal injuries – and even, as here, in the face of the loss of human life – would exclude the possibility of complete reparation of the damage, does not have the assistance of an appropriate right. It therefore breaches the guarantee established by Article 2 of the Constitution for the inviolable protection of the person."

The judgement was criticised in doctrinal writings. These pointed out that it was not correct to make a comparative evaluation of the interests involved, in merely financial terms. They also noted that the judgement flouted the international regulation of air transport, whose economic effects the Court had completely ignored. In our legal system, they said, there exists no right to *complete* compensation of the victim; in other words it is not possible to identify in the system an absolute and unconditional right of the injured party to recovery of *every type* of damage to the person. Still less was there a right to *integral* compensation for the entire loss suffered, such that this right should be included among the inviolable rights of man. The Court's reasoning, which doubtless constituted the *ratio decidendi* of the entire judgement, would be understandable if the rule in the law ratifying the Warsaw Convention had *completely* excluded compensation for damages; which it did not.

After considering the question of damage, the Court went on to consider the criteria for assigning liability:

> "the general rule, for non-contractual as for contractual liability, is that only damage wrongfully caused through the fault of the person causing it is recoverable from him."

In the absence of fault, the loss or damage must be borne by the person suffering it. Without concerning itself with the opinion now held by doctrinal writers and by ordinary judges, that there are instances of strict liability, the Court observed that:

> "it is certainly true ... that the modern trend is in favour of undervaluing the requirement of fault, but this is happening exceptionally and with specific implications (such as the imposition of a quantitative limit on the

amount of damages) and does not undermine the general principle of "no liability without fault." [17]

The Constitutional Court has also intervened on the subject of the damages payable to people who were injured by allergic reactions to vaccinations against poliomyelitis (pursuant to the Law of the 30th July 1959, no. 695). The Law of the 25th February 1992, no. 210, which reformed the matter, did not provide for compensation in the cases where the damage had been inflicted while the former law was still in force (Judgement no. 27 of 1998).[18] Thus it was unconstitutional. The Constitutional Court has returned to this argument several times (see Judgement no. 258 of 1994[19] and also Judgement no. 118 of 1996).[20]

With regard to the damage suffered by a passive smoker, it has been recognised that the infringement of his rights falls within the circumstances of Article 2043 of the Civil Code and gives rise to an obligation to pay compensation for the damage, including damage constituting a potential impediment to the activities by which the human person achieves self-realisation. This pronouncement was made in the course of a judgement finding Article 1 of the Law of 11 November 1975 no. 584 to be in accordance with the Constitution. Complaint had been made against the article for not having provided that smoking should be prohibited not merely in hospital wards but in other areas of hospitals, as well as in the places where postal services were provided, and inside restaurants. In its Judgement of 7 May 1991, no. 202,[21] the Constitutional Court ruled that the Article was not unconstitutional. The ruling was based partly on the fact that the new legislation was not retroactive, and therefore did not make it possible to claim damages against smokers who had caused damage to the victims of passive smoking before it came into force.

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[17] Medina, *La dichiarazione di inconstituzionalità della limitazione di responsabilità del vettore aereo internazionale* [The declaration that the international air carrier's limitation of liability was unconstitutional], in *Dir. mar.* [Journal of maritime law], 1986, 2149.

[18] In *Foro Italiano,* 1998, I, 1370.

[19] In *Foro Italiano,* 1995, I, 1451.

[20] In *Foro Italiano,* 1996, I, 2326.

[21] In *Foro Italiano,* 1991, I, 2312, with notes by Pardolesi and Ponzanelli.

Although it relates to an admittedly unlikely possibility, in this case also, the judgement contains several pronouncements on civil liability and shows how Article 2043 of the Civil Code is to be interpreted in the light of the principles of the Constitution. Thus, the Court specified that:

> "it must be considered that a person can be held liable in civil damages for his conduct only if at the time when he engaged in that conduct, there was in existence a specific legal obligation, confirmed by a provision of legislation and ascertainable by him. In the judgement of this Court [*a quo*], there can only be a specific actionable wrong, consisting in failure to comply with a provision imposing a rule of conduct, if the provision was in force and ascertainable at the time in question. Following the prevailing trend in decided cases and supposing liability to be founded on fault –even if a sufficient affirmation of the existence of that psychological element (fault) could be founded on the (mere) fact of failure to comply with a legislative provision– it must be necessary expressly to specify the relevant legislation, which must be in force at the time when the event took place."

To justify its reasoning the Constitutional Court used the European Convention:

> "Even the European Convention on Human Rights (Articles 5, 6 and 7) is construed as meaning that for a court correctly to find that a (particular) breach of a general duty confirmed by a provision in legislation is actionable, it is essential that the provision should have been ascertainable at the relevant time...The citizen must know what behaviour the provision requires, especially if a restriction on one of his liberties is involved."

The judgement is important where it underlines that:

> "an infringement of the right to health (Article 32 of the Constitution) *is enough on its own* to found a claim in damages under Article 2043 of the Civil Code. Article 32 of the Constitution in conjunction with Article 2043 of the Civil Code imposes a primary, general prohibition against damaging health."

For the avoidance of doubt, the Court confirmed that the recognition of the right to health as a fundamental right of the person and as a primary asset, protected by the Constitution, *is fully operative even in the relationships governed by private law*. In the words of the judges of the Constitutional Court:

> "since it must be accepted that infringement of the subjective right guaranteed by Article 32 of the Constitution includes cases catered for by Article 2043 of the Civil Code, there can be no doubt as to the obligation to pay damages for infringement of that right. In other words, when Article 32 of the Constitution is combined with Article 2043 of the Civil Code as aforesaid, it follows that the wrong is unjust and consequently actionable in damages."

It should be noted that recoverable damages relate not only to damage to (material) assets but also to all the damage that potentially prevents the self-realising activities of the human person.

The individual is protected against himself by judgement no. 180 of 1994, which makes the use of a helmet obligatory even for adults riding motor cycles. Moreover, as regards experimental treatments, the Court has found that in the minimum content of the right to health, aspects must be also be included that must be satisfied when the interested parties are in disadvantaged financial circumstances.[22]

Article 32 of the Constitution has also been applied directly to employment contracts, to allow a worker's state of health to be (compulsorily) ascertained with regard to the AIDS virus (Judgement no. 218 of 1994). Here too, there are conflicting interests to be balanced: the interest of the infected employee in keeping his state of health confidential and thus protecting his privacy; and the interests of the persons who, in the course of the work he carries out, might come into direct contact with him. The law protecting AIDS sufferers gave precedence to privacy; but the Constitutional Court reversed this ranking of values, giving precedence to the health of third parties.

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[22] Judgement of 26.5.1998, no. 185, in *Foro Italiano,* 1998, I, 1713, with note by Izzo.

Still on the subject of direct application of the provisions of the Constitution relating to the person, in the course of research carried out a few years ago, I was able to record instances of the use of the general terms, *dignity* of the person, and *solidarity* as well as the use of the yardstick of *social conscience* to measure the relationship between the individual and the group.[23]

2.4 Legal relationships involving obligations

Legal relationships involving obligations, which are governed by Articles 1173 ff. of the Civil Code, are not directly covered by the Constitution. The Constitutional Court has indicated in several judgements that freedom of contract is not directly protected by the Constitution, because it is merely instrumental in exercising the economic freedom governed by the Constitution in Article 41[24] (Judgement 7 of 1962). A complex picture of the limits to individual autonomy emerges from the case law of the Constitutional Court: the quest for profit is legitimate and therefore although price regulation is permissible the law must not be used to restrict economic initiative (Judgement no. 144 of 1972); limitations to economic initiative can only be imposed by laws (Judgement no. 4 of 1962) and this does not mean that all such laws will be constitutionally legitimate. It is legitimate for the state to intervene to suppress private monopolies (Judgement no. 59 of 1960); its intervention aimed at suppressing the obstacles to free competition can take the form of the imposition of a public monopoly (Judgement no. 255 of 1974); the public interest may be expressed by declarations of (state) planning, but the plans must not be too rigid or arbitrary (Judgement no. 46 of 1963); agreements in restraint of competition may be suppressed in order to safeguard the public (collective) interest (Judgement no. 223 of 1982).

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[23] Alpa, *L'arte di giudicare*, [The art of making judgements], Roma-Bari, 1997.

[24] " Private economic initiative is free. It cannot be conducted in conflict with public weal [the public interest] or in such [a] manner [as to] damage safety, liberty and human dignity. The law determines appropriate planning and controls so that public and private economic activity is given direction and coordinated to social objectives."

One of the first judicial pronouncements made by the Constitutional Court of the general principles regulating legal relationships which involve obligations was made on the 1st April 1992, in its Judgement no. 149.[25] The question before it related to the legislation governing property leases (the Law of 25 November 1987, no. 478), Article 2 of which provided that the tenant was exempt from liability in damages to the landlord for his delay in giving up possession, but made no provision for the landlord or the court to verify whether the tenant actually had any difficulty in finding suitable alternative accommodation. The provision had been enacted in derogation of the rule set out in Article 1591 of the Civil Code, which though it allows the possibility of damages being payable in addition to sums equivalent to the rent, during the period of delay in vacating, does not make any distinction as to the tenant's circumstances, or mention the question whether he can find alternative accommodation. The Constitutional Court had previously stated that the provision for temporary exemption from liability did not conflict with the principles of the Constitution.[26] However, in Judgement no. 149, the Court changed direction, on the basis of the following reasoning:

> "the limits of constitutional legitimacy are a consequence ... of the nature" (of the provision under discussion). [It is] "a rule [provision of legislation] expressing a value judgement based on the balancing of two conflicting interests, both of which are given importance by the Constitution. It is characteristic of the constitutional values (or principles) that they be weighed against each other, so that it is impossible to predetermine once and for all which one should be placed above the other. The priority to be given to one over the other, where the task of balancing them is not left to the judge on a case-by-case basis, but is to be operated by the law in the form of an abstract rule,

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[25] In *Foro Italiano*, 1992, I, 1329.

[26] Especially with Article 42 para 2 of the Constitution; see the Judgement of 24.1.1989, no. 22, in *Foro Italiano*, 1989, I, 959, with note by Piombo. Subsequently [the Constitutional Court] found the said provision to be lawful, in numerous judgements: see the note in *Foro Italiano*, 1992, I, 1329 referred to above.

must be made to depend on certain typical conditions, as have a legal effect in the particular circumstances. In the absence of such conditions, the outcome of the comparative evaluation cannot be the same."

The Court goes on to state that a rule of this type will be unconstitutional

"to the extent that it does not reserve the right for the person, whose interest has been postponed, to prove that, in the particular case, the conditions are not fulfilled which alone would justify the precedence given to the opposing party's interests, in the balancing carried out pursuant to the rule. The rule complained of [Article 2 of the above Law] in fact precludes the landlord from offering any evidence to the contrary, without taking account of the fact that his rights can lawfully be restricted, only to the extent actually necessary for the purposes of supporting the tenant's economic activity [business]. Where the tenant needs a period of time in which to find another suitable property for the exercise of his business. If these condition is not fulfilled, that is, if and as soon as the tenant gains possession of another property or could have done so with reasonable diligence, the denial to the landlord [of his right to] payment of damages for [any] further delay in vacating the premises constitutes a breach of the protection of the right to ownership provided by the Constitution."

On the question of the duration of a contract of lease and the inheritance of it on the death of the tenant, the Constitutional Court has, in an extremely courageous judgement, extended the right to inherit a residential tenancy even to a cohabiting couple living as husband and wife when the cohabitation can be defined as stable.[27] The basic premise of the judicial reasoning is consideration for the family the cohabiting parties have established:

"in 1975 the legislator wished to protect not only the nuclear family or the family of relatives but [also] the

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[27] Judgement of 7.4.1988, no. 404, in *Foro Italiano*, 1988, I, 2515, with note by Piombo.

> group of cohabitees living together in an extended group including non-relatives (since heirs can include non-relatives), relatives no matter how distant, and even relations by marriage. It is clear that the legislator wishes to make itself the interpreter of that duty of social solidarity that consists in preventing anyone from being homeless and that finds expression here in the regulation of the inheritance of contracts of lease; the aim of which is to avoid rendering homeless, immediately after the death of a tenant, as many categories of person [as possible], even outside the circle of the legitimate family, provided they were habitually living with [the deceased at the time of his death]."

The Court took account, in its examination of the matter, of the actual (albeit not legitimate) family as a grouping in which the personality of the individual finds expression (Article 2) and of the fundamental need for a home (the so-called *right to a home*). It had a field day criticising the decisions made by the legislator when regulating housing, which ignored the actual (albeit not legitimate) family, despite the wishes expressed in doctrinal writings, which had relied not so much on the protection of the family as on Article 2 of the Constitution and the right to a home as an absolute right of the person. In analysing the earlier court judgements, the Constitutional Court remarked that:

> "at the beginning of the eighties there was a trend in doctrinal writings and in court judgements for perceiving the right to a home as an absolute right of the person, which was always bound to make the position of the tenant take precedence over that of the landlord. It was suggested that the example of French and German law be followed, so as to enable residential tenancies [to continue] for an indefinite time, subject to termination by the landlord only for a legitimate reason."

This represents a departure from the Constitutional Court's previous position. This had been that the stability of a residential situation did not constitute independent and unfailing grounds for exercising inviolable rights under Article 2 of the Constitution, even though the Court recognised the home as a primary asset to be

adequately and effectively protected, because of its fundamental importance in the life of the individual.

However, the right to a home does not have unlimited protection. The Constitutional Court considered the matter afresh[28] in relation to the constitutionality of the legislative provisions inflicting forfeiture of the right to an allocation of cooperative housing and concomitant loss of credit benefits in the event that the person to whom the housing had been allocated did not immediately proceed to occupy it (Article 98 of the Consolidated Law of 28 April 1938, no. 1165, and the Law of the Province of Bolzano, of 2 April 1962, no. 4). Here, however, the Court declared that the law was in accordance with the Constitution, provided the principle was respected that *performance cannot be compelled*, which principle has constitutional status. In other words, forfeiture and revocation do not operate if the person concerned is temporarily in difficulties. As a general principle, the Court specified that:

> "the interest of the creditor (or obligor) in the performance of the duties held to be an obligation must be placed, in the order of precedence which the provisions of the Constitution, or of ordinary law, give to the values that govern the matter before us. When, in respect of a particular performance, the rights or interests of the creditor [obligor] come into conflict with a right or interest of the debtor [obligee] that is protected by the legislation, or actually by the Constitution as a pre-eminently meritorious right [*merito*] or one which is in any case superior to the one that is advanced in support of the creditor's claim, then [debtor's] non-performance, to the extent strictly necessary for the satisfaction of the interest whose merit is pre-eminent, appears to be legally justified."

This principle that *performance cannot be compelled* finds confirmation by the highest courts, both ordinary and administrative. Having set out this principle, the Court continues, remarking that:

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[28] With its judgement of 3.2.1994, no. 19 in *Cons. Stato*, 1994, II, 150.

> "there is no doubt that [if] a person cannot fulfil the legal requirement for continuing to benefit from the public contribution to [his] home loan, which requirement is actual, continuous and stable occupation of his home by him, [and if he cannot fulfil it] because he needs to be with and to help his father, who is seriously ill and incapable of an independent existence, in another city, [then] that [person's] case fulfils the conditions for mitigation by the higher duty of social solidarity. [This higher duty] is defined in Articles 2 and 29 of the Constitution as not subject to derogation and [it] is capable of amounting to reasonable justification for non-fulfilment of the aforesaid requirement. The application of this principle is not restricted to the context of the state's legislation. As it involves categories [definitions] and meritorious rights that are of constitutional importance and as it is a general principle concerning the obligations involved in legal relationships as such, it is universally applicable in the [entire system of] legislation and therefore must not be ignored, even in the interpretation of regional or provincial laws."

The Constitutional Court has several times stated its position on *long-term employment contracts*, in its Judgements nos. 311 of 1995, 822 of 1988, 349 and 36 of 1985 and more recently, in its Judgement of 31 May 1996 no. 179[29] relating to a question concerning the insurance of work and against work-related illnesses. On this subject, it has confirmed that:

> "in our constitutional system the legislator is not debarred from making enactments that unfavourably modify the rules on long-term [work] contracts."

But it specified that

> "the said enactments, however, like any other legislative precept, must not go to extremes so as to make an irrational ruling, or arbitrarily affect the fundamental

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[29] In *Giur. cost.* 1996, 1660.

> [legal] situation created by earlier laws, so as to betray the citizen's trust in that stability of the legal system that is a fundamental and indispensable feature of the legal state."

On the question of *prescription* (the statutory extinction of rights by lapse of time), the Court, examining Article 2941 item 7 of the Civil Code, specified that the principle of the suspension of prescription operates in favour of anyone who finds himself in circumstances that prevent him from exercising his rights and therefore justify his failure to do so.[30]

The Constitutional Court has considered the issue of the *surrogation* of the I.N.P.S. (the government body in charge of social insurance against invalidity etc. for private, not state, employees) to the rights of the assisted person, where he is entitled to payment of damages arising from the civil liability of a private person for a road traffic accident. In its Judgement of 6 June 1989, no. 319,[31] the Court declared Article 28 paras 2,3 and 4 of the Law of 24 December 1969, no. 990 to be unconstitutional. This was because this law purported to entitle the I.N.P.S. to obtain reimbursement of expenses incurred by it for services rendered to the injured party as a consequence of such an accident. In the event of the insufficiency of the sum insured through the I.N.P.S., to cover the damages caused by the accident, the I.N.P.S. would be able to demand reimbursement of the shortfall, from the civil liability insurer to itself, to be withheld or deducted from the sums owed to the insured; thereby limiting the victim's right to the payment of the damages owing to him. Since, the Court observes: "in our legal system the right of a person not to be injured can be described as a 'fundamental right of the individual' which the Republic is enjoined to protect" (Article 32 of the Constitution); in the event of injury: "the particular definition of, and protection afforded by, this right impose on the legislator the duty to legislate suitable measures to ensure the fullest [possible] compensation [in the event of its infringement]." A similar decision was given in regard to Article 1916 of the Civil Code, which relates

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30 Judgement of 24.7.1998, no. 322, in *Foro Italiano,* 1998, I, 2617.

31 In *Foro Italiano,* 1989, I, 2695.

to private insurance, and Article 10 paras. 6 and 7 and Article 11 paras. 1 and 2 of the Decree of the President of the Republic no. 1124 of 1965 which relate to public insurance. The judgement dealt with the passages in these items of legislation which allowed an insurer to claim from the person liable in damages, the shortfall between the amount it had paid out in damages for biological damage (personal injuries), and the amount covered by its own insurance, thus depriving the victim of that amount.[32]

On the subject of *insurance cover for liability for damages arising from road traffic*, the Court anticipated the bringing into force of the EC Directive of 30 December 1983, no. 84/5 on the question of insurance cover including members of the insured person's family. In its Judgement no. 188 of 1991,[33] the Court declared that Article 4 (b) of Law no. 990 of 1969 was unconstitutional, insofar as it purported to exclude from the benefits of compulsory insurance cover for his personal injuries, the insured person's spouse, his legitimate, natural and adopted ascendants and descendants, and his adopted relations, relatives and relations by marriage to the third degree, if living with the insured or maintained by him. In its judgement no. 301 of 1996, the Constitutional Court, this time applying the Law no. 142 of 1992 with which the legislator brought the said Directive into force, found that Article 4 (a) of the said Law was not unconstitutional, to the extent that it only excluded the driver from cover. The Court's finding was based not only on the necessity to bring the domestic legislation into line with EC legislation, but also on the provisions of Article 32 of the Constitution. The Court stated that:

> "the decision made by the legislator in 1992, [which was] grounded in the necessity to comply with the EC source of the law, forms part of this development and should be viewed positively, as reinforcing the protection of health that is guaranteed by Article 32 of the Constitution. This protection has, on the question under consideration, been undergoing a gradual process of accommodation [into the

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[32] Judgement of 18.7.1991, no. 356, in *Foro Italiano,* 1991, 2967 and judgement of 27.12. 1991, no. 485, in *Giur it.*, 1994, I, 162.

[33] In *Foro Italiano,* 1991, I, 1981.

> legal system] which [process] has come to completion in the new formulation of Article 4 of Law no. 990 of 1969. But precisely because of this, it [the decision] cannot act as a *tertium comparationis* [third element for comparison] for the purposes of deciding whether the legal provision previously in force and which has been impugned, was constitutional. That provision had its own, appropriate grounding in the connection already stated, based on Article 2054 para.3 of the Civil Code, between exclusion from cover and the class of persons who were nevertheless liable in any event for road traffic accidents. This is enough to hold it immune from the alleged vices of unconstitutionality. Nor is any negative reflection cast on its reasonableness by the context of legislation that has been created since the reform of the law relating to families, [although] the referring [judge] seeks to rely upon that, underlining in particular [the] favour with which the legislator has treated the institution of joint ownership of assets [*comunione dei beni*] as the legal property regime of the family. Indeed it is obvious that once such a regime has been established [i.e. joint ownership], the spouses cannot escape the legal consequences that the law connects to co-ownership of each asset, whatever the source of its establishment; and liability under Article 2054 para.3 of the Civil Code is indeed one of these consequences."

To continue with these examples of the application of the Constitution to legal relations between private persons: the Constitutional Court has frequently emphasised that the freedom of private persons to contract receives *indirect* protection from the Constitution, because that freedom is *an instrument intended to realise economic initiative*. That is why the legislation on the forced administrative winding-up (*liquidazione coatta amministrativa*: a special form of winding-up for companies of particular public significance) of insurance companies by the court has been declared by the Constitutional Court to be in conformity with the Constitution. The legislation provides that only the insurance company taking over the obligations of the one in liquidation has the right to withdraw from the insurance contract and prevents the insured from doing so

for a period of two years.[34] The case revolved around Article 2 para.1 of the Legislative Decree of the 26th September 1978 no. 576, which was converted into the Law of the 24th November 1978 no. 738. The judgement of the Court goes beyond the confines of the limited question before it to consider the limitations to the protection given by the Constitution to private autonomy [freedoms]. The arguments brought are many and various. First of all, the Court observed, the principle of equality is not considered to have been breached in any way:

> "in relation to the position of those who are insured with other [insurance] companies...because their position is wholly different and cannot be compared with the position of those who have had the bad luck or bad judgement to insure themselves with companies that were insufficiently capitalised or improperly managed and which in the end went into forced administrative winding-up. On the contrary, the law in question has the effect of putting the insured, in terms of risk cover, in the position he would have been in had he taken out insurance with a *solvent* insurance company. [Nor is the principle of equality breached] in the legal relations between the insured and the company [that has taken over the obligations of the insurer], because the derogation from the principle of formal equality between the parties to a contract in terms of the liberty to terminate it, allowing the company to retain [that liberty] and depriving the insured of it for a two-year period, is justified: first, because the company should not be deprived of the means of restoring the business to health by abandoning non-economic contracts and those that are out of keeping with legal requirements (for example, contracts with huge premium discounts, agreed in the context of tariff dumping); and secondly, because it is necessary to ensure, without an excessive sacrifice of the insured person's liberty to contract, the preservation of the assets of the business for the purposes of the public interest in production saving jobs."

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[34] Judgement of 11.2.1998, no. 159, in *Foro Italiano,* 1988, I, 1445.

Neither did the Court consider that Article 41 para.1 of the Constitution had been breached:

> "particularly because this rule of the Constitution is designed to protect productive business, which is usually exercised in the form of a company, so that freedom of contract *per se* is only indirectly protected, as being an instrument of economic initiative. Secondly, [this is so] because, even if one admits the possibility of construing an implied general principle from Articles 41 and 42, to the effect that the Constitution protects private autonomy, the reasons of public interest set out above are sufficient, according to a criterion repeatedly affirmed by this Court,[35] to justify the extraordinary and temporary restriction imposed by Article 2 of the Legislative Decree no. 576 of 1978 upon the insured person's freedom of contract, in terms of his liberty to terminate the contract."

3. Concluding remarks

With regard to the Italian model for applying the rules of the Constitution to legal relations between private persons, this review of the case law relating to the Constitution does not bring to light any particular anomalies or reasons for criticism. Leaving aside the French model, whose construction is still in progress, and comparing the Italian with the German model, one finds similarities in the use of governing principles, general categories, general terms and general clauses. There is a greater volume of case law in Italy on the law of personality, and thus a *direct creation* of individual rights of the person. On freedom of contract, in both models the application of the Constitution is *indirect*. In the German model, which is more invasive, the Constitutional Court makes a connection between fundamental rights and the autonomy of the individual which is still not permitted in our own system. The prohibition against making this connection has been justified in Italy on the grounds that the

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[35] Compare [see], finally, the Judgement of 23.4.1986, no. 108, in *Foro Italiano,* I, 1145.

legislator should not interfere in contracts (more or less) freely agreed upon by private persons, except where this is essential for the protection of the public interest, or the health, safety or dignity of the person. But judicial analysis in the decided cases has confined itself to justifying the powers of the legislator to ensure reasonable limitations to the freedom of contract, which would otherwise include the liberty for the stronger party to impose his terms on the weaker one.

The picture that we have drawn shows the complexity of the debate on the relationship between constitutional and private law. The complexity of this debate makes it impossible to draw definitive conclusions; but it prompts reflection on the promising changes that have marked the two disciplines of constitutional and private law over the last few decades, the models on which their respective legislation is based, the ways in which they affect each other and their boundaries. Just as the dichotomy between private and administrative law has been resolved, in several important areas the dichotomy between private and constitutional law has also been overcome. In the present situation, the invasiveness of the constitutional legislation, the *Drittwirkung* of the rules of the Constitution upon legal relations between private persons, the *Drittwirkung* of the (super-national) rules defining fundamental rights, the renunciation of sovereignty in matters that come within the competence of European Community law, the diffusion of EC law into the domestic legal system, and the globalisation of markets, make it necessary to redefine the meanings of the expressions "constitutional law" and "private law" and thus to redefine their boundaries.

Looked at from this point of view, constitutional law in the traditional sense should now only have the task of organising the state: economic and social relationships should be divided up between constitutional and EC law. Private law in the traditional sense should have the task of dealing with the (technical) legal rules of detail in the law relating to property, and with bringing EC legislation into force in the domestic system, as well as those matters that are not within EC competence, such as family, inheritance and property law. The fields of personal meritorious rights, the rights of the personality, and relationships between the individual and the group, form a collection of matters in which the traditional distinction between constitutional law, EC law, and private law has lost its

meaning, since the distinctions between them are no longer dictated by differences in the objects or subject matter of the legislation, so much as by the *order of precedence* or *competition* between different sources of law.

This result can be arrived at by a variety of different routes: (a) the formal route, concerned with the identification of the applicable legislation; (b) the hermeneutic one, concerned with the methods of interpretation to apply, and the consequent operations - the "results" obtained; (c) the methodological route, concerned with the reference to rights and values, the legislative models for comparison and the identification of the factors both internal and external to the legislation that have a bearing on it and are the driving force behind the evolution of the forms of the law. However, even a merely descriptive account of these active phenomena reveals how reductive is an analysis that is restricted only to their legal aspects, and how illusory - and therefore misleading – it is to break them down into an analysis, sector by sector, of uncoordinated material. Obviously a more complete account would have to deal with the policies behind the law enacted by the legislator and the other institutional agents, as well as with the domestic, EC and international economic situations, and with the development of social structures. The horizons terminate in this way, only to extend themselves further, affecting the very concept of law and of the role of the legal analyst as currently known to us.

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THE WELFARE STATE AS A LEGAL OBLIGATION

SALVO ANDÒ

The twentieth century should not only be remembered for the enormous massacres which it occasioned, but also for the revolution in the culture and protection of human rights which characterised its latter half. Human rights have been recognised as innate and state sovereignty in this field has become ever more limited as human rights protection, initially left to state constitutions, comes to be entrusted to international law and to the supranational authorities created by virtue of international law. If human rights are to be taken seriously, it is clear that the international control of the way states carry out their duties of protection and promotion in this field will become *the* big problem of the twenty-first century. It is also clear that the international community does not protect human rights as intensively as certain state constitutions do. However, the process of internationalisation of human rights does not authorise individual states to use their treaty commitments to reduce the level of human rights protection guaranteed in terms of their constitutions. Thus, European Law cannot reduce the level of protection which each state assures to its own citizens. This is particularly true in regard to the social entitlements guaranteed by the welfare state. If human rights are fundamental and inviolable, then the welfare state, which is an essential means for implementing these rights, cannot be altered for the worse.

1. The Universal Declaration of Human Rights and the decline of national sovereignty

The Universal Declaration of Human Rights, approved by the United Nations General Assembly on the 10th December 1948, is one of the most politically significant documents ever produced by the UN in all its history. In a sense, the Declaration appears to naturally

complement the UN Charter.[1] Indeed, even if the creation of the United Nations did not *per se* give rise to an effective international legal order, it was certainly a concrete attempt to reconcile state sovereignty and human rights protection; to guarantee peace through the medium of law. In this sense, the UN Charter has been an important starting point, albeit one destined to be gradually superseded and reinterpreted. Thus one could reflect on the fate of the Charter's prohibition of interference with matters concerning the "domestic jurisdiction" of states.[2] In the last decade or so, this prohibition has been increasingly bypassed through measures allowing the UN to intervene in the internal affairs of states wherever human rights are threatened or infringed (so-called 'humanitarian interference').[3] Similarly, territorially based notions of

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[1] It is clear that the Universal Declaration develops principles, which were already present in the UN Charter. However, since the Declaration assumes a set of juridical stances which all refer to the human person, it has allowed a significant evolution of international law in this field. The Declaration posits three fundamental affirmations: (a) States cannot exist in a state of nature and are obliged to respect precise rules enforced by supra-national authorities. (b) The principle of reciprocity, i.e. the principle of reciprocal recognition of rights by states in favour of their respective citizens, should not regulate inter-state relations, which impinge upon interests prioritised by the international community. Consequently, the principle of *do ut des* is not applicable to human rights. (c) Peoples and individuals are considered as autonomous entities in respect of the States, in which they live and begin to have a separate standing as such. They are no longer simply the "objects" on which state sovereignty is exercised. On the basis of these affirmations it follows, for example, that even if the Declaration does not expressly mention it, there is clear justification for accepting the principle of self-determination.

[2] "Domestic jurisdiction" has often been invoked to conceal grave crimes against humanity, especially during the Cold War period. At the time USSR representatives used to object that concern for state criminals tended to destabilise the internal order of states, thus provoking serious instability in international affairs (Andò 1997: 58; Arangio Ruiz 1990: 35; Cassese 1992: 31).

[3] Here one should highlight the particularly intense form assumed by humanitarian interference when required to punish the authors of grave crimes against humanity, in the face of the inertia of states or the impossibility of having a due process in them. Judicial interference is the culminating phase of the process of internationalisation of human rights protection. It involves the substitution of states in the exercise of a typical prerogative of internal sovereignty: the authority to punish. In this field, great progress has been made in recent years which was unthinkable a few years ago. A good index of this progress is the creation of an *ad hoc* Tribunal with jurisdiction to adjudicate the crimes committed in ex-Yugoslavia

sovereignty now seem more and more questionable in the face of ecological catastrophes and the need that all countries share the "common heritage of mankind", wherever it is located. In short, it is clear that the theory of national sovereignty is an inadequate test of the legitimacy of international behaviour when the interests at stake transcend national boundaries and are not territorially confined. Indeed the political categories which found expression in the concept of sovereignty have themselves been superseded by modernist transformations which have simultaneously altered both the fundamental definition of a human person, as well as the nature of potential threats to fundamental human freedoms.

In the light of these transformations, it is generally accepted that while the Declaration of 1948 was incorporated in a non-binding resolution of the UN General Assembly, it still represented the first international act of a generic character specifically aimed at affirming fundamental human rights. Had this precedent not existed, there would have been no subsequent international treaties which *did* introduce legal obligations intended to ensure an ever more global and comprehensive protection of the human person.[4] Nor would various human rights norms have acquired the status of customary law. So called "humanitarian interference" –itself unthinkable in the Cold War era— would never have become a standard way of guaranteeing human rights; one which is even capable of legitimating the use of force in the spirit of respect for international legality.[5] Thus, through the Declaration of 1948 and its successors human rights have acquired an international character

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and Ruanda. Even more indicative is the prospect of an permanent international Tribunal with jurisdiction to try the gravest crimes against humanity, which should be instituted as soon as states ratify the Statute of institution, approved in the Rome conference of 1998.

4 Starting with the International Covenant on Civil and Political Rights of 1966 and the Optional Protocol to the latter, which allows individuals to accuse governments of violations of their rights, as well as the International Covenant on Economic, Social and Cultural Rights.

5 Peace is now unanimously accepted as an indispensable precondition for the protection of human rights, both within individual states and internationally. A clear relationship has been established between the democratisation of the international system and an increasingly effective system of international human rights protection which operates at a higher plane than the systems of individual states (Aron 1973: 136; Boulding 1978; Doyle 1983).

apart from that which they possess within municipal legal systems. In this way, the Declaration has stimulated a gradual revolution not only in the internal law of states, but also in their external law.

As the expansion of human rights[6] imposes ever increasing restrictions on the sovereignty of states, international relations will come to be governed by principles aimed at guaranteeing an ever more dignified human existence and this irrespective of the conditioning exercised by the environment which humans inhabit. This is how, for instance, the "right to development" should be understood. International law after 1950 is no longer the legal regime which concerns the prerogatives and powers of states, but it is also the law which deals with the innate rights of individuals and groups. Thus it has happened that the number and scope of human rights has expanded; departing from the initial rejection of warfare considered as an anachronistic way of settling international disputes towards an unconditional recognition of human rights which is no longer based on and limited by a definitive list of these rights. Once human rights come to legitimate the formation of new international powers which can restrict the sphere of action of states, they coalesce into a unitary body of norms which must be recognised and protected as a global and interdependent whole and not as individual rights which can exist in isolation from one another.[7] Naturally the evolution of new forms of protection of human rights has been favoured by epochal transformations which have influenced the international community, ranging from the diffusion of democratic forms of government to the end of the Cold War, the new dominance of liberal and democratic ideologies even in the formerly communist countries and the refusal of the military option as a form of dispute resolution among the leading nations. If human rights are now considered as universal rights, then this indicates the undermining of the historical resistance which induced many states to privilege certain rights over others on the basis of ideologies incompatible with a liberal and democratic culture of rights.

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[6] Here one could think of the new human rights of the so-called "third" and "fourth" generations.

[7] Indeed it is clearly evident, to judge from the international treaties which have gradually translated the Universal Declaration into binding norms, that the evolution of a right is conditioned by that of all the other rights.

From this perspective the contemporary situation is very different to that of the fifties. There is no longer a Communist Bloc within the UN General Assembly which is hostile to civil and political rights and perceives them as the Trojan horse used by the West to foment internal dissidence and destabilise their regimes. Moreover, in the meantime, human rights with their full expansive potential have been incorporated into post-war Constitutions. Even more significantly, an array of protective mechanisms has been developed through which these rights are guaranteed, and the capacity of citizens to respond to abuses of power reinforced.

2. The return to Natural Law

It has been observed that the internationalisation of human rights produces new supra-national authorities entrusted with the task of supervising the implementation of human rights and promoting their expansion (so called humanitarian interference). In this respect, human rights fulfil a constitutional function (Barbera) inasmuch as they require the creation of an "international power" destined to impinge in an increasingly incisive manner on the internal workings of domestic jurisdictions, so as to defend peace and realise justice in the relations between peoples. Such a power operates not only through the medium of political initiatives, but also through the working of International Tribunals –so far of an *ad hoc* character, but in the future hopefully permanent— authorised to ascertain the gravest violations of the rights of peoples on the part of national governments. When viewed in this light, it has rightly been asserted that human rights could acquire the same function, which in the countries of the European Continent previously belonged initially to the doctrine of national sovereignty and later to that of popular sovereignty (Matteucci). An obligation is imposed on states to negotiate the peace, to support processes of national pacification, to operate through their own tribunals to target the most serious violations of human rights. Consequently, in this way, the international community comes to control the decisions through which the plenitude of state powers has for centuries been expressed. Furthermore, state constitutions acquire an enlarged significance. While they originated as part of an attempt to limit the internal power of states so as to safeguard rights, these constitutions come to be incorporated within a supranational power in the service of human rights.

Thus the crisis of the modern state which is incapable of acting as an autonomous centre of power, the sole protagonist on the international scene, together with the need for an ever more pluralistic ordering of democratic societies and the international community (themselves characterised by growing interdependence between states), increasingly undermines the boundaries of the state and its traditional powers. The field of application of law is proportionally internationalised. *Ad hoc* supranational authorities do not only produce norms, which are held to be binding on all, that is a supranational law. They also have the authority, through the medium of appropriate courts, to establish the manner in which this supranational law is to be applied by states in concrete cases. The greater the limitations imposed on national sovereignty, even by the development of human rights, the greater the expansion of the field of action of supranational authorities. The jurisdiction of these authorities comes to encompass not only the traditional human rights, but also all those factors, which aggravate global inequalities, especially the imbalance between rich and poor countries, which condemns a growing number of human beings to under-development.

The internationalisation of human rights and the ever more drastic reduction of the internal power of states in this sphere must therefore be seen as parallel processes which influence one another.[8] The internal and external powers of states are here continually subject to erosion, under the influence of similar cultural tendencies, which assert themselves both within states, and in the international community. The motivation of the acknowledgement of the importance of human rights has been a juridical culture, which considers these rights as somehow innate and not as rights which have been conceded by states. Indeed, the sole belief that human beings have innate rights, which exist even if states do not recognise them, has had a tremendous effect in the history of human thought. This belief has radically transformed the perspective from which the relationships between governing authorities and the

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[8] There is a clear parallelism between the "open" character of new constitutions with regard to the international community and the implicit principle of interference in the domains traditionally reserved for national sovereignty whenever this is required to protect the fundamental rights of individuals and peoples.

peoples they governed have been considered. Although it was traditionally acknowledged that these relationships could be considered either *ex parte principis* or *ex parte civium*, indubitably the former of these perspectives historically prevailed. The dominant outlook stressed the rights of those who governed, whose interest lay in affirming their *jus imperii*. By contrast the governed were primarily considered only as the subjects to whom obligations were attributed, foremost among which being that of obedience to the law.

The Universal Declaration completely inverted this perspective, displacing attention away from the right of the sovereign to impose his law on his subjects and focusing it on the citizen's right to the recognition and respect of his fundamental human rights vis-à-vis the sovereign.[9] Moreover, if the individual possesses these innate and inalienable rights, it is clear that the sovereign has correspondingly inescapable duties towards the individual.[10] Consequently innate rights bind the sovereign to execute the corresponding duties and states are not solely endowed with rights, but also with obligations (Bonanate). This perspective has transformed the nature of states, especially following the birth of the constitutional state.

A comparable revolution did not, however, occur in the experience of the international community. Here the rights and not the duties of states continued to be emphasised and states were still considered as the only legitimate subjects of international law according to a centuries-old tradition of denying any *locus standi* to individuals and peoples. Only in the last few decades, and primarily due to the Universal Declaration and successive acts of the international community, has there been a change in direction in international law and within the life of states. Thus in the fields of constitutional and international law, the post-war era has witnessed a powerful revival of those naturalistic conceptions which had undergone a continuous decline from the second half of the nineteenth century onwards under the assault of positivist theories.

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[9] The juridical status of these fundamental human rights was no longer derived from sovereign concession, but from their innate, "natural," character (Bobbio 1998).

[10] Foremost among these duties are those of the avoidance of oppression and non-discrimination among individuals, given that these are free and equal beings in terms of the first article of the Universal Declaration.

Indeed what could be termed the process of progressive "juridicisation" of the state had led to a situation where no other entity apart from the sovereign state seemed capable of creating law. By contrast, the revolution produced by the emergence of human rights is increasingly placing into question the state's monopoly of law, be it municipal or international, in the field of human rights.

Together with the doctrine that the state should have a monopoly of law, another myth is also being questioned. This is the notion that resort to force should never be permitted in international affairs even when this takes place for a just cause. We are here referring to the pacifist belief that one should never resort to force, even where the protection of human rights are at stake and the military option offers the possibility of putting an end to rights violations. The use of force is nowadays acceptable to the international community, not only with the aim of defending a vital interest of a state which has been threatened or attacked, but to protect the human rights of peoples or ethnic groups which are being threatened or attacked; because the violation of rights brings about political instability, lack of security on a more or less large scale of the kind which wars of conquest used to produce in the past.[11]

Therefore force is legitimate not only when it is at the service of the rights of the state but also when it is at the service of the individual's rights. If security is a fundamental value to guarantee a well-ordered, and therefore just, international community, there is no doubt that security these days no longer depends on the balance of force, on persuasion through deterrent arms, but on social justice carried out on an international scale. The violation of rights leads to war because it produces imbalance in both great and small regions.

If we consider this new meaning of the concept of security –which depends more than ever on the observance of law and social justice– without any doubt the policies of rights within states and relations

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[11] In such cases one does not speak of a "just war", which is the use of military force to repel oppression, but of international police actions, aimed at restoring the law which has been violated. There is indubitably a common element between the two legitimate reactions based on the use of force; and this consists of the proportionality of the military reaction which aims at restoring the *status quo*, whether this concerns a national sovereignty which has been violated or whether the violation concerns the fundamental rights of ethnic groups or whole populations.

between states will be based on the need to guarantee above all a: "fundamental right of universal sharing," with the express purpose to avoid the danger that massive violation of rights everywhere will provoke a chain of processes that create instability on an international scale. A new concept of the responsibility of peoples and of states is developing with the aim of protecting man from threats to the world, which no one will be able to avoid for the simple reason that we all belong to the human race.

From this point of view, the universal approach to human rights expressed in the Declaration has found its way not only into the most important documents of international law, but also into the constitutions which have from time to time been written in the post-war period.[12] And this is understandably present in the constitutions which were written at the time of the Declaration itself, because they expressed the same fears, the same horrendous memories of massacred rights; but above all because the constitutions and the Universal Declaration are based on the same philosophy of human rights: the philosophy of Natural Law. A brief examination of the principal constitutions that belong to the same period as the Declaration will prove it convincingly.

The common root in Natural Law of the Universal Declaration and the constitutions written immediately after the Second World War can clearly be seen if one considers the norms concerning the adaptation of internal law to international law, the principles regarding the rights of the individual, and the rules that safeguard the position of the foreigner, who is no longer protected as a citizen of another state but as a human person. International law, by the declaration of rights and the internal organisation of states, by means of the new constitutions, both uphold the priority of the rights of the international community, that is of the rights of peoples. In this way there has been a return to Natural Law.

Basing both the international and the internal legal systems on human rights conceived as innate rights, actually recognises the existence of a superior order pre-existing the state which in some way

[12] It is precisely the universal character of human rights which is the most visible link between the Universal Declaration and the new trends towards Western constitutionalism, that have been established after the First World War and which have called into question the "unlimited" character of the sovereignty of states in matters concerning domestic jurisdiction.

restricts not only the use of force by states (recognising this right as belonging only to organisations approved by the international community, such as the UN) but also states' monopoly of law. Consequently, there will be a constant migration of values, guarantees, and acknowledgements concerning human rights from international law to internal law, thanks to the rediscovered priority of natural law.

In conclusion why can we say that the approach of natural law has been successful? Because the old international order, which was founded on the centrality of the states and above all on the principle of the inviolability of national sovereignty, fell into an ever deeper crisis in the twentieth century because of the two world wars and the civil wars which broke in between and after them, and because it has not succeeded in maintaining the status quo, or stability, in relations between states, and in guaranteeing fundamental human rights within states. Above all, a state's monopoly of law in the field of human rights is at variance with the aim of the international community to guarantee universal standards which are qualitatively and quantitatively minimal in the enjoyment of rights. When these standards are absent, in this world which has become smaller on account of the widely accessible freedom of individuals and peoples (such as the freedom of movement), the contradictions and injustices which occur at a local level cause chain reactions all over the planet.

Therefore it was, and still is, inevitable that the progressive spreading of international bills of human rights, which have given new responsibilities to the international community, (which was traditionally solely concerned with the relations between states, but which, with the establishment of the subjectivity of peoples and individuals, has had to prepare adequate defence instruments for the new subjects of international law), was accompanied by an opening up of the internal legal system to international law. As has been observed, this has occurred above all through the automatic incorporation of some principles which are unanimously shared by the international community within internal legal systems.

3. The internationalisation of human rights and its repercussions on internal legal systems

The rediscovery of Natural Law at the level of International Law, and therefore the drastic reduction of the prerogatives recognised to domestic jurisdiction, in the internal law of states, is stimulated mostly

by the unanimous need to acknowledge that the human person is an essential point of reference both of social organisation and of public powers.

Human rights enter into the life of states in two ways:

a) Through broad and generic acknowledgements, which are actually contained in norms which enunciate general principles of social policy. These norms are aimed at allowing the constitutionalisation of all those rights which progress considers indispensable for the complete fulfilment of the human person (cases in point are section 2 of the Italian Constitution and sections 1 and 2 of the Fundamental Law of Bonn).
b) Through the mechanism of automatic adaptation of internal law to international law, and therefore through the production of binding norms within states, which are "borrowed" from customary international law (in this way state law is constantly adapted to the law of the peoples, whose priority is thus recognised).

3.1 The recognition of fundamental rights

Modern constitutions show almost in unison that human rights cannot be ignored. The rights of the individual are, first of all, innate rights; therefore they are universal, inviolable and cannot be renounced. The fact that human rights are innate rights means that they are not created by law, but are only recognised by it. They belong to an ontological reality which pre-exists written law. While the law creates subjective rights, human rights are only recognised, and their recognition cannot be revoked, neither by whoever has created them nor by anybody else.

By recognising such rights, the state does not limit its powers (as the followers of positivist theories used to affirm during the last century and at the beginning of this one), because otherwise the expression used in the constitutions would have been "concede", and not "recognise" rights. Neither can it be said that they are based on an agreement between the political and social powers, or on a contract, because such an agreement, of its own nature, can be revoked while rights are defined in the constitutions as being irrevocable and inalienable. It is clear that this approach of natural law gives rights, globally understood, present and future, the character of "arms" to combat power; which by

recognising them is forced to adapt itself to them in their entirety and in their development.[13]

3.2 The automatic transfer of human rights from the international legal system to the internal legal system

From this viewpoint, however, the state is not only bound to explicitly recognise rights but also to adapt itself to them by means of norms which refer to the international legal system as the source for generating norms to protect human rights. It is the natural law approach itself that legitimises automatic adaptation. The international laboratory of human rights produces rights destined to move into the internal legal system of states without a formal act of reception. By automatic adaptation, the constitutional legal system opens up to a superior system which is governed by the rights of peoples and is in a state of continuous evolution. This system comprises all human beings, as individuals who are influenced more or less directly by the destiny of the human race.

4. Rights of citizenship and the residual discrimination between the citizen and the foreigner

Since human rights are innate and therefore universal, that is they concern all men, and therefore do not allow discrimination between different men wherever they may live, and since they are global, interdependent and cannot be kept down to a minimum number which should never change, it is clear that the boundary between human rights and the rights of the citizen (as conditioned by citizenship) is becoming narrower and narrower the more human rights advance by embracing new rights. In this way, rights that up to now have been normally conditioned by citizenship must be guaranteed to everyone, to citizens and to foreigners. Therefore the peoples' law penetrates deeper into the internal law, conferring on everyone capabilities that used to derive only from citizenship. Consequently, the expansion of rights implies a larger number of persons who benefit from public duties.

The internationalisation of the fundamental rights of the individual and the effects that this process has on the internal organisation of states

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[13] See Viola, *Dalla natura ai diritti* Laterza, Bari, 1997, p.271 onwards.

does not only generate negative obligations to control the actions of states, but also positive obligations. The latter constitute a series of duties in the absence of which it would be difficult to exercise many of the rights of citizenship. Moreover, the actions which are traditionally taken by states to guarantee the fulfilment of the human person and which were formerly only available to the citizens of a state, are slowly being extended to the citizens of other states and this not only when they live in their own territory (the foreigner's position is thus freed from the old ties of reciprocity),[14] but also when they live in their country of origin (and receive the help of other states, in conformity with the duties of international solidarity, which are often incorporated into the internal laws of states).

The process, which has been set in motion, keeps reducing the distance between the position of the foreigner and that of the citizen. Taking into account what we have said before, considering the prospects that the overshadowing of the state's sovereignty implies for human rights, one may ask whether the gap that presently separates the foreigner's position from that of the citizen is destined to remain there in the future.[15] Both old and new constitutions have often gone beyond the ordinary laws which were in force before they were drafted, especially the laws of citizenship, as well as the laws of public order, which are called upon to defend social normality against the threat posed by all types of diversity represented by the various minorities, notably the diversity of the foreigner. Perhaps, at last, the right conditions prevail, considering the widespread sensitivity of the international community towards forms of protection of the human person, so that so many declarations of principles, which are contained in constitutions and which up to now have appeared to be fanciful, might actually come into effect. Taking this into account, one may ask:

1) Can the rights which up to now have been conferred only on citizens be extended to all men? In what measure is it legitimate to dis-tinguish between citizens and foreigners, and how far can those guarantees which up to now have been given only to citizens be extended?

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[14] See Cassese A., *I diritti umani nel mondo contemporaneo* Laterza, Bari, 1994, P. 85.

[15] See here, p. 71.

2) Even if the list, or number, of those rights which cannot be defined *a priori* is taken into consideration, can the qualitative standard of human rights which are mentioned in the Declaration and in the constitutions be guaranteed everywhere equally, notwithstanding the political regime and the social context in which these rights exist?

These problems, particularly the first one, arise especially with regard to those legal systems which, like the Italian and the French ones, contain discriminatory general norms like section 16 of the preliminary rules of the *Codice Civile*, or section 4 of the *Code Civile*. According to these legal systems, the foreigner's enjoyment of civil rights is subordinated to the so-called conditions of reciprocity; a technicality which restricts foreigners' rights, excepting the provisions of relevant bilateral agreements between the state of origin and the host state.[16] This problem does not arise in other Community legal systems, like those of England or Germany, because the English system does not contain general norms that are unfavourable to foreigners. The German system, although in special laws it provides for the technical condition of reciprocity to restrict foreigners' rights, does not contain general discriminatory provisions and moreover, in section 2 of the *Grundgesetz*, it has provisions from which one can infer the general approach that is adopted to the problem of the juridical treatment of foreigners. It is true that the *Grundgesetz* distinguishes between human rights and rights that are given only to German citizens (especially in regard to the rights of participation in political life) and therefore does not really place the foreigner and the citizen on equal terms. But it is also true that section 3 pronounces the principle of non-discrimination on the basis of nationality. This is the general rule.[17] Then it must be pointed out that section 2 of the *Grundgesetz* safeguards the free development of the personality of German citizens as well as of foreigners. Eventual particular regulations which discriminate against a specific group of subjects do permit persons who have been excluded to avail themselves of the provisions of section 2 to claim the protection of each of their fundamental rights.

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[16] See here, note 1 on page 58.

[17] See Finocchiaro, *La tutela giuridica dello straniero* (The juridical safeguards of the foreigner), Maggioli, Rimini, p. 50.[18] See p. 23.

5. The protection of the foreigner in European constitutions

If it is true that the Universal Declaration –and the other Declarations and Agreements which have followed in its wake– and the constitutions of many European states, especially those contemporaneous with the Universal Declaration, share this vision based on natural law which does not accept the "annihilation" of man consequent to the primacy given to the state and its laws, then it is clear that the laws of states which concern the position of the foreigner must be reconsidered in the light of this vision which places man at the centre of the juridical system. As we have seen, this reasoning is not only based on the principle that places a high value on the human person in all its forms, which is shared by all these constitutions and which implies the constitutionalisation of human rights, as shall be explained further on, in terms of an flexible framework which does not envisage an exhaustive list of protected situations, but refers to a concept of human rights as rights which are continuously evolving.[18] It is also based on the process of the so-called internationalisation of the rights of the human person which is specifically effected through automatic adaptation. The increasingly high profile assumed by human rights in constitutional systems is emblematically reaffirmed in the rights that are extended to the foreigner, and above all in the trend to eliminate every type of discrimination between the citizen and the foreigner. The foreigner who is protected on account of his being a human person and not as a "splinter of sovereignty" of another state which has to be recognised due to the doctrine of reciprocity, becomes the object of universal rights that are destined to increase in quality and quantity.

There is no international convention regarding foreigners. There are, however, international agreements which provide regulations which govern the treatment given to foreigners, as well as regulations controlling immigration: the International Convention for the Elimination of Racial Discrimination;[19] the European Convention on Human Rights (on the treatment and expulsion of foreigners);[20] the European Convention on Settlement;[21] the European Convention for the Protection of Human

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[18] See p. 23.

[19] Signed in New York on the 7th March 1966.

[20] Signed on the 22nd November 1984.

[21] Signed by the member states of the Council of Europe in 1955.

Rights and Fundamental Freedoms;[22] the Convention of the Council of Europe on the juridical status of emigrant workers.[23]

On all these topics, it is worth repeating, a considerable contribution has been forthcoming from the sources of international law, the effectiveness of which has been guaranteed by the general development of the institutes adapting internal law to the regulations of international law (for example in Italy, section 10, paragraph 1c of the Constitution). In some countries with a federal structure, like Germany and Belgium, this adaptation has given direct efficacy to international regulations in the context of local autonomy.[24]

Even though not all the constitutions expressly provide for the condition of the foreigner (the German Constitution only provides for the problem of political asylum), there is no doubt that the prevailing trend in Europe is that of extending the limits of constitutional protection guaranteed to the foreigner. The trend is to confer on the foreigner the same rights enjoyed by the citizen, except for political rights (but even here there are exceptions concerning municipal elections).[25] Important steps forward have been taken in this field by

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[22] Signed in Rome on November 4th 1950 by the member states of the Council of Europe, which in section 4 forbids the expulsion of foreigners for economic motives.

[23] Approved in 1977.

[24] On this point see Finocchiaro, *La tutela giuridica dello straniero*, cit., page 41 ff.

[25] However the subject of political rights has witnessed the taking up of more rigid positions by some states, because political rights - even those concerning political participation at the lower level, that is on the level of the local council - are considered by many as the essential nucleus of citizens' rights. There has also been resistance to conceding the right to vote at municipal elections to Community citizens. It is not a coincidence that, among the provisions of the Maastricht Treaty which have been considered incompatible with the constitution of a member state, France, one finds the law that introduces section 8 B1 in the text of the CEE Treaty, by virtue of which a Community citizen who lives in another member state has the right to vote in town-council elections. As to this point, see the judgement of the *Conseil Constitutionnel*, 9th April 1992, which states that the ratification of the Treaty of Maastricht, in so far as this problem is concerned, requires a previous constitutional amendment. The recognition of the Community citizen's right to vote, even in municipal elections, is held by the *Conseil Constitutionnel* to be incompatible with the French Constitution. This point of view is shared by the German Constitutional Court which, referring to a law of Schleswig-Holstein which conceded the right to vote to foreigners (there was therefore no Community law in question) upholds that the concession of the right to vote violates the Federal Constitution; judgement of the 31st October 1990.

adopting international acts like the Declaration against Racism and Xenophobia of 1986; by means of which the European Parliament urged its member states to eliminate all the existing administrative obstacles so that foreigners may participate in political, cultural and social activities on an equal footing in a multicultural society. One should also mention the European Convention on the participation of foreigners in public activity that was approved by the member states of the Council of Europe in Strasbourg on the 5th February 1992 and lists a series of rights to participation in politics that can be exercised by foreigners residing in the respective states.

The distinction between foreigners and citizens still stands in almost all constitutions. This is evident in the bombastic tone by which some constitutions refer to "all the Germans," or "all the Belgians," to show that there is some kind of discrimination in citizenship. However the trend is that the practical scope of discrimination is narrowing.[26] This is coming about either through a strong interpretation of constitutional norms which give wide but general guarantees to the individual[27] or through the explicit and qualified recognition of the foreigner's rights, which are not referred to *per relationem*, by quoting other sources, but are expressly formulated.

A brief look at European constitutions does not reveal one standard model of recognised status for foreigners. However, in spite of the fact that the gap between citizens and foreigners, as far as the protection of the rights of citizenship are concerned, has been steadily reduced, up to this day we cannot say that it has disappeared completely. In actual

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[26] It is important to understand the reasons why human rights have not absorbed all the traditional rights of the citizens. This is not always due to lingering racist attitudes. Sometimes the reason is linked to the defence of national interests which are not necessarily interpreted in an aggressive, nationalistic manner. For example, some developing nations are reluctant to give foreigners the same status as their citizens because they fear that their national resources may be exploited by those who have a better know-how to use them. The problem consists of defining the limits within which discrimination between the foreigner and the citizen seems to be justified.

[27] A case in point is the French Constitution which does not contain definite articles concerning the rights and freedom of individuals, whether citizens or foreigners, but lays down general principles in the Preamble where reference is made to the concept of conformity to International Law by quoting the Universal Declaration of 1948 and the Constitutional Preamble of 1946.

fact, the rights of the "new citizens" are not equal in quality and typology to those of the "old citizens." In this regard, it is worthwhile to consider how this problem is tackled in the more recent European constitutions.

The Greek Constitution of 1975-1986, in article 5, par. 2c, decrees that: "all the persons who are on Greek territory enjoy full protection of their life, honour and freedom without any distinction of nationality or language, or of religious or political convictions. Exceptions are allowed only in cases provided for by international law..." The same article establishes in paragraph 1 that everybody: "has the right to freely develop his personality and to participate in the social, economic and political life of the country, so long as one does not harm the rights of others, nor violates the Constitution or public morality." Therefore the citizen and the foreigner enjoy the same rights to freedom and honour.

The Belgian Constitution (1994) states that the foreigner who is on Belgian territory "enjoys the protection given to persons and goods, saving the exceptions established by the law" (article 191). Therefore the foreigner enjoys the rights given to all persons, but not those that are granted only to Belgian citizens, like those ratified in articles 26 (the right of assembly) and 27 (the right of association).

According to article 13 of the Spanish Constitution (1978), foreigners in Spain enjoy the public freedoms guaranteed under the first title in the terms established by treaties and by law. This article is linked to the general principles contained in the preamble of the Constitution that refers to co-operation between peoples and to peaceful coexistence, and with article 10 where it is stated that the freedom and dignity of the individual, the inviolable rights, the observance of the law and the respect for the development of one's personality are fundamental to public and social order. These rights and this freedom belong to the human being and not solely to the citizen. And again, article 10, paragraph 2c, decrees that the regulations that refer to fundamental human rights shall be interpreted according to the Universal Declaration of Human Rights and according to international agreements on these matters.

Even public freedom is granted to the foreigner. In fact, article 13, paragraph 2, which was added in 1992, states that only Spanish citizens enjoy the rights mentioned in article 23 (political rights), except for those established by international law and by treaties for the active and passive electorate in municipal elections. And the law grants foreigners who belong to the [European] Community the right to vote in town-council elections. In this field, therefore, there is a distinction between

the rights of every human being and the rights of the citizens, but there is a clear trend towards full equality between one and the other even as regards political rights.

The Constitution of the Netherlands (1983) devotes many articles to fundamental rights, but these are formulated in general terms. It is up to the legislator to further specify these provisions, by widening or narrowing their scope. The same thing happens with reference to the rights of foreigners, for whom article 2, second paragraph, provides that: "the law governs the admission and expulsion of foreigners." This is certainly a general rule, which however contains an important declaration of principle: the juridical situation of foreigners does not fall under administrative discretion. Moreover, the Constitution of the Netherlands never distinguishes between citizens and foreigners (it says "everyone"), except for article 3, where it decrees that all foreigners are equally admissible into the public service and article 4 which insists on the same concept with reference to the rights of the active and passive electorate. However, article 130 contains a derogation of a general nature to article 4 and decrees that a law approved in Parliament may even grant residents who do not hold Dutch nationality the right to vote and to be elected members in local councils, provided that they possess all the requisites that citizens must possess.

The Swedish Constitution (1974, the "law on the form of government"), is the only constitution that does not recognise any difference in status between citizens and foreigners regarding the rights of citizenship. This constitution explicitly decrees in article 22 that: "Foreigners in Sweden are equal to citizens." This is the constitution which grants the best guarantees to the foreigner, since it also specifically lists a series of areas for which this equal status is in force. The limitations (for instance in regard to the right of assembly) are the same as those contemplated for Swedish citizens. On the whole the law restricts foreigners in the exercise of their rights in the same way that it restricts its citizens.

This brief review of the provisions contained in some European constitutions regarding the status of foreigners shows that the legislation which was in force before the more recent constitutions came into effect is on its way out. This legislation used to reserve the juridical protection of the foreigner to a decision of the state, which used to employ two different models of participation in the national community: one for its citizens and another for foreigners. Certainly, there is still much to be done in this field for the foreigner to reach full

equality with the citizen. Yet the prevailing tendency is the granting of new statuses to the foreigner; that is to gradually include in the human rights framework new rights which used to be available exclusively to a state's citizens.

6. The central position of the individual in contemporary legal systems; the interdependence and indivisibility of rights

In the preceding section we have considered the evolution in the systems of protection accorded to the foreigner by state constitutions. In this field, in recent years, we have witnessed significant innovations in the national legislation traditionally aimed at protecting internal security from the presence of the foreigner. These are not only signs that internal legal systems are opening out to international law, thanks to bilateral and multilateral treaties which have slowly come into force; they also conclusively show that the field of human rights is inexorably spreading and that, whereas it used to coincide with that of natural rights, nowadays it has come to coincide with the rights of citizenship. With regard to this expansion, at first international law was paradoxically an obstacle that hindered the establishment of new rights for the foreigner, but later became a fundamental stimulus to increase the protection of human rights within the individual states.

Besides these external influences, both positive and negative, which human rights policies have undergone in states, there is no doubt that the philosophy of human rights itself, which is at the basis of the new national constitutions that are all founded on the central position and sacred character of the human person, induces the expansion of human rights, both in the typology of the protected situations and the quality of the protection. Conversely, this philosophy also provokes the reduction of discrimination in legal protection between citizens and foreigners In this way an evolution has started in the life of the state: a relentless process that is encouraged by the conversion to liberal democratic beliefs of those states which have been communist for more than half a century.

If human rights do not consist in an absolute list of rights that has been restricted beforehand and which are in a sense "inferior" to the rights of citizenship, but are rather continuously expanding and destined to absorb the latter entirely or almost, there is no doubt that every barrier which makes the foreigner an object of particular vigilance and control shall fall. Consequently, as the protection of human rights

becomes wider and more general, the protection of the foreigner's rights shall become stronger.

We have seen that the post-war European constitutions, regarding human rights and their extension, stand out not only for opening up to international law but also for the "personalist" character that marks them. Indubitably, both the international inspiration and the "personalist" inspiration, the latter being most evident in the Italian and the German constitutions, influence one another; because they express the same vision of the juridical system based on natural law. According to the so-called "personalist" viewpoint, law, and therefore, first of all, constitutional law, institutionally guarantees the individual against the abuse of power. "The public status of the individual" and the constitutional control of the state's powers are two keywords in a legal system which is based on the absolute value of the individual and his links of solidarity with other persons. These cultural influences of a "personalist" character (in the meaning given to them by E. Mounier)[28] are evident in articles 2 and 3 of the Italian Constitution and in articles 1,2,3 of the fundamental Law of Bonn (the German Constitution), as well as in the Preamble of the French Constitution of 1946, which has been wholly recalled in the Preamble of the present French Constitution of 1958, which does not devote *ad hoc* rules to human rights.

The central position of the individual is realised in practice by affirming the following principles:

a) The protection of the individual's fundamental rights.
b) The protection of rights connected to the social and cultural fields (obviously including the right to cultural identity of minority groups, whether ethnic or religious); in this context the condemnation of racism in all its forms by the majority of states and by the international community is extremely significant.[29]

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[28] Mounier E., *Il personalismo*, Garzanti, Milano, 1953.

[29] The present rules on equality, included in all the constitutions, that mention racial equality do not allow revocations and have been gradually interpreted as rules, which imply taking positive action. The prohibition of racial discrimination has been interpreted not only in a negative way, that is as discrimination against individuals or minority groups, but also in a positive way, as the state's obligation to set up the necessary instruments that allow the full expression of the human person as an individual and as a member of an ethnic minority group. Consequently racial equality, when it is referred to the fundamental rights of

c) The protection of civil rights (without the limits or conditions of "reciprocity") and economic rights.
d) The protection of political rights.

These rights are increasingly being seen as interdependent, that is as globally leading to the fulfilment of the individual. They are therefore indivisible.[30] And since they are inseparably functional in leading to the fulfilment of the individual, they must indubitably be granted to all men, wherever they live, whether they be citizens or foreigners.

Some problems may arise, and they have risen, as we have seen, regarding political rights. And yet it seems that the prevailing trend in European countries –as can be evinced from the brief analysis of the constitutional articles that refer to the status of the foreigner, a few pages back– is that which aims at getting the foreigner closer to the life of the community where he lives, by granting him the right to vote in municipal elections.[31] Only a few bold systems have eliminated all the distinctions and limitations in this field (above all Sweden), but the way is now open for full equality between the citizen and the foreigner, even in the field of political rights.

Thanks to their global and indivisible character, their inviolability and interdependence, human rights belong to all human beings; to the citizen as well as the foreigner. Globalisation is a key word in understanding rights, that is rights do not exist in isolation but are part of an increasingly complex network of normative relationships. This

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the individual must include the right to cultural identity, naturally in forms that are compatible with the coexistence of the various cultural identities. If racial equality policies cannot consist only of the prohibition of discrimination, but must be founded on positive action - albeit this problem concerns the whole field of the promotion of human rights - then it must be founded on adequate social policies. Anyway, social policies are the privileged instrument to make the two areas of human rights and of the rights of citizenship coincide. This is valid mostly for those social policies whose aim it is to guarantee equal opportunities for development to all the persons who reside in the same territory, notwithstanding the fact that they are or are not citizens or whether they are in a position to ask and obtain citizenship. Giving equal opportunities does not only mean acting on the mechanisms that distribute wealth, but also promoting occasions for the growth of the individual that go beyond the minimum heritage of human rights that one obtains at birth.

[30] See Viola, op.cit., p. 275.

[31] See section 3, pp. 66-68.

implies, as we shall soon see, that the evolution of one right is influenced by that of all the other rights and, above all, that it is impossible to: "exercise rights without having a global vision of their meaning."[32]

The problem may arise concerning whether a foreigner who has broken the laws of immigration by entering secretly into another country (unless when conditions in his country of origin did not allow him to exercise his fundamental rights) should enjoy all the rights mentioned here. Without any doubt the enjoyment of certain fundamental rights cannot be denied to anyone. However, there are rights which derive from an act of reception and acceptance of the foreigner by the host state. Such an act cannot be forced nor presumed. Only the decision to receive the immigrant (for example by means of the concession of the residence permit) can bring about the condition whereby the foreigner can be granted the rights of citizenship in full or almost so. Here one would not be splitting up the indivisible nucleus of indivisible fundamental rights, by making a distinction between the fundamental rights of the illegal immigrants and the fundamental rights of the foreigner who is in conformity with the laws of the state which hosts him. However it is clear that the foreigner who on entering a country in which he wishes to be welcomed breaks its law, and to whom the country in question is not ready to give hospitality, cannot legitimately claim its protection.

In the same way as acceptance implies the granting of all the rights, non-acceptance, or the violation of the laws that govern entry into a country cannot be taken lightly. This situation will inevitably prevail, unless international law decrees, quite improbably, that each state must accept all men within its frontiers. In this way, it would give effect to a duty of acceptance which is in some way symmetrical to the duty of every state to allow freedom of movement for the entry or exit of every man, temporarily or in a definitive manner, unless there are legal obstacles. Concisely put, the right to emigrate, ratified not only by international conventions but also by some constitutions (article 7 of the Swedish Constitution, article 35.5 of the Italian Constitution, article 19.2 of the Spanish Constitution, just to give a few examples), does not as yet find, and rightly so, its natural corollary in the right to freely enter the territory of a state. Neither is it accompanied by an obligation of the

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[32] See Viola, op.cit., p. 275.

state to receive and protect the guest in the same way as its citizens. Only treaties can limit states' freedom of action in this field.

7. The protection of fundamental rights in European constitutions and particularly in those of Italy and Germany

The opinion upheld in this paper, that human rights are indivisible and interdependent, each being equally inviolable, and that they are moving closer to the rights of citizenship, derives from the role assigned to these rights in almost all the European constitutions. These rights occupy a central position in the ever-expanding area which is constitutionally protected –for reasons that shall be better explained later on– in constitutions which do not declare, nor create these rights, but limit themselves to recognising them. In this case human rights are actually presented as rights which, since they have not been created by the state but only recognised by it, have therefore been in existence before the birth of the state itself. This difference between rights created by the state and pre-existent rights which belong to the individual and to social groups independently of the will of the state, is a very important difference. If the state is obliged to recognise human rights, such rights actually constitute a limit on the sovereignty of the state because they are rights against power,[33] or at least they exist independently vis-à-vis the governing powers' decisions on how these rights can be exercised.

It has been said that these rights cannot be dispensed with (which means that the state cannot abolish them), that they are indivisible (which means that they are close-knit) and that they cannot be classified in order of preference on the basis of the prevalent ideology professed by political regimes. And if the source of these rights is not the positive legal system but an autonomous superior order, one may question whether they can be restricted by law on the basis of a closed and eternal list. This *querelle* has been hotly debated by generations of jurists, with supporters of natural law and supporters of positive law lined up on opposing sides ever since societies organised by law came into being, and especially in the last two centuries following the first Declarations of rights. However there is no doubt that after infinite diatribes, some Constitutions of the post-war period have spoken

[33] See Resta, *Rights versus Powers*, in this journal, Vol. 2, No. 2, p. 3 et. sec.

clearly, especially constitutions like the Italian and the German ones which, respectively in articles 2 and 1, uphold that the state only "recognises" such rights and does not confer them, that is it does not create them, whatever their source, whether natural or not. The term "inviolable rights" in the Italian and German constitutions (the latter speaks of rights that besides being inviolable are also inalienable, and uses the corresponding expression "untouchable" to refer to human dignity), instead of the term "essential,"[34] as someone pretended, was intended to defuse the conflict between the supporters of natural rights and those of positive rights.

The solutions that have been adopted in the constitutions here examined are apparently compromise solutions. This is particularly true of the Italian constitution. Judging by the doubts expressed by Italian constituents, the Constitution should not have made explicit references to particular ideologies. And yet all the political parties agreed that the person should come before the state. This does not mean that the old *querelle*, about whether the primary rights were those pertaining to the individual person or to the state, was decided in favour of the person. Because by decreeing that the primary rights are those of the person one does not deny the primary character of the state's system, but only affirms that the state, as a juridical system, is independent, in the sense that it does not recognise any other entity above it. The primary nature of the individual's rights should therefore be considered as pre-existing their recognition by any juridical system, or by any human society. As regards the state, the primary nature of its system is based on a relative judgement that concerns the whole set of rules that coexist with those of the state and in relation to which the state takes priority, notwithstanding the limits that the plurality of these systems places on the state itself. Over and above the prevalence or not of a vision based on natural law regarding human rights in these constitutions, without any doubt the central position of the human person constitutes the fundamental value around which the entire juridical system rotates.

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[34] Although the German constitution later refers to the essential content of fundamental rights in article 19.2 ("in no circumstance can a fundamental right be broken in its essential content"). But here it does not refer to the nature of the right, taking its source into account, but its fundamental nucleus, its deeper meaning, that cannot be broken by any restriction imposed on collective co-existence.

The constitutions that are here being examined in detail, the Italian and the German ones, were strongly influenced by the ethical and political climate prevailing just after World War II, as a result of the tragic experiences which the German and Italian people had gone through under the Nazi and Fascist dictatorships. Article 1 of the German Constitution[35] and article 2 of the Italian Constitution,[36] on account of their ideological implications, are indispensable to understand the cultural inspiration animating these constitutions. Cultural influences, especially the personalistic ones, that mark these constitutions, as well as the will of a whole people to affirm, by means of these constitutions, a solemn break with the past, do not belong only to the German and Italian heritage. This particular anxiety for freedom that is directed towards the promotion of the human person can also be found in other European constitutions that were approved in the following decades, especially in those of Spain and Portugal, both of whom were keen to show that the political change after the long years of dictatorship was irreversible. But whereas in Italy and Germany the constitution was approved immediately after the end of the war, when the national peace-making process had not even started, in Spain and Portugal this happened many years after the conclusion of the tragic events that had divided society in these countries.

The Italian Constituent Assembly long debated the importance that was to be given to human rights, especially to the question whether a preamble devoted to human rights should be introduced similar to the one in the French Constitution of 1946. Even other constitutions, anyway, contain principles as an introduction to the constitution, giving an orientation to the constitutional structure of the state. However the Italian constituents did not simply want to follow the example of other constitutions in paying homage to particularly significant constitutional

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[35] Article 1 states: "The dignity of man is untouchable. It is the duty of every statal power to observe and protect it. The German people recognise the inviolable and inalienable human rights as the foundation of every human community, of peace and justice in the world. The following fundamental rights bind legislation, executive powers and jurisdiction as an instantly applicable right."

[36] Article 2 states: "The Republic recognises and guarantees the inviolable human rights, to individuals and to the social groups in which one develops one's personality; and requires that the unassailable duties of political, economic and social solidarity be evident."

traditions, especially those of the West. They wanted to affirm a different concept of the democratic state that ratifies the: "sacred, natural, inalienable rights of the citizen in opposition to the fascist state which, by upholding reflected rights, i.e. the theory that the state is the exclusive source of rights, denied and violated human rights at their foundations."[37] Moreover, when the topic of human rights was debated in the Constituent Assembly, almost all the members of the house did not refer simply to the individual rights mentioned in the Constitutional bill of 1789, but also to the social rights of the community by means of which the person finds fulfilment.

The protection of social groupings by which the human person finds fulfilment is a further development of the rights of freedom that are guaranteed to the individuals. The source of: "dignity, autonomy and freedom of these social groups" is always the individual.[38] All in all, stress was laid, especially by the Catholic parties, on the need to give due importance to the spiritual nature of the human person which legitimises his indefeasible human rights, as opposed to juridical and philosophical theories like that of reflected rights which was upheld by fascism. There is no doubt that this objective, notwithstanding the various political ideologies professed by the constituents, was the common aim of all the parties in the Constituent Assembly. They all affirmed an idea of democracy that was not only capable of being or appearing clearly opposed to the concept of the state which characterised the authoritarian regimes, but would be able to prevent a regression to authoritarian systems by means of a pluralistic organisation of power and by encouraging social pluralism with every means, and whose ultimate goal would be the fulfilment of the human person.

One must keep in mind that during the discussions of the Italian Constituent Assembly frequent reference was made to the French Constitution of 1946. This constitution was not only the fruit of a Socialist

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[37] La Pira expressed himself in these terms in the introductory paper he read on "principles of civil relations" in the meeting of the first sub-committee of the Constituent Assembly of the 9th September 1946; cfr. *La Costituzione della Repubblica Nei Lavori Preparatori dell'Assemblea Costituente*, cit., p. 316, which contains a good summary of the point of view of the Catholic members of the Constituent Assembly.

[38] Moro at the sitting of the Constituent Assembly on the 24th March 1947; cfr. op. cit., vol. 1, p. 593.

and Communist majority, but also of a vision of human rights inspired by natural law, because its preamble declared that the indefeasible, sacred human rights must be protected by the State. Therefore, the notion that the individual's rights pre-exist the creation of the state did not belong solely to the Catholic tradition but was traceable to a common cultural heritage that goes back to the purest tradition of Western civilisation. This is undeniable, as is the fact that not all human rights can be considered as natural, because throughout history, step by step, man has conquered new rights which are not derived from his "nature" but from political and social battles, and are therefore products of historical evolution. This argument was dear to the left, and especially to the Communists, as is clear from many of the interventions that this political party made in the Constituent Assembly.

The German Constitution arose from similar visions inspired by natural law, and especially from the personalistic conception of the constitutional system. In particular, the Fundamental Law of Bonn, by exalting the Constitution conceived as a bill of values, could not but give a lot of importance to the primary nature of the human person. Here again we see a philosophy of social and developmental organisation that is centred on the human person, and considers man as the centre and the goal of every public and private activity. It is significant that the German Constitution opens by stating that the protection of human dignity is the fundamental objective of the Republic.[39] The new German State could not have taken a stronger

[39] The ideological unity of the German Constitution (an ideological unity which one does not find in the Italian Constitution, which is more of a compromise, nor in the French Constitution) is expressed, as has been shown in the text above, through the conception of the federal law as "a system linked to values". A conception which already transpires in the written text (article 1, 19 paragraph 2, and 79 paragraph 3), but which is more fully formulated in the decisions of the federal court. This ideological unity was certainly helped by the fact that the process of formation of the fundamental Law of Bonn was not reached through the participation of the German people, and therefore of the dramatic divisions which marked German society after the conclusion of the Nazi tragedy. The text of the Constitution was written by a parliamentary committee (65 representatives chosen from the 11 Landers' parliaments and 5 from Berlin with an advisory status). In such conditions it is easier for the political parties to reach ideological unity, since they were all united in their will to stress the break of the new democratic

position against the Nazi experience. If some doubts could be expressed about the Italian Constitution on the basis of the fact that inviolable human rights have a "pre-state" character and in terms of the Left's insistence that it is not only nature which produces rights but also social evolution, such doubts cannot be referred to the German Constitution. In the latter, the inviolable and inalienable human rights pre-exist the state because they are expressly stated as the foundations of human society (article 1,2).

8. Human rights: from moral rights to legal rights

It is clear that this concept of human rights, which is present in many European constitutions and is based on the spirituality of the human person, and therefore inevitably tends to widen the list of necessary rights beyond those of 1789 to include social rights and those of the fundamental communities, implies the reform of the social and political structure of the state. The state must first of all satisfy the needs of a pluralistic society; one which is founded on an organised system of autonomous social groups.

It must be said that, in some countries like Italy and France, where the left had considerable influence, this direction could have given rise to a serious ideological clash between Catholics and Marxists, by

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government with the Third Reich. The values to be taken as points of reference and which should be placed at the basis of the Constitution were values shared by all the political parties. The ideological unity in question, however, depended mostly on the fact that, contrary to what had happened in Italy, the constituent process in Germany was under the constant control of the Allied Forces, especially of the Americans. In Italy the Americans were mainly interested in the balance of the political forces which were being formed, due to the risk of the political hegemony of the PCI (Communist party). The institutional problems were left in the hands of the Italians, also because after the fall of fascism an anti-fascist and non-fascist ruling class came to the fore; it had been formed in old liberal Italy before the advent of fascism and it was rather nostalgic for that political system. These wanted to revive the institutions of liberal "Little Italy", but they mediated with the new leaders of the parties of the left who wanted a system which was more open to the values and principles of socialism. In Germany there was nothing of the sort, and in any case, the ruling classes which were being formed had little say in the matter of how to build the new constitutional order and of its political identity.

stretching to the limits the dualism between eternal, irrevocable rights and positive rights which are contingent and irrevocable. This danger was effectively present in Italy just after the end of the war. A Constitution, which was too ideological, would have created a political clash, and the approval of a partisan Constitution, if ever possible, would have precluded social peace instead of promoting it. Efforts were therefore made to prevent certain ideological excesses, which could be provoked by an overly authoritarian and absolutist concept of the state. This was necessary not only to accelerate the process of national reconciliation in an Italy which was still divided into Fascists and anti-Fascists, but also for other reasons, like expediency. The parties of the left wanted the Constitution to be available to all and that it would not be too difficult to understand because of its ideological complexity[40].

In spite of the efforts to free the Italian Constitution from ideological implications which would have made it impossible for all the citizens of the new Italy to identify themselves with and defend it, the Italian Constitution is one of the most explicit in linking the recognition of the individual's rights to instruments which are capable of guaranteeing the effective safeguard of recognised rights. Here lies the socialist spirit of the Constitution, which in a certain sense integrates and modifies the liberal and Catholic humanistic visions. However this characteristic is not exclusive to the Italian Constitution but can be found in many other contemporary constitutions.[41] This, after all, is the fundamental

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[40] This was for instance, the stance of Togliatti, *La Costituzione Italiana*, op.cit., p. 309.

[41] Social, economic and cultural rights which were traditionally an ideological "emblem" have now become part of the heritage of all modern democracies, defying the capitalist societies. The Welfare State is now an achievement that cannot be disposed of because giving it up would be a step backwards in view of the standards of quality and quantity that have been reached by human rights. Everybody has become conscious that the Welfare State is therefore a precondition so that civil and political liberties do not remain guaranteed only on paper. One must also say that these rights have been implemented in the West rather than in Communist countries. In the East these rights were "moral principles"; in the West they are binding directives for the actions of the public powers. The Constitutional Courts were responsible in ensuring that these rights would not be "impossible", destined to remain on paper for lack of resources. In recent years the Constitutional Courts declared, for example in Italy, Spain and Portugal, that the laws that provided for these rights had mandatory character and not only programmatic value. In

difference between rights that are recognised and organised with a view to their potential "implementation" in contemporary constitutions –that is, to protect rights by means of a system of obligations that bind institutions and society in general–and the liberal constitutions of the end of the Eighteenth Century, as well as any bill of rights written fifty years ago. In the contemporary state, moral rights have become legal rights by means of this undertaking of the State to create the right political, social and economic conditions so that these rights can be exercised. The instruments of the Welfare State are the privileged instruments for bringing about this social transformation. In this way the constitution, which normally is a document that establishes a precise balance between the powers of the state and those of social groups which must not be upset, becomes a fundamental document by which the principal political actors undertake to change society to make it more just. And it is the people's parties which operate by means of these reforms to make social change possible and to make rights effectively available. Then the judicial organisation, through its sophisticated jurisprudence, completes the job by adjusting the relationships between the forces and solving the social conflict in favour of the weak.

Italy it was even declared that they were "inviolable human rights" according to the provisions of article 2 of the Constitution. But how are the resources to finance these rights obtained? Obviously the Courts, by their progressive interpretations alone, cannot "finance" these rights directly. Some people have said that these rights must be implemented gradually; that it is the duty of the legislative and executive powers, which means political powers, to find the means (this has been said on many occasions by the Spanish Constitutional Court). The Italian Constitution has gone even further, and succeeded in controlling the gradual achievement of the objectives stated in the Constitution, the coherence of the financial measures with these objectives, and rejecting the laws which prejudiced these rights with respect to these objectives. All in all it gives concrete guarantees that the Welfare State is a duty, and that social policies that have been adopted cannot be changed for the worse, *in pejus*, that is by criticising the legislative policy. Even the German Constitutional Court has followed this line by theorising that every measure that affects "vested rights" is considered as violating the right of ownership. A similar measure would in fact violate the principle of equality, as it is understood in article 3 of the Italian Constitution as substantial equality, and therefore as a guarantee of the removal of all the obstacles which prohibit the complete fulfilment of the human person. It is clear to everyone that social rights cannot be implemented with the same techniques used for negative freedoms.

In this framework, article 2 and, perhaps even more, article, 3, 2nd paragraph of the Italian Constitution are emblematic.[42] The former provides for the fulfilment of the duties of political, economic and social solidarity, and the latter decrees that it is the duty of the Republic to promote the right conditions so that freedom and equality of the individual and of the groups in which one's personality finds fulfilment become real and effective. The same commitment is declared in the Spanish Constitution, almost in the same words used in the Italian Constitution, in article 9, 2nd paragraph. And there can be no doubt that article 2 of the Italian Constitution was intended in such a way as to be converted into action immediately, so that every citizen could easily invoke it. This means that article 2 must be interpreted dynamically.

The recognition of fundamental rights is open first of all to all the new developments that appear on the international scenario, with the express purpose of avoiding conflicts that might arise between constitutional laws and norms of customary origin. Article 2 indicates an objective: to guarantee the necessary duties of political, economic and social solidarity, leaving the possibility open for human dignity to be progressively protected by laws which are more favourable than those contained in the Italian Constitution. This means that article 2 opens up the Italian legal system to juridical values which are alien to it and which protect human rights (so long as these are self-executing, that is so clear that the citizen can invoke them in legal actions). It is open to new international and community values, but it also precludes the latter if they are less favourable to its laws. In this sense, one must remember

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[42] It is evident why article 2 of the Italian Constitution places the rights of the individual side by side with the prescription of duties, which are functionally linked to them. This is because rights are interdependent, in the sense that they are either protected in full or they inevitably perish together. Besides, if one says that the more rights there are the more are called for, this would mean that rights condition one another. The interdependence of rights implies duties at the top levels of the state, which is obliged to promote and guarantee new rights, but it also implies duties at the top levels of the community, which is also obliged to guarantee "contextual duties". The concept of a duty is therefore not only, linked to a moral law, but also to the rights of other human beings. In this sense one may speak of "natural duties". If the welfare and the rights of the others depend on our behaviour, we are objectively responsible for the welfare of our neighbours which depends on our actions. It has therefore justly been said that "responsibility has taken the place of duty". Cfr. Viola, op. cit., p. 238.

that article 2, precisely on account of the effective and concrete character that it confers on the protection of the human person, legitimises new commitments by the state in the international field which could even require the use of force, if this is necessary to protect human rights that are threatened by the use of force. While states are endowed with the necessary instruments to transform weak rights into strong rights, the international community does not possess the necessary instruments to transform human rights from moral rights into legal rights.

For some years, and especially during these last few years, since 1989, the way to achieve this transformation has been hotly debated. The only practicable strategies in this sense appear to be two: 1) to provide that the observance of the requirements contained in the various Declarations of rights be an essential condition for a state to belong to the international community; 2) to provide that the international system be given such a strong power that it could prevent or repress the violations of the rights that are declared in the constitutional bills of almost all countries, even authoritarian ones. In this way a strong step forward shall be taken even in the system of duties of the states, which would be transformed from moral duties to legal duties.[43]

In consideration of the above, therefore, general constitutional laws that recognise human rights must be interpreted in such a way that they would have a directly binding effect, even in the context of constitutions that only express abstract fundamental principles which must be referred to a global project of the political and economic transformation of society. This opinion has not always enjoyed general acceptance. In fact, for example, in Italy in the first years of the Republic; when the bureaucracy and certain members of the judiciary were strongly resisting a correct interpretation of the new laws of the Republic, especially of the Constitution, some people held that the above-mentioned laws on human rights would only have a programmatic character. They would only indicate some fundamental political orientations of the state, which could not be directly translatable into juridical precepts. It seems to us, however, that constitutional jurisprudence soon gave the lie to these minimalist interpretations by

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[43] In a conference held in Valencia entitled "A program for the 3rd millennium" a project was drawn up on the "declaration on duties and responsibilities that is addressed above all to the states.

giving these constitutional laws a directly applicable meaning which was capable of binding even the most significant activities that were giving a political direction to the country. This happened in Italy; but also above all in Germany. It was a process of slow but univocal evolution of constitutional jurisprudence.[44]

The innovation introduced by the post-war European constitutions in regard to the recognition and protection of human rights, consists in the functional link that was created between the establishment of human rights and the necessary: "fulfilment of the inviolable duties of political, economic and social solidarity," required for the fulfilment of the human person.[45] This is what article 2 of the Italian Constitution expressly

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[44] The Italian Constitutional Court has not always appeared well disposed towards an open interpretation of article 2, one which could be extended also to rights that are not included in the text of the Constitution. However, with time, new subjective situations determined by technological development are introduced among fundamental rights. As a consequence the Constitutional Court tackled the question of transsexuality with the judgement of the 24th May 1985 (on the topic of the modification of documents on civil status), with a theory on the right to "recompose the equilibrium between the soma and the psyche, allowing the transsexual person to enjoy relative well-being". There is therefore a new concept of sexual identity and the right, which derives from it, can be found in an open interpretation of article 2 of the Constitution. In this direction a trend developed from the mid Eighties to give article 2 the nature of an open law to allow a wider exercise of human rights in a European perspective which is ever more sensitive to the values of freedom and of the dignity of the human person. In this way there developed the idea of the protection afforded to affective family ties where blood relations are lacking (judgement n°. 189 of the 18th July 1986); the question of gender discrimination regarding the personable age was tackled (judgement n° 137 of the 18th June 1986), and values regarding the equality between men and women that were established in the social system passed into the constitutional set-up and were ascribed to the wide scope of article 2.

[45] Similar principles are affirmed in the German Constitution, in article 1, paragraph 3, where it ratifies that the fundamental rights "bind legislation, executive powers and jurisdiction as immediately applicable rights" (therefore these are not merely programmatically, declamatory rights but specific ties for the whole system of public powers!), or in article 2 of the Italian Constitution; and in the preamble of the French Constitution of 1958 which says that "the nation ensures for the individual and for his family the necessary conditions for their development"; in the Swedish Constitution of 1974 (the law on the form of government) which in article 2, paragraph 2 ratifies that "the personal, economic and cultural wellbeing of the individual is the fundamental objective of public activity. Particularly it is

affirms. The prevalent trend is therefore to make the recognition of rights correspond to specific duties of social solidarity. These duties are directed firstly to the state, which is assigned social objectives, all of which revolve around the protection of the human person. In some constitutions the guarantee of human rights has an immediate, precise functional value which can be deduced from the fact that the human person is protected not only as an individual but also in the social groupings within which he fulfils his personality (article 2 of the Italian Constitution) or of the "groups in which he becomes integrated" (article 9, paragraph 2 of the Spanish Constitution). The means envisaged by the system to concretely promote human dignity (for instance, see in this regard article 3, paragraph 2, of the Italian Constitution) will often not be very effective if, besides referring to the individual, they do not also refer to the social group, to the communities that the individual chooses to belong to so as to better develop his personality. Considered in this way, the social groups that are necessary for the full development of the human personality are also subjects of constitutional law, and the duties of solidarity indicted in the constitutions are addressed not only to the individual but also to the social groups in the context of which the individual acts. The inviolability of human rights does not only concern individuals but also the social groupings which are essential for the fulfilment of human beings.

9. The constitutional recognition of human rights as also addressed to future human rights

In the preceding paragraphs we have taken a firm position on the long-standing question of how the constitution's recognition of human rights, which is often vague, should be interpreted: whether they should be considered as a closed list, consisting only of the rights that are

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the duty of the public administration to protect the right to work, to have a home and to education, and to promote the care and social security and a good living environment"; as well as the Spanish Constitution which affirms in article 9, paragraph 2, that "it is the duty of public powers to promote the conditions so that freedom and equality of the individual and of the groups wherein he integrates be real and effective; to remove the obstacles which prohibit their full application or make it difficult, and to facilitate the participation of all the citizens in political, economic, cultural and social life".

mentioned specifically therein, and which could therefore be recognised synthetically, or as an open list, in such a way that the typology of rights would be viewed as a historical evolving reality.

It seems that the inviolability of human rights, recognised but not created by the state, would imply certain consequences among others:

a) This inviolability refers to values which pre-exist the formation of the State, and which are not all necessarily catered for in the precepts adopted by constitutional law in a given historical moment.
b) The inviolable character of human rights does not only imply their application to private as well as public power and that they take priority in the event of their clashing with other freedoms and powers (obviously with the exception of cases where peaceful coexistence would be prejudiced by exercising one of these rights), but also implies, according to certain authors, a limit to constitutional power itself. This means that the fundamental rights and freedoms of man make up a nucleus of provisions within the sphere of the constitution itself which are endowed with a power which is above the constitution, in such a way that they cannot be modified in their essence, not even by the constitution's powers of revision. Consequently a violation of these rights, even if it were made according to the procedures for a revision of the constitution would violate the constitution. Their definition as inviolable rights therefore confers on them a peculiar position. The protection of inviolable rights must be considered as one of the supreme principles of the institution, and these principles constitute implicit limits to the very powers of constitutional revision themselves.[46]

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[46] In this regard article 2 of the Italian Constitution must be considered in the same way as article 139, which ratifies that the republican model is unchangeable. The limits which are implicit in constitutional revision derive from the need to pinpoint the essential nucleus of principles which give a system "its identity". If this nucleus of principles is broken, in part or in whole, there will be a break in the system that amounts to an irreversible crisis of the political system itself. This essential nucleus should include the principle of the inviolability of human rights. On this point see Grossi, *Introduzione ad uno studio dei diritti inalienabili nella Costituzione italiana* (An Introduction to the inalienable rights in the Italian Constitution), Padova, 1972. Even the Constitutional Court has shown in some of its decisions that it shares this interpretation of the inviolability of fundamental principles. See judgement n. 48 of 1979 and n. 214 of 1983.

c) However, inviolability represents above all a clause which is open to other freedoms, which can from time to time emerge from the social conscience. In this sense, the reference made by certain constitutions (for instance the Italian and Spanish ones) to social groups as natural groups, or better as privileged centres for the fulfilment of human potentials, provides the concrete possibility that standards in the quality and quantity of human rights will constantly evolve, thanks to the increasingly pluralistic character of contemporary society. This pluralistic set-up not only functions as a "laboratory" for producing new needs, but also as a privileged zone for the elaboration of increasingly effective instruments for satisfying these needs. With regard to this pluralistic structure, the state's duties of social solidarity must also be interpreted as the ability to ensure fair competition between groups, so that the prevailing group will not be the strongest one but the one which, on the basis of social justice, has the more legitimate right to ask and be given.

All in all the recognition of human rights is an open recognition of social transformation and of the unavoidable new human needs which it brings with it. The term: "to recognise" as used, for instance, in the Italian and German Constitutions with reference to human rights is actually, irrespective of any state decision, an affirmation that these rights pre-exist the state and that they can be modified and increased. While, on the other hand, the list of natural rights may be a closed list, which refers to a pre-existing natural law from which inalienable natural rights are derived. These natural rights are not highly influenced by historical processes. The human being is endowed with a subjectivity which is based on moral qualities and which does not permit him or her to be treated as an object, nor that s/he would not be equal to another subject.[47] On the contrary human rights, although they descend from natural rights, have a positive character and are based on a human self-understanding which cannot be found at the basis of natural rights.

Therefore the recognition of rights must be continually updated and increased with regard to the catalogue of rights, under the pressure of

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[47] Viola rightly points out that human rights therefore cannot be placed in a definitive list because the human person and her awareness of her rights adapts to historical changes. In this regard see Viola, op.cit., p. 274 ff.

the logic that started it. The processes of emancipation, of man's increasing freedom create new needs that sooner or later will require adequate legal protection, even in advanced societies. Rights produce rights. As we have already said, the evolution of a right is conditioned by the evolution of all the other rights. And in this regard the global character of rights implies that it is impossible to place an insurmountable limit to the process of evolution in this field. It is therefore difficult to establish the minimum standard of a right.[48]

This evolutionary process of the assertion of rights, judging by a few recent important international conferences, like those devoted to the environment (the Rio Conference), the demographic boom (the Cairo Conference) and to women (the Peking Conference) is not always clear. In fact, during these conferences, it was often necessary to manipulate the topics treated in order to avoid fierce clashes between the participating countries. And there is no doubt that political mediation, ideological bargaining, and the need to make different cultural identities coexist in a common effort to promote new rights, have blurred the clarity of the principles in question. The internationalisation of human rights should foster contacts between the various cultures, even though it cannot eliminate the differences on this level. What counts is bringing about real convergence, while taking into account these differences, concerning a small nucleus of values which cannot but be accepted internationally.[49]

However, it is one thing to protect the cultural identity of each people, to ensure the right to freedom of expression for all its ethnic, religious and national groups and quite another to recognise a "right" to intolerance. Consequently, the protection of cultural identity and of the

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[48] When it was only necessary to define a right as dominion (of a man on a thing), the boundaries of rights were easier to set down. But when a right is considered as a quality inherent to a person, in relation to the various status that derive from it, it is difficult to establish an insuperable limit for a right. See Viola, op.cit., p.275 ff.

[49] Besides, cultural and religious differences are criteria for the interpretation of these values. One cannot refrain from taking into account the fact that in the West the protection of the freedom of the individual has to pass through mechanisms set up with the aim of allowing the individual to react against the overpowering state. In India instead, individual freedom is limited by the organisation of society in castes, within which the individual fulfils his social dimension. In countries, which are prevalently Buddhist, where society is founded on the family regime, the individual finds his fulfilment above all within the family.

right to freedom of expression should not violate the essential nucleus, which is the minimum content, of rights. The protection of rights must be interpreted in a historical and cultural context, but in any case not in such a way as to tolerate the oppression of other identities and the criminalisation of the dissenter, the denial of freedom of expression and political participation to anyone. The international community cannot accept any *realpolitik* about rights, which would lead to the repression of freedoms, which are now considered as indispensable in collective awareness. All in all, the "recognition" of human rights plays the same role as that played by the ninth amendment of the American Constitution which explicitly affirms: "the listing of certain rights in the Constitution cannot be interpreted in such a way that other rights to which the citizens are entitled will be denied or diminished".

Being open to social evolution and therefore to the new rights which will be produced in the future, the protection offered by human rights is first of all open to those rights, which have been recognised in international acts and conventions. A further argument in favour of this conclusion can be found in article 19, second paragraph, of the "Basic law of Bonn", which decrees that the limits imposed by collective peaceful coexistence can never impinge upon the "essential content" of fundamental rights. Even this law confirms the open and flexible character of the recognition of fundamental rights. There is an essential group of rights from which new rights emerge, taking into consideration social evolution and technological transformations. This in spite of the fact that the German Constitution on first sight appears to opt for a closed list of rights when it decrees that: "the following fundamental rights bind the legislature, the executive and the judiciary as immediately applicable rights" (article 1, paragraph 3). It seems that the practical aim of this rule is not so much that of affirming the exhaustive character of the list of fundamental rights as of emphasising the immediate effect, both of the rights which are set down in the law and of those which will come later.

Anyway, the fact that the essential content of the fundamental rights cannot be compressed or limited implies that the catalogue of rights is destined to become ever broader with social evolution, and that the exclusion of new rights from the catalogue would prejudice the fundamental rights which are explicitly recognised, since everything holds together in this matter. In this regard one must note that if rules like those contained in article 2 of the Italian Constitution and article 1 of the German Constitution, attribute to fundamental human rights

the character of subjective entitlements possessing the rigidity which is typical of constitutional precepts, the automatic adaptation to international treaties mentioned in article 10 of the Italian Constitution and article 25 of the German Constitution would be meaningless. In brief, norms like those of article 2 of the Italian Constitution, article 1 paragraphs 1 and 2 of the German Constitution[50], and article 10, paragraph 1, of the Spanish Constitution[51] are a step forward with respect to the constitutions of the Eighteenth Century which provide for similar principles, precisely because contextually these constitutions refer to the instruments, that is the duties, of the state; through which these declarations of principle can then be put into action. If there are any references to the duties of states, these are actually references to moral and not legal duties.

Let us consider, just to give a few examples, article 3 of the Italian Constitution: "it is the duty of the Republic to remove all the economic and social obstacles which actually restrict the freedom and equality of the citizens, hinder the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country," and article 2, wherein the Republic requests every citizen to: "carry out the unassailable duties of political, economic and social solidarity." Attention should also be paid to article 1, paragraph 3, of the Basic Law of Bonn: "The following fundamental rights bind the legislature, the executive and the judiciary as immediately applicable rights," and article 2, paragraph 1: "Everyone has a right to freely develop one's personality." Finally, article 9, second paragraph, of the Spanish Constitution (which almost slavishly repeats what is written in article 3, second paragraph, of the Italian Constitution) states: "It is the duty of public [powers] to promote the [right] conditions so that the freedom and equality of the individual and of the groups into which he is integrated be real and effective; to remove obstacles that hinder their full application or make it difficult and to help the citizens participate in political, economic, cultural and social life."

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[50] The German people recognise the inviolable and inalienable human rights as the foundation for every human Community, of peace and of world justice.

[51] "The dignity of the human person, the inviolable rights that belong to it, the free development of one's personality, the observance of the law, also constitute the foundation of public order and social peace."

The recognition afforded by human rights, a recognition without preventive limits, that all present and future needs which are useful to the full development of the human person must be protected, gives rise to a number of duties incumbent upon the state which are the principal raison d'être of the welfare state. The state has an overriding goal, which is the fulfilment of human beings. The achievement of this goal conditions the activities of all public powers. The welfare state is the means for achieving this objective and cannot therefore be renounced. This goal is explicitly mentioned in the Italian and Spanish Constitutions, and it is even more explicitly mentioned in the "Basic Law of Bonn". The Bonn Constitution actually follows the fundamental principle of promoting human dignity with every means, since this principle is the nucleus of a legal system based, as the constitution affirms, on values. From this point of view human dignity is therefore the fundamental value of the legal system, not a simple object of the action of the state and of society. No other constitution adopts such a holistic vision of human dignity, understood as a common objective of private and freedoms and of both civil and political rights.

Therefore the welfare state is a necessary consequence of the acknowledged primacy of human dignity as a value, which pre-exists the State and is not conditioned by the *ius positum*. This not only implies that all three powers of the State must protect human dignity by means of social justice (article 1, paragraphs 1 and 2 of the German Constitution), but they must know how to promote it. Bringing about social justice and knowing how to adapt the legal welfare state to such a task is an objective which cannot be defined once and for all; that cannot be achieved by an identical strategy of reform, which takes no account of the historical context. Discovering the way by which social rights are to be determined –what to give to whom– that is, the way in which acts of redistribution are to be performed, necessitates a continual rewriting of fundamental rights as rights which are in constant development.[52]

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[52] See Haberle, op.cit., p. 256 ff., who notes that achieving the welfare state, that is realising a process of redistribution of political and economic power among the various social groupings, understandably provokes bitter political and social conflicts. The German constituents choice of expressing "the objective of the welfare state as a general clause", instead of pin-pointing fundamental social rights (like the right to work or to have a home) have given the welfare state in Germany a scope for intervention and a flexibility that are without parallel in the West.

The wider the area covered by human rights becomes, and the more human rights and citizen's rights coincide with one another so that even the latter become inviolable and cannot be dispensed with, the more indispensable the welfare state becomes, since it becomes the essential instrument to guarantee human rights (as the Italian Constitutional Court has decreed). Rules like the one contained in article 2 of the Italian Constitution are therefore the meeting point of two concepts of man: as an individual with innate characteristics (in this regard see also article 1 of the German Constitution) and as a social being which is necessarily destined to find fulfilment in the Community (in this last regard see also article 10 of the Spanish Constitution).

10. The ideological genesis of the duty of social solidarity enshrined in some European constitutions

The instruments that have been referred to, whose aim is to guarantee in pluralistic and conflict-prone societies (like the Western ones) the fulfilment of the human person by means of the exercise of fundamental rights, are "solidaristic" instruments which must be set in motion not only by public decisions, but also by initiatives from below, originating in social groups. Therefore solidarity must not only be a duty of the state but also a vocation of society. This solidaristic model of society constitutes another new element on which post-war constitutions are based.

Traditionally, the law has been concerned with man as an "economic" individual, as the principal subject involved in commercial exchange. Equality itself, which is mentioned in all the constitutions and declarations of Rights since the French Revolution, considers man as an individual, and his freedoms as individual freedoms. However, the individual who operates within social groups mentioned in the constitutions that we have examined, finds his fulfilment in interacting and co-operating with other people. In brief, the person mentioned in article 2 of the Italian Constitution is not only the individual engaged in commercial conflicts but the individual who wants to develop his personality by asserting spaces of autonomy even in the legal regulation of his affairs[53] and by behaving in a manner which demonstrates solidarity with other individuals in the forms that he believes are useful.

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[53] Vecchio, *Le istituzioni della solidarietà*, Giappichelli, Torino, 1998, p. 88 ff.

It is this vision of man that leads to the recognition of innate duties, as well as innate rights. These duties all revolve around the concept of solidarity. Even here, with reference to the duties of solidarity, the state restricts itself solely to recognising duties that are naturally linked to social coexistence and that do not come into being by the will of the state. The state favours this natural human disposition; providing instruments through which it is easier to express this: "spirit of solidarity". Evidently this concept of man radically inverts Hobbes's vision of *homo homini lupus*. Therefore while the state commits itself to fulfilling public duties by means of binding regulations, as regards private duties it limits its role to recognising such duties of the individual as he chooses to give or receive, depending on his social choice.[54] Moreover, the recognition of the duty of solidarity gives individuals and social groups the freedom of choosing the ways and means that are more suitable to reach this goal. If solidarity is a duty, the ways to reach it are not. Solidarity has to be subjected to a principle of autonomy, that is to the auto-regulation of society. Therefore, in article 2, new orientations of a humanitarian nature can be perceived, which fall outside the state's monopoly of legislation. In this field, individuals and communities engage in a dialogue with the state, within a relationship in which solidarity as a public duty is secondary to the duty of social solidarity in general. In fact, the range of duties of social solidarity, which are contextual with and symmetrical to the recognition of human rights according to the philosophy of article 2 of the Italian Constitution, tends to broaden to incorporate new duties as the scope of human rights increases and the state's management of relations of solidarity narrows down thanks to the crisis in the Welfare State.

Thus, the duties of solidarity cannot be defined once and for all. In the same way that article 2, in the past, used to impose on the state the duty of giving effect to and of managing these relations of solidarity in order to guarantee emerging new rights, nowadays the social management of such relations must be seen from a much wider perspective. All this is definitely permitted by article 2 which is an "open norm", dealing with rights and duties that are both qualified as "innate." Article 2 therefore tanscends both the model of a centralised, state-managed social welfare (the Welfare State) and instead points towards

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[54] Vecchio, op. cit., p. 90 ff.

a society which is organised through the medium of corporate bodies. These associations should have the capacity to regulate their own affairs freely and to choose their mode of organisation.

11. The protection of human rights in the relations between the internal legal system and the international legal system

The importance that the new European constitutions attribute to the human person is evident not only in regard to the relations between the state and every human being who lives in its territory, that is on the level of domestic jurisdiction,[55] but also on the level of the relations between the state and the international community. Provisions like those of article 1 of the Basic Law of Bonn or article 2 of the Italian Constitution are the basis of the whole constitutional system. They therefore constitute a limit on the state's exercise of power in foreign affairs and must be viewed together with the provisions emerging from within the international system, which according to the Italian Constitution are also intended to be applied within the internal system. A clear connection indubitably exists between articles 1 and 2 and articles 24[56], 25[57], 26[58] and 87a[59] of the German Constitution and

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[55] For instance the parliamentary Commissioner for Defence of the Bundestag, provided for by article 45b of the Fundamental Law of Bonn, whose main office is to supervise the observance of human rights.

[56] The Fundamental Law of Bonn, article 24: "The Federation may transfer by law rights of sovereignty to inter-state organisations". ""The Federation may, in order to safeguard peace, join a system of reciprocal collective security; therefore it will agree to restrictions of its sovereignty that will bring about and ensure a peaceful system in Europe and among the peoples of the world ...". "In order to settle issues between States, the Federation shall sign agreements concerning a general and compulsory international jurisdiction of arbitration."

[57] The Fundamental Law of Bonn, article 25: "The general rules of international law are an integral part of the federal law. They prevail over the Laws and give rise to immediate rights and duties of the inhabitants of the federal territory."

[58] The Fundamental Law of Bonn, Article 26: "Actions which may disturb the peaceful coexistence among peoples, in particular those that can lead effectively to a war, and that are taken with the express purpose of doing so, are unconstitutional. Such actions must be legally prosecuted".

[59] The Fundamental Law of Bonn, article 87: "The Federation prepares armed forces for its defence. Besides defence measures, the armed forces can only be engaged within the limits explicitly allowed by the present law."

articles 10[60], and 11[61] of the Italian Constitution; that is between norms devoted to the protection of the human person and norms devoted to the automatic adaptation of internal law to the norms of general international law and to the principles which policies of foreign affairs have to follow regarding the use of military force and international co-operation.[62] Both norms are an expression of the same universal culture of human rights.

The "generally recognised norms of international law" mentioned in article 10 of the Italian Constitution, which envisages that the Italian legal system must automatically conform to them, and the "general norms of international law" which, according to article 25 of the Fundamental Law of Bonn, are "an integral part of federal law," constitute a corpus of rules which has been defined as rules of general international law. In whatever way these norms are identified, whatever the instrument which verifies the customary international norms which enter in their own right into the state's legal system from other constitutions, the recognition of fundamental rights must be considered as a customary norm.[63] In fact, one can safely say (and this was the orientation of the Italian Constitutional Court in judgement n° 67 of

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[60] Article 10 of the Italian Constitution: "... the Italian legal system follows the provisions of international law that are formally recognised".

[61] Article 11 of the Italian Constitution: "Italy repudiates war as an instrument which is offensive to the freedom of other peoples and as a means for resolving international issues; it agrees, under conditions of equality with the other states, to restrictions of sovereignty which are necessary for a system which guarantees peace and justice among Nations; promotes and helps international organisations who work for the same aims."

[62] In this regard see the Preamble of the French Constitution of 1946, which is an integral part of the French Constitution which is presently in force, where it is stated that "The French Republic ... conforms to the provisions of international public law"; article 28 of the Greek Constitution: "The rules of international law which are generally accepted ... are an integral part of Greek internal law ..."; and article 29, third paragraph, of the Irish Constitution: "Ireland accepts the principles of international law which are generally recognised".

[63] The effects of automatic incorporation have been hotly debated, that is whether customary constitutional norms are automatically inserted into the internal juridical system or whether, thanks to the mechanism provided for by article 10, a norm is created in the internal system which is correlated to the international one. The meaning and the aim of this norm are very clear. The aim is to make incorporation automatic so that it will not be necessary every time to enact internal legislation. The constitutional norm shall therefore guarantee a continuous perfect

1961) that the unanimous consensus on the typology and quality of human rights, and on the protection of these rights, derives from the norms of general international law. The national forms of protection may vary, but the obligation to protect cannot be questioned. The need to protect human rights on the basis of standards derived from general international law is an obligation for every sovereign state. But the existence of such processes of automatic incorporation constitutes a significant factor which goes beyond the traditional concept of the sovereignty of states, which is a concept which had remained stable for centuries, from the Treaty of Westphalia to the present. And it is precisely the need to discover, at the basis of every constitutional system –at least of every constitution worthy of its name– basic values, common universal rules, mostly those dealing with human rights, that justifies the internal limits to the sovereignty of states.

The constraints on the sovereignty of states aimed at ensuring the real centrality of the human person and his rights, go beyond simply submitting the state's legal system to the rules of general international law. Over and above this static obligation, there are dynamic obligations that concern the action of the government and processes of political decision-making in their continuous development, with reference to the states' power in foreign affairs. Even here, state sovereignty encounters an insurmountable limitation in some of the principles expressed by the constitution, like the pacifist option, the concept of solidarity, the choice of international co-operation as an essential instrument to guarantee peace among nations and therefore the rejection of war in all its forms and whatever its justification. Values of peace entrusted to an international system which is capable of preventing and resolving conflicts and the value of solidarity, realised through political, economic and cultural co-operation on an international level, set insurmountable limits to the exercise of national sovereignty. These values motivate the creation of international systems which are constructed by the surrendering of parts of their sovereignty on the part of the individual

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balance between the juridical system and general international law. The norms of automatic incorporation constitute an element, which gives permanent elasticity to the whole system. As we have observed, these norms constitute a kind of "permanent transformer" (La Pergola). Thanks to them it is possible to accomplish within the State a quick evolution concerning the protection of human rights.

states that adhere to them. The main objective of this limitation of the state's sovereignty is the promotion of the human person, not simply within the boundaries of an individual state, but within the international community considered as a unified subject.

The priority of human rights conceived in this manner is not only declared, but, as happens internally through the enforcement of the duties arising from social policies, it produces duties, which influence foreign policy. As an example, it is enough to quote the clear directive contained in article 11 of the Italian Constitution: "Italy promotes and assists organisations that are able to guarantee peace and justice among nations"; or that contained in article 24, first paragraph, of the German Constitution: "The Federation may transfer by law the right of sovereignty and international organisation", and in paragraph 2: "The Federation may, in order to protect peace, join a system of reciprocal collective security; it shall therefore agree to restrictions of its sovereignty which bring about and ensure a peaceful and long-lasting order in Europe and among the peoples of the world." Similar provisions are contained in other constitutions like the Greek one, article 28, paragraph 3, where explicit reference is made to human rights, which must never be infringed as a result of international co-operation.

The opening up of state systems towards the international community by means of the transfer to it of portions of national sovereignty, can never cause a diminution in the safeguards provided by national constitutions, since it is aimed at an ever wider and more effective promotion of the human person. This should be extremely clear if one considers the practical reason behind restrictions of sovereignty. Still this concept, according to which provisions created by customary international law and those deriving from a treaty are applied only if they are more favourable to the human person than those of the state, has also been expressly stated in some constitutions, like the Portuguese[64] and the Spanish[65] ones.

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64 Article 16, 1 of the Portuguese Constitution says: "The fundamental rights provided for in the Constitution do not exclude any other right provided for by the laws and by provisions of internal law".

65 Article 10, paragraph 2 of the Spanish Constitution says: "Provisions concerning fundamental rights and the freedoms that are recognised by the Constitution are interpreted in conformity with the Universal Declaration of Human Rights and the International Treaties and Agreements on the same topics ratified by Spain".

12. The primacy of Community law does not subsist if its norms conflict with fundamental human rights

The concept which is embodied in many constitutions, according to which supranational organisations do not constitute a value in themselves but are aimed at achieving an adequate system of government that provides security and social justice in states,[66] is confirmed in the case of relations between member states and the European Community. In this regard an important clarifying action has been carried out by the Constitutional Courts of the member states from which it emerges that European integration is not a sufficient objective in itself. It is a strategic objective, in the sense that integration must never lose sight of the social objectives, above all of those that are concerned with the promotion of the human person in all its forms, whatever the specific powers that are conferred to the Community in the various phases of the process of integration. Therefore integration must not be sought at the cost of lowering the quality of the standards of protection of human rights which have been consolidated in the various member states.

In this regard it seems that the work of the Italian Constitutional Court has been very significant. Notwithstanding that this Court holds that Community regulations are not subject to its scrutiny, because the evaluation of the legitimacy of Community laws falls within the powers of the organs of the Community system,[67] the Constitution however provides a counter-balance to the restrictions of sovereignty, and such counter-balance includes the inalienable rights of the human person, as affirmed in judgement 183 of 1973 and judgement 170 of 1984. Therefore, as a general rule, if Community regulations violate fundamental principles, the Italian Constitution allows the possibility to react to them. This is not done by means of a direct inspection of Community laws (a possibility which is allowed by the German

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[66] Only in this way is the transfer of portions of national sovereignty justified. The renunciation of portions of sovereignty would be a price paid without a just cause, if it were not justified by a general improvement of the living conditions of the individual and of peoples.

[67] States' Constitutional Courts verification of the conformity of community law to fundamental human rights on the part of a good guarantee for the protection of the citizen.

Constitution; cfr. decisions 74/18:B. Verf, GE 37, 271 ss), but by contesting the internal norms which authorise the direct application of the regulations.

In consideration of the above, the rule which gives priority to Community sources[68], and which upholds Community regulations and within certain limits Community directives[69] over state laws, cannot imply the priority of the Community source over constitutional norms;[70] especially in the case of rigid constitutions, which do not allow tacit modifications of the constitution without a procedure of constitutional revision. Wherever there is a judge who verifies the conformity of laws to the Constitution, it is clear that even national laws which give effect to European legislation must be assessed in this sense. The laws enforcing European legislation must respect the Constitution. A similar conclusion can be drawn from article 93, paragraph 2, of the Basic Law of Bonn, which also provides for the direct application of: "anyone who feels that he has been harmed by the public authority in the enjoyment of one of his fundamental rights." Article 161 of the Spanish Constitution also provides for the: "right of protection," meaning that every citizen can lodge a direct petition to the Constitutional Court, to safeguard his freedoms and the rights which are recognised by article 14 (the principle of non discrimination) and section I of Chapter II. The priority of Community law, which is directly applicable within each State – even by means of the non-application by the judge of any conflicting provision of national legislation, just as stated by the Court of Justice (by the judgement of the 9th March 1978, lawsuit number 106/77, and by the judgement of

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[68] An orientation validated by the famous Simmenthal judgement; EEC Court of Justice, 9th March 1978, c. 106/77.

[69] In fact for the Court of Justice of the European Community, directives may be directly effective if they are not conditional, are sufficiently clear in their provisions, and when the dateline for its implementation has passed without the member state having done anything about it. Only on these conditions can individuals apply to national judges to contest a norm of international law, which is not in conformity with the directives.

[70] The Italian Constitutional Court by judgement 232 of the 21st April 1989 affirmed its right to examine the provisions of the Treaty of Rome, even though it seems to be excessively anxious to justify this bold statement, as if it contradicts in some measure the restrictions of sovereignty ratified by article 11 of the Constitution.

the 19th June 1990, lawsuit number C/213/89) – becomes ineffective in the case of a conflict with fundamental rights.

How can one reconcile this conclusion with articles 10-11 of the Italian Constitution, where it states that the Italian legal system must conform to the generally recognised norms of international law (article 10) and accepts the: "restrictions of sovereignty which are necessary to a system which guarantees peace and justice among the nations" (article 11)? What is the import of articles 10 and 11 of the Constitution?

Auto-limitation of sovereignty certainly implies the non-applicability of national law which is contrary to Community law, and which becomes effective "in execution" of the constitutive treaties of the European Community. The priority of Community law, however, has its limitations:

1) The norms of execution of treaties must obviously consider the specific objectives of the Community.
2) Besides, as has been stated up to this point, Community norms cannot disturb the "constitutional identity" of the member state, which means that they cannot contradict the nucleus of interests and values which are present in the constitution and which constitute the indispensable substance of the sovereignty of the state concerned. In spite of its fluctuations concerning the priority of the Community system over the state legal system, the Constitutional Court does not allow any doubts on this matter. The fundamental principles of the constitutional system and the inalienable rights of the human person constitute an insurmountable limit for "Community law" which therefore, from this point of view, is liable to scrutiny by the Constitutional Court (cfr. the Constitutional Court's judgement of the 21st April 1989, n. 232, and of the 18th of April 1991, n. 168).

The Italian Constitutional Court has often expressed this preoccupation with defending fundamental constitutional values which form the essence of the Constitutional Charter and justify its rigidity in regard to Community sources which might limit the practical effectiveness of these values, especially with reference to the rights of the human person. Such a concern has also been shared by other constitutional courts, like the German and Portuguese ones. German constitutional jurisprudence, notwithstanding its openness towards the European Court of Justice, has always held that the Community norm is only applicable so long as it is not in conflict with one of the

fundamental rights recognised in the *Grundgesetz*. In this case, the *Bundesverfassungsgericht* has full competence, whenever it is necessary to evaluate the compatibility of Community law with the Constitution (cfr. BVerfG., 29th may 1974). This power of the Constitutional Court is also confirmed by its decisions which hold that, historically, the jurisprudence of the European Court of Justice in matters regarding fundamental rights, provides an adequate level of protection, and that therefore the Court does not intend to "exercise" *rebus sic stantibus* its jurisdiction over Community law (BVerfG., 22nd October 1986). Therefore these are cases where jurisdiction is not exercised, but where it is not renounced; which means that the Constitutional Court verifies in every case that the Court of Justice ensures an adequate protection of fundamental rights which is of the same level as that offered by the German Constitution.

In fact, in the opinion of the German Constitutional Court, the "Basic Law of Bonn", considered from the standpoint of the ethical values it expresses and not solely from the legal perspective, places a limit to the entry of customary international law in this field, in the case where it is found to be incompatible with these supreme principles. It cannot be taken for granted that Community guarantees of human rights are of the same level as those offered by the "Basic law of Bonn", taking into consideration the human-centred philosophy on which, as has already been observed, this latter charter is based. From this it follows that Community law cannot be considered as "having priority" so long as it has not reached such a stage of development as would produce a catalogue of fundamental rights equivalent, for example, to that of the German Constitution.[71] Therefore, Community law may only prevail and the Court of Justice may only bind the German Federal Republic, so long as the protection of fundamental rights is equivalent to the protection guaranteed by the German Constitution within the German legal system.

Thus even the German Constitutional Court holds, in a manner analogous to the Italian Constitutional Court's interpretation of article 11 of the Constitution, that article 24 paragraph 1 GG, where it provides for the transfer of the rights of sovereignty to supranational

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[71] This conviction is affirmed in the Ordinance of the 29th May 1974 and was then confirmed by the judgement given on the 22nd October 1986.

organisations, does not allow an unlimited transfer, that is a transfer which permits a tacit modification of the Constitution. A similar position is expressed, in our opinion, by the Portuguese Constitutional Court. Indeed, this approach is expressed even more vigorously, due to the fact that the Portuguese Constitution does not contain any norm which provides for the transfer or restriction of national sovereignty in favour of supranational bodies, or which affirms the priority of supranational law over national law. Consequently the priority of constitutional principles and provisions over international laws which are in conflict with them seems to be absolute; although it must be stated that the 1989 revision of the constitution has eliminated some principles which were in disagreement with the Community system, and therefore such conflicts between the Community system and the international system should not occur in practice.

A less drastic position in this matter, that is concerning the priority of constitutional law over Community law, has been taken by the *Tribunal Constitucional* of Spain, which recognises the admissibility of the *recurso de amparo* not in regard to the norms and acts of the Community but exclusively in relation to the behaviour or dispositions of Spanish public powers, even though they may be implementing Community law (Trib. Const., 22nd March 1991). This means that, notwithstanding that article 10, paragraph 2 of the Spanish Constitution states that the interpretation of internal norms must be carried out in conformity with international treaties and agreements, such interpretations cannot lead to the "annulment" or effective modification of constitutional norms. All in all, albeit it is apparently indisputable that the European Court of Justice is competent to judge whether the activity of the Spanish public authorities is in conformity with European Community law, the Spanish Constitutional Court remains fully competent to evaluate whether the execution of the Community norms is in conformity with the principles and norms of the Constitution or not. Having made reference to the *recurso ad amparo* in the aforementioned judgement of the Constitutional Court, it must be pointed out that the Constitutional Court's control of acts of execution must be limited to fundamental rights, whose protection is the object of the *recurso de amparo*, and therefore is not extended over all the rights ratified by the Constitutional norms. These decisions do not prejudge the general issue of the compatibility between the primacy accorded to Community law and the observance of constitutional legality. With regard to the protection of the human person, the priority of the Constitution is beyond dispute.

The priority given to fundamental rights which limits the priority of Community law itself, and which for the reasons mentioned above can never in this field conflict with national constitutions, is based on the fact that they explicitly or implicitly restrict the scope of constitutional revision. One must remember that restrictions on the power to revise the constitution, being absolute limits that are insurmountable (otherwise the constitutional order would be subverted), must concern the principles and values on which a state's framework is based, and that they can therefore never be derogated from by international law. These principles and values are not always explicit; however they can be deduced from the sort of "political pact" which lies at the basis of the constitutional system.[72] For instance the republican form of government, mentioned in the Italian Constitution in article 139 as the only limitation on constitutional revision, must not be understood as an institutional form – that is as a prescription directed at preventing the return of the monarchy – but rather as a collection of principles and values on which the republic is founded. This interpretation of the supreme principles of the constitutional system, as restrictions which cannot be set aside by revision of the constitution itself, is also shared by many European Constitutional Courts. Without any doubt, the inalienable rights of the human person must be included in the unchangeable nucleus of the constitution (in this regard see judgement n. 183, 1973, of the Italian Constitutional Court and judgement n. 1146 of the 29th December 1988). Any changes to these rights would be revolutionary modifications of the form of the state itself. These principles are therefore above the constitution because they express the sovereignty of the state. Fundamental rights help to define once and for all the enduring identity of the system. The system of procedures guaranteed by the constitution (qualified majority, etc.,) cannot impinge on this stable nucleus which constitutes the element of continuity in the legal system.[73] Obviously this does not

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[72] See Pizzorusso in *Commentario Costituzione*, Branca (ed.), Garanzie Costituzionali, art. 134/139, Bologna, 1981.

[73] This aspect of fundamental rights is explicitly affirmed in article 79, paragraph 3, of the Fundamental Law of Bonn. In the Italian Constitution there is no equivalent rule, although the majority of legal analysts hold that fundamental rights constitute a restriction for the revision of the constitution.

mean that the typology of human rights cannot be modified, since it is continuously developing and from time to time recognises new subjective situations which to be protected.

However one must add that although it is true that the priority of Community law is not absolute where fundamental rights are concerned, nevertheless very serious problems may occur when the conflict is not between Community law and fundamental rights but between Community law and laws which are in a sense functional to the effective safeguarding of fundamental rights. One may mention the laws relating to social protection which in this century, which has been rightly defined "the social-democratic century," have been one of the privileged instruments for the realisation of human rights, but which seem inevitably destined to clash with certain attitudes towards the formulation of public accounts which prevail inside the European Union. Dismantling the welfare state will certainly affect the future of fundamental rights, by rendering the decision to construct a welfare state into a reversible choice. Whereas, since this is an issue which concerns the very shape of the state itself, it should be considered an irreversible choice. This means that the welfare state can be performed, but must not be eliminated. Nor can it be reduced beyond a certain point. If this were to occur, we would inevitably assist to a forfeiture of fundamental rights.

Concerning the systems which have here been examined it must be held that, as we have seen before, the process of adaptation of the system for the protection of fundamental rights affirmed in their constitutions to bring it in line with the structure and aims of the international community, cannot in any event determine a lowering of the qualitative standards that this protective system has reached in the various national systems. This means that the transformation of the states' obligations into rights of the individual, and the consequent transposition of Community norms into the internal jurisdiction, which is the source of such rights, cannot create problems for fundamental rights.

Now, taking into account what has been said up to now, and if one considers that the list of fundamental rights is not the same in all the legal systems of the Community – for example, while the German tradition appears to be inclined towards the inclusion of rights which assist economic initiatives, the Italian tradition is more restrictive because it only considers those economic rights which are absolutely necessary to the development of the human

person[74] – there is no doubt that the competence of the European Court of Justice to control the constitutionality of Community acts which violate the fundamental rights that are expressed in the national constitutions may replace the competence of the Constitutional Courts only when such competence is exercised on the highest level which up to now has been reached by the various Community systems in the matter of human rights. So long as this does not happen, the competence of the Court of Justice must be considered as simply complementing that of the national Constitutional Courts. However, the evolution of the Community system in such a way as could consolidate in quantity and quality the whole catalogue of fundamental rights, which are recognised by the member states, is not yet in sight. In fact, the Community system is sectarian by definition and therefore, in matters such as the ones being here considered, needs to be integrated with the national systems. This principle has often been discussed within the Court of Justice itself, which has declared that in this field Community law must draw inspiration from that of the states, since there is no such thing as a category of Community fundamental rights.

The protection of fundamental rights may even conflict with Community acts, which are formally free of the obligation to respect fundamental human rights: an obligation which is ratified only on the national level. In fact, if the fundamental rights that are expressed in the constitutions and national laws constitute a limit which cannot be attacked on the basis of any provision of international law, there is no doubt that this principle must also be valid for Community law. This problem will remain until Europe's political union is fully achieved and until it will have integrated the powers which are presently directed mainly at controlling the market with the powers that concern the status of citizenship as a whole.

The objectives of the EU, according to the founding Treaty, pertain to economic relations and follow a philosophy which does not fully agree with the principles embodied in many constitutions, or which have been adopted by many European constitutional courts, including the Italian one. For example, no one can deny the strong presence of humanistic

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[74] See Perlingieri, *Diritto comunitario e legalità costituzionale*, ESI, Napoli 1992, p.36 ff.

and solidaristic values in the Italian Constitution and in other constitutions.[75] All in all, this preference for the values of the human person over profit and the market is not explicitly present in the founding documents of the EEC and the EU. However, to admit the possibility of derogating from principles which give a particular value to national constitutions would mean that one accepts in theory the existence of a European Constitution, which transcends the national constitutions. This is not the case. The co-operative structure on a governmental level between the states party to the Treaty of Rome was retained in the Treaty on the European Union. In this way, Community structures continue to show a deficit in democratic character. But they also continue to demonstrate a preponderance of liberal ideas which do not incorporate the social and solidaristic values which prevail in other European constitutional charters. As to the protection of fundamental rights, their dilution by restricting the areas which fall under the protection of human rights guaranteed by states, would imply a derogation from the principle of the people's sovereignty. This can be done neither by the organs governing the Community nor by the Court of Justice.

In this sense, the European Court of Justice can never substitute the states' Constitutional Courts in evaluating the legitimacy of Community decisions, by claiming the right to interpret the juridical values of European civilisation, as a kind of Community natural law and this precisely because, at the Community level, market values still prevail today over social values and solidarity. A gradual integration of Community laws with constitutional laws regarding human rights may in the long run increase the level of human rights protection at the Community level, considering the provisions of certain contemporary European constitutions in this field. Until this objective is achieved, the constitutions, with their norms on principles and the constitutional procedures provided for by the member states, remain the most effective tool for the protection of human rights. Only when the guarantee offered by the Court of Justice becomes the most complete, in the context of the human rights policies implemented on the European continent, will the European Court of Justice be able to play a role which would replace the Constitutional Courts of member states. It could then bind

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[75] Perlingieri, *Diritto Comunitario*, op. cit., p. 72.

states with its "judicial precedent," because this precedent will constitute the highest point reached in the jurisdictional protection of human rights at the European level.

One can therefore conclude – and this is the point of view of the Italian Constitutional Court – that the process of gradual opening up towards the needs of the Community cannot put into question the supreme values of the constitution that concern, for example, the republican identity of the state itself, which are remote from the sphere of influence of Community law. As long as the essential values of the constitution are different from those which characterise Community law, this conclusion appears indisputable, especially when one reflects that the problem of recognising Community law as the yardstick of the constitutionality of the laws of a state is only felt in the areas which come under the competence of Community law, that is in the economic sector.[76] This conclusion is not contradicted by the decisions of the Italian Constitutional Court, which hold that Community law enters directly into the national system (judgement n. 389 of 1989) and is solely unable to tacitly modify the constitution. If the essence of the constitution lies in the people's sovereignty, then the principles of democracy, equality, and the rights of the human person constitute implicit restrictions to the revision of the constitution. And they certainly constitute restrictions, even to the incorporation of Community law.[77]

When the Community legal set-up will expand and become more general and complete, unlike the founding document of the

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[76] On the evolution of constitutional jurisprudence regarding the relations between the Community system and the internal system, see F. Sorrentino, *Profili costituzionali dell'integrazione comunitaria*, Giapichelli, Torino, 1994, especially pages 5-31.

[77] See Barile, "Rapporti tra norme primarie comunitarie e norme costituzionali e primarie italiane", in ID, *Scritti del diritto costituzionale*, Padova, 1967, p. 701.[78] This option can be found in the common Declaration of the European Parliament, Council and Commission of the 5th April 1977, which confirms the European institutions' commitment to observe fundamental rights, as described in the Constitutions of the member states and by the European Convention for the protection of human rights and fundamental freedoms. Subsequently, on the 12th April 1989, the European Parliament approved the Declaration of rights and fundamental freedoms, the Preamble of which sets out the Community's instruments and international treaties which aim to protect human rights, and contains the list of cases which are judicially safeguarded.

Community, the problem of the general prevalence of the jurisprudence of the Court of Justice over the constitutional courts will become more tangible. In this case, however, we will be facing a real Community constitution, which will be considered as being hierarchically superior to the states' constitutions in all fields. This can only happen if the European Community assumes the character of a truly federal state, so that the Court of Justice will vigilantly oversee the observance of the treaty/constitution of a federal state, just as constitutional courts do today with respect to the constitutions of states. Until the life of the European Community undergoes such a significant evolution in its institutional identity, the Court of Justice cannot go beyond the limits that derive from its very nature as an organ created by an institutional treaty. This difficulty cannot be overcome, as the Court of Justice has tried to do, by itself laying down the criteria and principles to be applied in the different legal systems and which must then be observed by the latter. One way to enhance the protection given to fundamental human rights would be for the Court of Justice to favour the movement towards social integration instead of that which is aimed at guaranteeing only an efficient single market.

So far the Court of Justice has only held that, in the absence of a category of Community rights specified in the Community Treaties, fundamental human rights are part of the general principles of Community law whose observance it guarantees (judgement Stauder of the 12th Jan. 1969). These are principles which the Court of Justice, in the absence of an EU Constitution which sets down a precise catalogue of human rights to be protected, derives from the common constitutional traditions of its member states,[78] and from the international treaties signed by them; while affirming that the protection of fundamental rights on a Community level must take place within the limits of the Community's objectives. As a result, provisions which are incompatible with the fundamental rights guaranteed by the constitutions of the member states are illegitimate. The Court has

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[79] It might happen that the application of this clause allows the Court to redraw and to filter the more advanced experiences which have developed in the national systems in this field, and can therefore give back to them an updated interpretation of principles and values borrowed from individual and national constitutional experiences.

adopted this approach in various decisions, beginning with the judgements delivered on the 17th December 1970, c. 11/70, and on the 14th March 1974, c. 4/73.

With reference to this position taken by the Court of Justice, it must be noted that the notion of human rights used by the Court is derived from the ordinary behaviour, that is from the "constitutional traditions" of the member states; and therefore, if there is a constitution which in this field seems to be particularly advanced, it does not constitute a stimulus to raise the qualitative level of protection of rights on the Community level, but is on the contrary an exception which is to be incorporated into the European "average protection."[79]

One may object to this conclusion by observing that the identification of the common principles of member states on human rights so as to interpret the import of their "common constitutional traditions" in this regard, does not fall within the institutional duties of the Court; because the latter should only supervise the correct application of the Treaty and the laws derived from it, taking into account the aims of the Community. But the most significant objection is a different one. It is objectively difficult to carry out a survey of such principles which are present in the constitutions of the member states, considering that constitutional laws reflect a compromise between different interests which is specific to each legal system and that they cannot be interpreted unless with reference to the kind of system for the protection of rights that each of the various legal systems envisages. Since there is no unique element for the protection of fundamental rights, it is therefore difficult to proceed to a common interpretation of these principles. Consequently, the recognition of the principles shared by the various legal systems in so far as fundamental rights are concerned,[80] besides being an unsatisfactory operation on the political plane, since a comparative approach brings about an inevitable dilution in the protection of these rights, also turns out to be problematic from the standpoint of the hermeneutic techniques on the basis of which it should be accomplished.

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[80] By this decision the Court of Justice showed its approach to include in the sphere of Community law juridical values derived from the juridical traditions of the member States. In this effort, it used an interpretative technique which does not take into account all the views expressed at the national level, but those which seem to be more suitable to achieve the Community's goals.

13. The role of the European Convention on human rights in the policies implemented by states on rights

To give a comprehensive picture, it must be stated that at present the most authoritative endorsement of the Court's approach is to be found in clause F, paragraph 2 of the Treaty on the European Union, the Maastricht Treaty, which states: "The Union respects the fundamental rights which are guaranteed by the European Convention on Human Rights and which derive from the constitutional guarantees which are common to the member states as general principles of Community law". The parameter of constitutionality which must be utilised by the Court of Justice is constituted, as we have seen, not only by the common traditions of the member states, insofar as these are general principles of Community law, but also by the European Convention on Human Rights. It seems, however, that what has been said concerning the "common constitutional traditions" of the member states of the Community should also hold for the European Convention. When the Convention is applied, the list of human rights which deserve protection would be shorter and the quality of the protection would be lower, when compared to the shelter afforded by some of the constitutions of the member states of the EU. Understandably, the Convention only stipulates a minimum level of protection which is common to the signatory states. Moreover, the same comment can be made with reference to the Declaration that was approved by the European Parliament on the 12th of April 1989. It seems, therefore, that in this field there is still a wide gap between Community law and the constitutional law of the states. Applying Community law means reducing the protection of fundamental rights to the lowest level, considering the diversity in the national standards of protection of human rights. This will occur so long as some constitutional charters provide for additional protection when compared to other constitutions and to the Convention itself. Of course, this additional protection cannot be renounced. This must not, however, detract from the role that the Convention has played in the expansion in quantity and quality of human rights in the countries that have adhered to it. Many constitutional courts have used the Convention as a launching-pad for a policy on human rights, feeling authorised by it to carry out ever more significant interventions in support of human rights and obviously carefully watching the dangers of slipping back. It is a fact that the privileged status accorded to human rights in the European Convention

has profoundly influenced the operations of the constitutional and ordinary courts of the States parties thereto by promoting a growing convergence in this area, especially in countries where democratic traditions are still young.

Reference to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms has become compulsory in the judicial practice of each state which adheres to the Convention, so much so that it has been said by the European Court of Justice that the European Convention on Human Rights has become a truly: "Constitutional instrument of European public order" (Lozidou vs. Turkey, judgement of the 23rd March 1995). This has been possible thanks to the fact that the Convention is an instrument, which every individual citizen can invoke without the need to have recourse to the mediation of some public authority. This is a revolutionary innovation in the process of internationalisation of human rights protection. In 37 out of the 40 States which adhere to the Convention, the substantive norms are automatically applicable. The United Kingdom and Norway have proceeded to draw up draft legislation to incorporate the Convention. The only exception is Eire, where the rights described in the Convention are not directly applicable.

In many countries like Austria, Belgium, Germany, Hungary, Poland, Spain and Switzerland, the Convention has become directly relevant for the application of the Constitution's fundamental rights. The constitutional courts give domestic fundamental rights the same extension that those rights have in the Convention, in conformity with the interpretations given by the European Convention of Human Rights. In this regard, the Federal German Constitutional Court's pronouncement of the 26th March 1987 is emblematic: "In interpreting the Basic Law, the content and state of development of the European Convention on Human Rights are also to be taken into consideration in so far as this does not lead to a restriction or derogation of the protection of fundamental rights under the Basic Law; an effect that even the Convention itself seeks to rule out (article 60). For this reason the case-law of the European Court of Human Rights also serves in this regard as an interpretational aid in defining the content and reach of the Basic Law's fundamental values and principles of rule of law."

Thus, the case law of the Strasbourg Court becomes decisive in interpreting national fundamental rights. This is a line of thought, which seems particularly attractive to the new constitutions of central and eastern Europe. The Hungarian Constitutional Court's statement in

this regard is significant: "The right to human dignity means that the individual possesses an inviolable core of autonomy and self-determination beyond the reach of all others, whereby, according to the classical formulation, the human being remains a subject, not amenable to transformation into an instrument or object ... Dignity is a quality coterminous with human existence, a quality which is indivisible and cannot be limited, hence appertaining equally to every human being." The Hungarian Court has construed this right as a "source right", or as a "constitutional right that the Constitutional Court as well as ordinary courts can call upon in a subsidiary fashion in the interest of protecting individual autonomy, in every case where none of the concrete rights explicitly named in the constitution are applicable in the given circumstances" (judgement of the 23rd April 1990/8 ABH 32, 45).

It follows that almost all the European constitutional courts employ similar methods to act as the guardians of constitutional rights. They interpret these rights in a convergent manner and derive comparable legal effects from them. Courts require a compelling state interest and a proportional relationship between means and ends as preconditions to any restrictions on fundamental rights. The principle of proportionality, which had originally been developed by some courts on the basis of their domestic experience, was later taken up by the European Court of Human Rights in Strasbourg as well as by the Court of Justice of the European Communities in Luxembourg and now constitutes a common standard all over Europe. Some courts, such as the German or the Hungarian Constitutional Courts have complemented this principle with the concept of the: "core of a right," which stands for the idea that the essential content of a constitutional right cannot be limited in any way. According to the Hungarian Court, the core of a right is violated when there are no adequate reasons to limit a constitutional right. Only the rights to life and human dignity are in principle unrestricted.

14. Conclusion

From the observations made up to this point, it emerges that, in most of the European constitutions in force, human rights not only contribute an essential part of the identity of the constitutional system itself and as such are not modifiable, not even by the procedures of the revision of the constitution, but they also have a constituent function in that they

legitimise the creation of supra-national authorities which limit the authority of states in this field. They therefore constitute an internal and an external limitation –each insuperable– to the sovereignty of states. Moreover, this claim does not consider their origin, whether as natural rights or rights that are recognised by the state. In any case they are rights which pre-exist the state, and as such they are dealt with by almost all the European constitutions. Most of the European constitutions are part of the productive process to which belong the classical works of Montesquieu and Rousseau, the French Declaration of Human Rights of 1789, the Federalist Constitution of the United States (1787) and the texts of the constitutions of many countries. This process continued after the War, with the Italian Constitution of 1948, the Fundamental Law of Bonn of 1949 and the new democratic constitutions of the Iberian Peninsula, of Portugal in 1976 and of Spain in 1974.[81]

The human person as an individual and as an integral part of social groups lies at the centre of these constitutions and conditions the internal and external activities of the public powers. In these new European constitutions, the citizen, who was formerly protected by the liberal state as an individual, an isolated citizen, is now more and more protected as a democratic citizen, a citizen who participates in the life of the *polis*. Private and public freedoms therefore constitute one whole, in a vision of the world which is destined to see this model of a state, the Liberal-Democratic State, migrate from the more to the less developed nations. This will occur through the provisions of international law, which promote the dignity of the human person everywhere, as well as those of municipal law which adapt themselves to the generally recognised provisions of international law. The rights of the democratic citizen – political rights– thus constitute the fundamental guarantee so that these declarations of rights will not only exist on paper, but will be translated into public duties: duties which primarily belong to the state, but also duties of society, in order to bring about social justice in all states, that is wherever men live. The protection of human rights, which are universal rights, necessitates interventions, often of a corrective nature, on the existing social, political and economic equilibrium; to guarantee a minimum standard of human rights protection, in quality and quantity.

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[81] On the characteristics of this evolutionary process see P. Haberle in *Le Costituzioni dei Paesi europei*, Padova, Cedam, 1998, p. 253.

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HOW MAY HUMAN RIGHTS ACQUIRE UNIVERSAL RECOGNITION?

LUIGI VITTORIO FERRARIS

The Fiftieth Anniversary of the Universal Declaration of Human Rights is an opportunity to assess the efficacy of the Declaration. Hence it is important to gauge the extent of respect for human rights; taking into account the differences between the various human societies existing in the framework of the international community. The 1948 Declaration embodied Euro-American principles. Hence the world outside Europe and North America was perceived in terms of distinctions existing within Western ideas. If human rights are the product of Western civilisation, albeit deemed to be "universal," the question of whether they should be accepted by those who did not participate in the intellectual evolution of human rights has to be posed. Respect for human rights is an obligation incumbent upon every member of the international community. Yet certain states are not ready to subscribe to key tenets of human rights unless these are modified to take account of their culture. These attitudes may serve as pretexts to justify violence or dictatorship. They may also reflect an irrational response to feelings of exclusion and powerlessness engendered by the process of economic globalisation. However, human rights should take into consideration the differing beliefs found in various cultures. This is the best way to ensure the growth of universal respect for human rights.

1. The Fiftieth Anniversary of the Universal Declaration of Human Rights can be considered an excellent opportunity to assess the efficacy of the Declaration and its survival during the turmoil of the East-West conflict. At the same time, it offers a convenient invitation to plan future initiatives to enhance the aims and content of human rights protection the world over. Since 1948 the General Assembly has adopted a vast panoply of conventions, resolutions and declarations, covering all possible aspects of human rights: from the rights of women or children to economic, social and cultural rights, from the condemnation of apartheid to the right of peoples

to peace; from the right to development to the World Conference on Human Rights in 1993; from the prohibition of land-mines to the ban on biological weapons.[1] Last, but certainly not least, the approval in Rome, although not unanimous, of the Agreement for the institution of an International Criminal Court has been hailed as a great step forward.[2] Notwithstanding the balking attitude adopted by some important members of the international community,[3] human rights are now an integral part of international law as expressed by the United Nations: the highest world institution.[4]

However, the scope of the subject cannot be restricted to the interpretation of present or future rules of International Law, nor to the aspiration to internationally prosecute the culprits responsible for massacres or genocide.[5] Even more promising is the development which has taken place in the last few decades; namely the increasing and deepening awareness of the existence of common principles on human rights, not so much in the name of mercy but as a requisite for stability within the international system with the ultimate aim to maintain or enforce peace as specific situations could require. Such a consciousness does not yet signify an unconditional recognition by all States of their obligations, nor it is a sufficient hindrance of violations. But it legitimises an analysis no longer

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[1] It could be possible to include into the general protection of human rights also the Agreement on Prohibition of Chemical Weapons [see the imminent publication of detailed analysis in "La Comunità Internazionale), 1998/4] and the many Agreements concerning Disarmament or Limitation of Weapons.

[2] See F.Lattanzi (ed.), *The International Criminal Court*, Napoli, Editoriale Scientifica, 1998; P.Ungari - M.P.Malintoppi, *Verso un tribunale permanente internazionale sui crimini contro l'umanità*, Roma, Luiss, 1997; *Towards the establishment of a permanent International Criminal Court, Conference. Proceedings, Valletta, 1997,* (Mediterranean Journal of Human Rights),II-1998/1; *Tribunale penale internazionale,* (Sistema Informativo - Archivio Disarmo), 1998/6.

[3] See K.Roth, *Sidelines on Human Rights,* (Foreign Affairs), XVII/1998,n.2, p.2 on the inconsistent attitude of the United States

[4] See A.Cassese, *I diritti umani nel mondo contemporaneo,* Bari, Laterza, 1988

[5] A dilemma is unavoidable: how to reconcile the trial of thousands accomplices in massacres and the possibility that a democratic process would elect into power the groups, from which the accomplices come. The human rights would be betrayed by democracy!

mainly of ethical categories entrusted to diplomatic documents, but of realistic political strategies.

It is thus of utmost importance to gauge whether the level of respect for human rights, in accordance with the fifty years old Declaration and subsequent documents, is higher and more widespread and above all to try to agree on the quality of the level itself, taking into account the dissimilarities among the different human societies existing in the framework of the international community. Such an approach is even more appropriate along the shores of the Mediterranean: a cradle of past civilisations as well as today a hotbed of many diverging views on the destiny of mankind and on the structure of political societies confronted by the challenges of the contemporary world.

Frankness and objectivity are necessary in order to overcome a dilemma: human rights should enjoy general acceptance, but without impinging upon the different intellectual and political cultures. To resume the core of the matter, the differences should not be used to provide an easy justification to escape from responsibilities, but on the other hand we should not yield to a traditional euro-centric approach, which could be self-defeating and misleading. Moreover it seems advisable to give a political evaluation of the whole texture of human rights, avoiding entanglement within an excessively theoretical, legalistic, approach or in a noble but vain moralistic attitude: the realism of international life would quickly belie either of these.

2. The 1948 Declaration embodied principles which were the offspring of a Euro-American approach linked to the historical period dominated by the war aims of World War II; which had mostly affected European peoples. The main tenets of the Declaration were intended as a response to the historical challenges of the first half of this century; namely to dictatorships and oppression supported by totalitarian doctrines bearing the name of Fascism in its various aspects and expressions. Thus the Declaration in its noble text gave high priority, in a humanistic spirit, to freedom through pluralistic representation (Article 21), openness to ideas (Article 18), anti-racial equality (Article 2 and 4) and the rule of law (Articles 7-12). The Declaration did not hesitate to make a choice outlining the general profile of its values, which were supposed to reproduce the proclaimed aims of the war for freedom and justice against the inhuman and

anti-historical Nazism. A: "*common understanding of these rights and freedoms is of the greatest importance,*" as the Declaration says in its premises, beneath which discordant feelings undermined this unanimity. East and West were already on the threshold of an antagonistic relationship.

It is a fact that the Declaration was adopted by the United Nations just when the hopeful expectations raised by the newly born international organisation were on the eve of being swept away by the cold war and by the partition of the world into two antagonistic groups. The authoritarian philosophy and the expansionist ambitions of one of the two groups or blocs was not consistent with many of the provisions of the 1948 Declaration. An ambiguity right from the beginning undermined the purpose of the Declaration: specifically how to strengthen democratic societies when the two blocks were at variance on the interpretation of democracy and thus on the very content of the human rights, which they purported to support. The Cold War succeeded in oversimplifying the antagonistic views:[6] formal political rights of freedom as a recognition of personal dignity on one side and on the other the social rights as a requisite for enjoying human rights. The historical origins of the Declaration were certainly anti-fascist, but not anti-Communist; human rights were anti-totalitarian, but upheld by totalitarian states. We have to reckon with such an ambiguity and its consequences can be traced right down to the present.

3. Two consequences have to be taken into consideration in order to try to understand the present significance of the Declaration. The first consequence of the Declaration was the result of the European way of thinking under the sway of immediate history but as well as the final outgrowth of a culture, the roots of which were more than two thousand years old. The Declaration was trying to sum up and convey European ideas for the benefit of the whole mankind. These ideas were constituent elements of the "idea of Europe,"[7] which cannot be understood without making recourse, as is today quite unfashionable, to the concept of civilisation. One must

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[6] See W.Schäuble, *Für sich allein ist jedes Land den Abhängigkeiten stärker ausgeliefert*, (Frankfurter Allgemeine), 15.5.1998, p.15.

consider the historical evolution of a certain number of peoples, the European peoples, through ancient Greece and Rome, through Christianity, through wars and revolutions which led them to construct sets of principles, which principles were further transformed by three Revolutions (the American, the French and the Russian October revolution). Let us assume as a postulate that the 1948 Declaration was based on European principles in the process of becoming universal principles, namely: the separation of spiritual and temporal authority, social pluralism, the rule of law, individualism, and so on. They were the core of what is meant as the West and its legacy.[8]

The second consideration might seem blasphemous. The approval by the United Nations of the 1948 Declaration was not considered a major historical event after World War II. We can hardly find any history books on that period mentioning the Declaration as a contribution to the shaping of post-war world.[9] The inception of the Cold War and the ensuing dramatic tensions consigned to oblivion the fact that theoretically the members of the United Nations, West or East, capitalist or socialist, had jointly subscribed a Declaration on Human Rights. The Declaration was at once submerged by opposing views and became a punching ball in an ideological feud, offering suitably offensive ideological weapons to both sides.

A third consideration logically follows the previous remarks. The Cold War system was imbued with the conflicting ideologies, both stemming from a Western approach. Even if western democracy and socialist democracy were fighting one another, both developed from European origins; both asserted their sources in western ideas and philosophies and each proclaimed their willingness to pursue collective human happiness. In the course of the *civil* war between

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[7] See F.Chabod, *Storia dell'idea di Europa*, Bari, Laterza, 1977

[8] See E. Huntington, *The West unique, not universal,* (Foreign Affairs), LXV/1996 n.6, p.30

[9] E.g. not even the vast Langer's *Encyclopaedia of World History* think it necessary to mention it nor does the official Soviet history, *Istorija Diplomatii,* Moskva 1974, bothers to mention it and prefers to relate on the Western initiative for warmongering propaganda. The two classical diplomatic history, Duroselle, *Storia diplomatica dal 1919 al 1970,* Roma, Ateneo, 1972 and E. Di Nolfo, *Storia delle Relazioni Internazionali,* Roma, Laterza, 1996 take notice of the Declaration.

the two ideologies, both of them claimed to be considered the righteous heir of the European traditions and each thought that the opposite ideology was trying to resist the destiny of mankind. Consequently both of them were appealing to human rights to support their own ideology. But they had a completely different conception of political and ethical values, even when they had recourse to the same words, such as democracy and justice, freedom versus social justice, the right to work versus the right to a free intellectual and moral development, free initiative versus planning from above and so on. A jointly shared set of human rights were not laid down in the Declaration, which could not supersede antagonistic views.[10]

4. As a result of such a complex situation of competition and confrontation, the world outside Europe and North America was submitted to this dichotomy existing inside the European world of ideas. The two antithetical blocks were endeavouring to persuade, by world-wide conquest or pressure, that their ideas were the best to satisfy everyone's needs and aims. Hence the diffusion of western type government or of fake socialist governments. The bipolar system was used to control the customary anarchy of the international system and to compel each member of the international system –in short the states– to side with one of the poles and to become in a certain sense its client. The attempt of the Non-aligned Movement to avoid the choice collapsed, leaving in the states concerned the ruins of many human rights.

Hence the results were on the whole rather disappointing. The West extended its support to authoritarian, corrupt or inefficient governmental structures as long as they were friendly and those governments professing allegiance to the Soviets installed social systems for ruling the economy, which proved to be a total failure, even more than inside the official Soviet block itself. However if we go a little deeper into the texture of the Third World –in the widest meaning of the word– the record of the European/Western influence was finally revealed to be better, although in a very uneven way.

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[10] For instance official texts in Russian of the Sixties do not list among the rights, the human rights but only political or social rights.

Western influence inculcated the roots of a democratic process, which was inadequate in its implementation but acceptable at face value and above all tried to give full recognition –albeit certainly not as yet full implementation– to human rights in the spirit of the 1948 Declaration. The disregard of the Declaration was, after all, felt as an infringement and in certain cases the promised redress took place.[11]

The upheaval of 1989 altered the picture. However, this change had been prepared during the last decades of the cold war period thanks to the slowly progressing détente, of which the different crises and steps forward are well-known. A mile-stone was reached by the 1975 Helsinki Final Act. It concerned only Europe and marginally the Mediterranean and therefore could not pretend to have a general value. However, it gave legitimacy on the level of a collective political engagement, which did not dare to call itself a treaty and which was not ambitious enough to be a universal declaration of some sort, to a typically Western European political and human society.[12] Political freedoms were to be the paramount goal and not social justice or social equality. In the process of the CSCE, the human right dimension or the so-called and well-known "third basket,"[13] which was not initially the main aim,[14] ended up becoming the most important part of the CSCE process. Even the code of conduct or the famous ten principles were influenced and inspired by the idea of respect of human rights, but strange enough with reference to the Friendly Relations Declaration, more than to the Human Rights Declaration.

The Helsinki Final Act was thus a stage in an evolutionary process and if we look back to the late 70's and 80s, we witness an increasing

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[11] Let us not forget that e.g., in Russia no responsible for he past crimes of the Soviet rule stood for trial: See O.Figes, *.Mehr braucht er nicht um ein Heiliger zu sein,* (Frankfurter Allgemeine), 20.7.1998,p.35

[12] Cfr.L.V.Ferraris, *I documenti della CSCE*, in (Affari Esteri), 1975/28, p.682; G.Barberini, *Sicurezza e cooperazione da Vancouver a Vladivostok,* Torino, Giappichelli, 1998

[13] See V.Mastny, *Human Rights and European Security,* Durham, Duke University Press, 1986

[14] See V. Tornetta (a cura di), *Verso l'Europa del 2000 - Il processo CSCE da Helsinki a Vienna* - Bari, Fratelli Laterza, 1989.

awareness of human rights as a precondition for détente and thus for stability and finally for peace. The evolution went so far that intervention into internal affairs in order to protect human rights started to be regarded as a legitimate action, thus weakening the until then watertight principle of non-interference into internal affairs. Human rights were still being treated as a pawn by the two blocks, but slowly in a more and more politically concrete mood. Possible agreements were looked into in order to underline the validity of the human rights dimension with the aim of encouraging détente as a method for crisis management. This was shown by the reactions to the invasion of Afghanistan in 1979[15] or to the military coup in Poland in 1981, but as well during the interventions in Lebanon to protect the Palestinians in pursuance of the European Venice Declaration of 1980 and finally by interventions, such as *Desert Storm,* which were labelled a police action to restore international law and order.

This evolution reached its apex in 1989 with the victory in Europe of the Western system of democracy. Nothing should now hinder the dissemination of human rights in the full meaning of the Western European version of the 1948 Declaration, as it was proudly announced. Such human rights as the right to freedom and to individual self-development, were placed at the centre of international relations. Democracy was to be the only system and autocracy doomed to disappear and this would in turn ensure universal peace[16] and the resolution of conflicts.[17] The extension of intervention into internal affairs would mark a turning point in the diffusion of human rights as the main objective in international relations. The frequency of interventions for peace-keeping or

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[15] In the Afghanistan tragedy a contradiction became baffling: the international community considered Russia responsible for an unlawful interference and supported the fighters for freedom - the mujaheddin - but after the retreat of the Soviet Army the winning forces have violently disregarded the rights of men and women and installed institutions openly against the West and its philosophy. Perhaps the 1948 Declaration was more respected under the Soviet occupation, at least in principle!

[16] See A.Panebianco, *Guerrieri democratici,* Bologna, Il Mulino, 1998

[17] See M.Quinto, *Diritti umani e conflict resolution per nuove strade verso la sicurezza internazionale,* (I diritti dell'uomo), VIII/1997, n.3, p.13.

enforcement, or of peace-making and the debate on the significance, aims and procedure of such interventions[18] were clear signs of the success of human rights and individuals would also become a factor in the international system as a constraint on the formerly unlimited powers of sovereign states.

5. Very much to the surprise of those, who were dreaming of the inevitability of peace all over the world, internal civil wars spread beyond any ability to prevent, control or stop them. Old ideologies were over; but in the meantime unexpected nationalistic sentiments, some of them frozen until then under the cover of the East-West ideological conflict, exploded and sometimes wars spilled over international borders under the banner of ethnic hatred. These were wars among peoples or tribes, no longer between rational states. Therefore, not only was the quantity of conflict growing, but their quality also worsened, as there was more and more brutality against innocent civil populations. The most basic human rights and of course the principles of the Declaration were trampled upon without restraint and even the most ancient rules of warfare were ignored: this happened as much in Europe as elsewhere. It is a sad truth that in the few years after 1989, more people have perhaps been killed through violence than in the previous 40 years and millions have been chased out of their homes as pawns in schemes of unrestrained violence.

How can we still pretend then that human rights are becoming a more and more integral part of the general framework of international society to the extent that, for instance, an international criminal court, a truly revolutionary novelty, can be launched? We should try to give an answer to this contradiction which, sadly, is still very palpable today. Does it mean that the complex of human rights, which are officially declared as a part of international law and the international system are not universally accepted? Is the Declaration no longer universal? Do peoples who do not consider themselves to be under any obligation to respect human rights exist? If so, why? Could this be because the principles

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[18] See A.de Guttry (ed.), Italian and German Participation in Peace-keeping Pisa, Edizioni ETS, 1996

of the Declaration are the product of a European/Western *Weltanschauung* and do not therefore enjoy universal validity? This is the central point and it is a major issue. From this angle, the Mediterranean could be considered as a small regional area where these queries could easily be raised, given the prevalence in this region of many conflicting interests and views on what human rights should mean concretely.

However, we cannot content ourselves with taking notice of such a gap between declarations and reality and thus reaching the simplistic conclusion that the universality of the human rights is increasingly difficult to sustain. We should rather try to identify a few principles, the universality of which cannot be denied, while accepting afterwards that they could be presented in different way. We should try to better express human rights and not to stick to a rigid set of rules, which may frequently be distorted in practice. This is indeed a dangerous path, because it could undermine the whole structure of human rights. However, a realistic approach could be recommended in order to avoid being overtaken by the realities of the international scene.

Moreover, we could not overrule the classical and well established answer of the analysts of international law: the Declaration on human rights and the principles concerning them are now a part of the general accepted rules in the world and they have lost their connotations as a product of Western European culture. Therefore their universality cannot accept exceptions or exemptions and, as a matter of fact, no state is willing to stand openly against the rules embodied in the 1948 Declaration and in the many other Declaration concerning individuals. Thus, according to this argument, the conclusion should be obvious: beyond any shadow of doubt it is legitimate to believe that the *corpus* of human rights is valid for everybody everywhere.

However we cannot ignore the fact that a present trend tries to adopt a selective attitude to human rights and their rules, on the grounds that they have historically been constructed from a European/Western standpoint, or attempts to adapt or implement them differently. We can witness such a trend in the many pompous Declarations approved in the context of Islamic views. The texts are apparently fully respectful of official human rights. But then some minor clauses reveal their inconsistency with the universal international documents and this upon the justification that the

general will of the people concerned, or their culture, make it necessary to provide for such modifications.[19]

Notwithstanding their merits, if the structure of human rights is a product of Western/ European civilisation –albeit entitled to become universal as set down in many international documents– must they be accepted *in toto* by those who did not take part in the intellectual evolution of human rights as they are now officially enshrined, or by those who have a different understanding of the essence of the individual and the collective destiny of human beings? If the core of human rights is the expression of a noble set of values which are part of the European tradition, why should the rest of the world share the same values without any modification or adaptation? One can certainly argue in favour of a: "globalisation of political morality" and for: "the construction of a body of international ethics, whose putative custodian is an amorphous but real entity known as the world community;"[20] but can we discard dissenting opinions?

6. The practical and political importance of the subject implies that we try to find an explanation of what is happening around us: namely violent transgressions of human rights and the inadequacy of the international system to put an end to these violations through collective action.[21]

For the sake of a tentatively realistic approach it seems advisable to explore the political implications of some substantial human rights, leaving aside their humanitarian profile.

a) A first principle poses a question, which embodies a goal: which are the criteria to declare that a state and its institutions are democratic, inasmuch as democracy is considered the bulwark of human rights. So far, the best functioning system to ensure

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[19] See P.Ungari - M.Modica (a cura di), *Per una convergenza mediterranea sui diritti dell'uomo,* Roma, Luiss, 1997,

[20] So R.Baultjens quoted in Z.Brzezinski, *Out of control,* New York, Simon & Schuster, 1995, p.93

[21] From the intervention in Albania under Italian guidance in 1997 or the antiterroristic air-raids of he United States in Afghanistan and Sudan in 1998 indicates that the collective action according to the ambitious United Nations charter is not conducive to solution.

a stable and functioning link between governed citizens and governing institutions has been the one worked out during many centuries in Western Europe and extolled by the American and French Revolutions. It was put into practice through different forms of parliamentarian or presidential constitutions, under the fundamental assumption that periodical changes in government are necessary in order to maintain a permanently smoothly working balance between government and opposition. More than a legalistic inquiry on electoral laws or bye-laws, the essential requirement is the principle that the opposition should be accepted on an equal footing as the government and that consequently citizens can carry out a change if they so wish.

Nowadays such a noble principle suffers under the stress of the public disaffection towards politics, due to the lack of convincing perspectives or credible alternatives. This notwithstanding, the above-mentioned basic tenets have to be recognised as the best guarantee of human rights, without which their political objective could be nullified. Few states refuse to be consistent with such a principle, at least verbally. Fewer states actually implement it. However the international society expects that, in one administrative/constitutional form or another, the principle of choice between the ruling power and the opposition should be made possible. This does not necessarily imply a fully-fledged democratic system, but it is a principle of balance which should be considered essential and it is now an integral part of the universally recognised human rights.[22]

b) According to a second principle, the flow of information, ideas and –in principle– the free movement of persons and the ensuing rights to free expression of ideas through the press and to collectively manifest a political or ideological conviction or ideology are also an integral part of human rights. Here

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[22] Until 1989 the international society accepted a different form of democracy, namely the communist and soviet brand, which now has lost its credibility. Therefore only one profile of democratic rule is accepted at least as an aim to attain gradually.

numerous caveats are put forward, attempting to defend ways of living or of worshipping, or traditional habits, or to safeguard the highest interests of the state or of the collective life. Such reservations could only be a pretext to reduce freedom or democratic expression. But they are not easily discarded when they express deeply entrenched beliefs, which cannot be simply ignored on the strength of a general principle, which could be considered foreign and negative.

We have to accommodate ourselves to the fact, that the interpretation of the concept of liberty is not shared in an unanimous way. The expression of liberty finds its limitation in the liberty of the others, it has been said, but as a result diverging ideas are entitled to be respected. Should we expect to impose on others our concepts of freedom of expression of ideas, when they could contradict the tenets of a society and its in-built solidity? Should new habits be introduced when they collide with the religious beliefs or the customs of the majority? Besides, what should be done, when the majority would like to introduce a system killing all possible flexibility and finally all liberties and how can we measure the extent of popular allegiance commanded by such negative developments? We could reflect on the depth of such controversies within the Mediterranean region itself, where we find many possible examples of this problem.

However it is difficult to resign ourselves to accept that in the name of stability and peace or of respect of diversity the open movement of ideas and of persons should be obstructed and turned upside-down. Therefore even this second principle could suffer some limitations, but the international society cannot accept its negation.

c) A third fundamental element can be summed up in the concept of the rule of law: "a long and rocky road."[23] A set of laws should be valid for all, without discrimination and the competent authority should enforce that set of laws with justice and objectivity. Of course the question could be put: which

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[23] See T.Carothers, *The Rule of Law Revival,* (Foreign Affairs), LXVII/1998,n;2., p.95

kind of laws? A state can pass unjust laws, or laws which violate the common understanding of human rights. Over and above the principles mentioned in the two previous paragraphs, expectations for the rule of law assume the sense of responsibility of an authority, which should introduce just laws or, better, laws consonant with respect for the principles of human rights and enforce them in an impartial way. It is always possible to introduce or rewrite laws. However: "the mere enactment of laws accomplishes little without considerable investment in changing conditions to ensure implementation and enforcement."[24]

As the next step, what is meant by a "just" law? "Just" in relation to what? To the general will of the people concerned and therefore enacted through a democratic process? But then this could also lead to abominable and demagogic laws, drafted under the influence of popular emotions, which can run out of control. Or can laws be considered just if they accommodate social pressures, even if they are not in accordance with the general rules of human rights?

Here we run against a conceptual stumbling block. Let us not think of the sort of laws which can be inspired by a religion, the prescriptions of which may be considered repugnant by other religions, or of changes in the evaluation of laws in the course of time. Let us recall, for instance, the debate about the death penalty. Many states consider the death penalty contrary to the respect of human life and Declarations and Resolutions in this sense have been approved by the United Nations. However, in certain lawfully governed states, the public opinion expects that some crimes should be punished by an adequate death sentence. Elsewhere, people believe that law and order require that crimes should be treated with severity; while still others enforce religious rules, which they say best ensure the public tranquillity.

Even if we are inclined to a pragmatic acceptance of cultural and religious values, which can differ from one civilisation to another and from one people to another, it is now common

[24] ibid.,p.104

knowledge that the infringement of the principle of the rule of law and the related arbitrary lawfulness cannot be tolerated and if this occurs, the wrong has to be redressed. No member of the international system would confess to not possessing a set of rules of law and this is a positive evolution, although these confessions are not always lived up to in practice. Highly disturbing events, as, for example, in Afghanistan[25] or a few years ago in Cambodia, met the acquiescence of the international society and in the first place of the United Nations. Both are prompt in preferring discipline and order even at the cost of disregard for human rights.

Only when the absence of the rule of law threatens stability and peace, can reactions be expected. However these reactions will not necessarily be co-ordinated. The struggle against international terrorism is an example. Officially the condemnation is unanimous (although attempts at justification are not uncommon). However, some well-known states tolerate or go so far as to assist such terrorism even if they are acquainted of gross violations of human rights. Being a signatory of Declarations on Human Rights does not restrain these states from such violations.[26] Unilateral retaliation[27] or collective sanctions can easily be presented as evidence of the recourse by the West, or by big powers, to a big stick policy of hitting the weakest states, which attains dubious results even

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[25] See the attitude towards the Talibans in Afghanistan in (Le Monde), 13.8.1998, p.1

[26] In Afghanistan the violations are financially supported by other members of the international community: F. Chipaux, *L'ordre pur et dur des talibans s'étend sur l'Afghanistan, (Le Monde), 13.8.1998,* and *L'offensive victorieuse des talibans aurait été financée par l'Arabie saoudite*, (Le Monde),15.8.1998, p. 2 . The terrorist activity is financially supported everywhere also in Albania as a good starting point for other activities: s: M.Rüb, *Die islamische Renaissance,* in (Frankfurter Allgemeine),26.8.1998, p.3.

[27] A typical case has been offered by the terrorist attacks in Nairobi and Dar-es-Salaam in August 1998. The international community did not react, starting with the customary European passivity, and the result was a unilateral American reprisal, which of course is not exempt from criticism, but it is evidence of the rights which single members of the international community think necessary to protect themselves in absentia of international measure

in the economic sphere.[28] On the one side, we find tolerance or indifference[29] towards violations of human rights, either in the name of ideologies or on behalf of concrete interests[30] and on the other side pretexts for an increasingly rebellious attitude; inflaming the continuation of terrorist acts, holy wars or mass mobilisations. In this chain of reactions, political aims assert their dominance over human rights.

This negative impact on human rights is even more devastating when ferocious wars are motivated by economic interests, greed for power, total lack of state consciousness or lack of a sense of responsibility for the common good. These elements can fuse to form an explosive mixture when members of the international legal community ignore all basic rules of human rights and even of the laws of war, as happens nowadays in some wretched parts of Africa.[31]

7. Once again, the shores of the Mediterranean offer a rich variety of all these three elements; which we can sum up in the word: "democracy" and which is nowadays considered as a kind of catch-all term: as a bulwark of human rights, a genuine expression of the popular will and the best guarantee against war.

But which kind of democracy are we talking about?[32] At this point, we should perhaps not consider democracy under the specific profile which has been constructed over the centuries by Western/ European civilisation. Instead, we should focus on some rather different interpretations of the general will of each single people

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[28] See L.Zecchini, *L'Amerique malade des sanctions,* (Le Monde)30.7.1998, p.1

[29] General indifference towards those generous persons who are on the spot to help and they are kidnapped fr months and months: that is the case for two Britons and one French in the Caucasus: (Le Monde), 15.8.1998, p.2. As another example the expression of solidarity towards the states hit by reprisals are typical: the Arab league supports Sudan after the American bombing, but they did not a word solidarity towards Kenya which was the major victims of the terrorist act

[30] See W.Köhler, *Die amerikanische Politik nährt den antimarikanischen Terrorismus, (Frankfurter Allgemeine), 22.8.1898,p.10*

[31] See U.Ulfkotte, *Vielen afrikanischen Regionen droht die Somalisierung,* (Frankfurter Allgemeine),13.8.1998, p.3.

[32] On democracy see G.Sartori, *Democrazia e definizioni,* Bologna, Mulino, 1957.

in the world, which do not stem from a Western/European cultural tradition, to adapt the tenets of democracy to their particular needs. This is of course a dangerous manipulation of terminology which can easily conceal every possible misuse of the content of democracy, namely freedom and human dignity and in the course of events, human rights as a whole. We would again incur the risk of promoting dictatorships, or autocratic systems labelling themselves as democracies and the examples in the world are manifold.

We fall therefore into two traps, which are not easily avoided. Firstly it is difficult, in the context of contemporary international society, to accept that a state which is a member of the United Nations and therefore a signatory to the Charter and all the other normative documents of the UN, including the Declaration on Human Rights, can declare itself in complete disagreement with democracy as the rule of the citizens, with the free interchange of information and the rule of law. But, and here is the second risk, each state can give different meanings to the same words, with the result that we must take into account the existence of different civilisations and different sets of principles, which can be differently implemented but which have to be accepted as legitimate.

Leaving aside the rather hypocritical opinion that a system can presume to call itself democratic only if it complies with certain procedures, which are now set down by the West, we should at least expect each member of the international community to be able to give a rational interpretation of the above mentioned three main points. Unless it upholds these basic principles, the international society is not willing to accept as a member a state which demonstrates that it is unable or unwilling to adopt these requisites. However these three elements, in their many facets, could be understood differently in accordance with the will of each people – as long as the people in question is able to express its views – or with its inclinations, which can be interpreted by those having the right to draw conclusions from the general will of the population concerned. A potentially different understanding of these points is legitimate only if their substance is respected. This requires a very delicate balance, the appraisal of which must be undertaken from the standpoint of the political and moral consensus resulting from globalisation. A subjective appraisal, which in turn can give rise to agonising debates and profound disagreements.

This is certainly slippery political and cultural ground, because if

we make democracy a relative concept it is not easy to draw clear distinctions. But it is the real substance of international life. In China: "the Chinese leadership will continue to resist democracy," as long as: "the top priority is to... continue political reforms that will enhance the state's ability to manage the challenges created by China's rapid economic development."[33] In Russia,[34] it has been recognised too late that stability there presupposes a certain level of autocracy and that the capitalist system imposed from above thanks the blindness of the IMF, which supported Russia through generous loans in the period of conspicuous violations of human rights in Chechneya,[35] and the reliance on a single personality of dubious democratic behaviour are causing immense damage. This comes as no surprise when different interests –whether economic or dictated by the need to promote stability– have priority and human rights become the object of expressions of solidarity but not of actions. Perhaps, in some cases, the fulfilment of these interests could really be more important from the perspective of general long-standing projects. Furthermore, it is important to consider that when survival is at stake, human rights may also suffer. This happens in Israel, which considers itself in a state of war and views Arab terrorism as a strategic danger. In such conditions, human rights are pushed aside.[36]

If we stick to such a pragmatic approach we should, or rather we are compelled, to accept interpretations of the three main elements which vary from purely westernised views[37] and a more sober

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[33] See M.Pei, *Is China democratizing?*, (Foreign Affairs), LXVII/1998,n.1,p.8..

[34] See the masterpiece of J.H.Billington, *The icon and the Axe,* New York, Vintage Books, 1970. See also *La Russia alle prese con la crisi finanziaria,* (CeSPI Brief), 1998/54

[35] SEE M.Feldstein, *Refocusing the IMF,* (Foreign Affairs), LXVII/19.98,n.2,p.20; G.Kolko, *Mais exportez donc! dit le IMF,* (Le Monde Diplomatique), mai 1998,p.7. Actually the IMN financed the war in Cechnya confirming that the interbatioal insitutons can cynicalli ignor human rights.

[36] See J.Bremer, *Israel sieht sich immer noch in Krieg*, (Frankfurter Allgemeine), 24.8.1998, p.7g

[37] See L.Dini, I*ntervento del 6 aprile 1998 a Roma*: "The universality of the rights does not imply tar the cultural fundaments, the language and also the institutional mechanisms, and the speed of implementation, should be uniform the world over". Se also as far the American policy is concerned L.Wieland, *Ohne Menschenrechte kein internationales Engagement,* (Frankfurter Allgemeine), 28.7.1898,p.5.

evaluation of the level of human rights which can be implemented in a particular state and in a specific stage of the evolution of that state.

8. Without entering into the now famous debate about the clash of civilisations and about inter-connections between civilisations and the merits and legitimacy of each civilisation, let us continue with a pragmatic approach. When a debate about civilisation gets underway, we could easily start from the Mediterranean, where two great streams of religion and culture have been meeting for centuries. The disregard for certain human rights around the Mediterranean is not a consequence of an open refusal to recognise the legitimacy of the three above mentioned elements; but it seems rather the expression of an anti-western feeling and therefore a rejection of modernisation on the assumption that modernity is connected with the Western approach, which is on principle rejected·

It is not that easy to initiate the debate on modernity. What does it mean exactly? Does being modern mean being qualitatively superior? Is being rich an advantage? Probably yes, insofar as the predominant materialistic path to welfare is a broadly shared aim. However, theoretically, we could also think that the improvement of man and the satisfaction of the soul could be as enriching as materialistic goods, as happens in some parts of Asia, where a different sense of human priorities prevails and it may go so far as to neglect economic advantages.[38] Such a transcendental attitude has been labelled as contrary to the evolution of mankind, where this evolution is identified with economic progress[39] and because violations of human rights will jeopardise economic development or living standards or welfare. Such a reaction is however endured in the name of the rebellion against imported moral values, namely human rights under the profile of Westernised society or in another form which is regarded as westernised.

It has been rightly maintained[40] that the choices of economic

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[38] See E. Heinz, *Gibt es ein asiatisches Entwicklungsmodell?*, Berichte BfOIntS, Köln, 1995/55.

[39] About the doubtful benefits of progress see the just published United Nations Report on Social Human Progress.

[40] See E.H.Carr, *The twenty years crisis*, Hong-Kong, Macmillan, 1984

science presuppose a determined political order and cannot be isolated from their political implications: "capitalism and liberalism are linked by bonds of solidarity."[41] The same thing can be said about human rights: how can they be severed from the political framework in which recognition of human rights should find their place? Thus we again return to the starting point: an effective respect for human rights, as they are embodied in generally accepted rules or even only in the three above-mentioned points, requires an economic and political structure, which is created, dominated and run according to Western/European standards and by these standards alone.

The structure of the world after the end of the conflicting ideologies, which had hegemonic ambitions and which promised the benefits of laws dictating development towards the future, offers now no real alternative routes to economic progress. This inevitably leads to unconditional acceptance of the Western economic and political model and with it of human rights, with no visible exception. We are once more inviting everybody, everywhere, to submit to the primacy of the Western general architecture of human society. A human organised society, which would not be ready to be incorporated into the same framework of thinking, would incur the risk of being excluded not only from modernisation (this could, for example, be the choice of a group unwilling to attain material progress),[42] but more seriously from the flow of life inside the international society. The myth of progress is now under scrutiny. Nevertheless nobody dares to refuse it, as long as the guidance of the West does not abandon its grip.

Over and above a people's willingness to pay the price for accepting the only overall functioning model, the new options for the globalisation of economies and thus also of politics have now become paramount the world over, independently from religions, ethical characteristics, national traditions, or specific values. Such options can no longer be seen only as a product of western civilisation and

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[41] See L.Pellicani, *Le sorgenti della vita,* Roma, Seam, 1997

[42] A moving and eloquent examples is offered by the Inuits - the former Eskimos - and their new autonomous territory in Canada, called Nunavut: See A.Cojean, *Rencontre avec les Inuits*, (Le Monde), 25,26,27.8.1998: "The Inuits would like to choose" how to live.

cannot be branded as an expression of colonialism, cultural or economical. In other words, globalisation may appear as something you cannot avoid, or as a destiny which is imposed upon you by unnamed entities in the shape of general norms, part of which are also the rules connected with human rights. As a short cut, it could be said that if you want to survive under the dominance of globalisation, you have to accept a political framework which may not agree with your *Weltanschauung*, but where human rights play a large role. Thus human rights would form part of a political system based on the ability to sustain an economic system, which you feel could act against your interests or on which you cannot exert any influence. Human rights would then appear as the result of your powerlessness. This is certainly a negative approach, which is not propitious to a convinced acceptance of human rights or their strictly westernised interpretation.

This situation is aggravated since human rights must be part of the competence of states, who should possess the power to implement them thoroughly. How is this possible, if some international network of industrial companies are stronger and dispose of more financial means than many sovereign states? Are states still sovereign, or are they submitted to the whims of great enterprises? Should we infer that globalisation is not guided or influenced by states but by powerful groups outside them?[43] If this is the case, how can we expect this power operating outside the ambit of states –and sometimes against the interests of states and their institutions– can really care for human rights if these are not identical to their interests?

9. In such a situation, single states or peoples get the impression (but is it only an impression?) that they are confined to be spectators of something decided upon elsewhere beyond their control or influence.[44] A rebellion is around the corner. In order to survive during the Cold War, various states delegated large parts of their

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[43] See I.Ramonet, *Firmes géantes Etats nains*, (Le Monde Diplomatique), juin 1998, p.1

[44] I am grateful for a large part of this argumentation to the excellent work of V.E.Parsi, *Interesse nazionale e globalizzazione*, Milano, Jacabook, 1998.

future and security to the leaders of the two groups. The reliability of the balance of terror and of deterrence had permitted states in the West to concentrate on economic development and security, while the rest of the world and the Third World were lingering on in the hope of getting assistance and profiting from the competition between the two blocks.

After the end of the Cold War, states are willing to recover a part of their sovereignty, even when some of them had forfeited it for the benefit of broader regional integration. They are compelled to take notice that international financial and economic activity has the power to bypass all the measures adopted through the instruments of national sovereignty. Economies which had been enhanced by external security and stability, are no longer under their control. The rich states, starting with the European Union, can resist the crisis from Asia to Russia. But what about the rest of the world, which feels itself at the mercy of a financial market?[45] On one hand, they have to take notice of the growth of the opinion that legality is necessary to everybody and above all to states, their economic welfare and living standards. On the other, they do not hesitate to bypass democracy and human rights in order to overcome profound economic crises, when the basic needs of their populations are regarded as more urgent than the respect of abstract principles.

The ongoing and often unclear process of globalisation thus imposes a common economic approach. This requires stability and order, but at the same time can weaken these same principles of legality; when decisions are taken by institutions which express their will independently from the legitimate members of the international community. If states have to accept a decay of their powers in favour of such uncontrolled and sometimes unknown powers, it becomes quite evident that states or peoples which are in position of weakness or disadvantage in the only important framework, namely the one

[45] See E.Renault, *La crise est une menace pour le système financier mondial,* (Le Monde),30-31.8.1998,p.15; E.J.Lincoln, *Japan's Financial Mess,* (Foreign Affairs)LXVII/1998, n.3, p.57. Under his respect it should not be underestimated the fact that the ASEAN, as an Asiatic organisation, failed to do anything, showing that the financial market depends on interventions from "Euro-American" states: See E.Haubold, *Viel Golf, zuwenig Politik,* (Frankfurter Allgemeine), 11.7.1898, p. 12

of economic capabilities, will feel themselves completely powerless to fulfil their aims or to attain their goals. They feel that they are pawns of an economic power which they cannot influence or modify. They can only accept it and suffer under it and they will see in this new Leviathan an instrument of a renewed colonisation, with the principal aim of protecting the global privileges of the rich and powerful, in the name of inequality among members of the international society.[46]

If we assume that this economic power expects to be supported by a general framework of Westernised human rights, it is easy to understand why human rights will also be considered only as instruments for the foreign economic power. Refusal then becomes a great temptation in order to look inward for identities, which should protect against the oppression of globalisation. In a rather irrational way, fighting against economic dominance is extolled as an act of freedom and human rights go largely down the drain of emotions and demagogy, because they appear foreign and unimportant.[47] Yet, on the other hand, the benefits of globalisation can be earned only by those who are willing to submit to the rules, which can be summed up in the complex of human rights.

This dilemma is aggravated by the fact that this westernised economic culture produces a new bourgeoisie,[48] which is at the service of the great industries and is highly paid. Its members possess a high level of education, which is in turn the result of a westernised educational and social system. There is no way out. Only those who come from such a culture, or from Western Universities, will be able to survive. The effect is the alienation of the emarginated, who are of course more than willing to discover excuses or causes to be against the western culture, which excludes them and to repudiate with this culture also the political background, including human rights. The international institutions, or: "global state institutions," which are called to support globalisation in economy and politics and are supposed to take over global responsibility, including that for

[46] See Waltz quoted in *La pace illusoria*, Milano, ISPI, 1992, p.18

[47] See G.Sacco, *Industria e potere mondiale,* Roma, Luiss, 1995 (?), p.225

[48] See. D.Duclos, *Naissance de l'hyperbourgeoisie*, (Le Monde Diplomatique), août 1998, p.18

implementing human rights, appear then to be solely the expression or the *longa manus* of the major powers, most of which belong to the culture which is imposing democracy, the free flow of information, the rule of law and human rights and economic progress.

Human rights tend to provoke emotional, rather than rational reactions and those not belonging to the happy few, feel that they are doomed to remain either underprivileged, because economic globalisation is depriving them of the means to better their lot, or unable to have a say in the shaping of the world. They feel themselves compelled to remain for a long time at a lower level of responsibility. Therefore, they do not care to participate in a state structure which would not give them any possibility – they believe – to overcome the condition of being underprivileged. Consequently, too, they resent those who are trying to demand from them the respect of rules – of human rights – which are interpreted in such a way as to restrict or further diminish their identity, autonomy, choices and pride as a nation of people.[49] Feelings of national identity supersede respect for human rights, especially in the case of minorities or those who belong to a different ethnic, cultural or religious group. They expect to pave their own way, which in turn leads them away from the mainstream of the generally accepted human rights. They also find blind support in public opinion, which is often willing to blame their weakness or misery on foreign pretensions that they implement refined human rights.

Terrorism, street demonstrations, attacks on embassies or guerrilla warfare are then the means to which such peoples take recourse; refusing negotiations or tolerance, and above all refusing to acknowledge their own misgivings and mistakes. In the process, human rights may be blatantly disregarded and global responsibility, which demands rationality and restraint, is avoided because it would require at least a minimum of common values and of shared approaches even with the enemy. However these values

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[49] Such an approach is common also in Europe now: See the excellent article by E.Costantinescu, President of Rumania, *as Poliitische als Fundament der menschlichen Gesellschaft,* (Frankfurter Allgemeine), 25.5.1898, p.15: "The reappearance of nationalism after 1989 is also the expression of a legitimate form of national dignity".

are once again coming mostly from the West (including this time also Japan).

But the picture is even more complicated because those values, which we love to call human rights, can find a surrogate in other values, which can also be considered human, albeit they are different. If Asian values can be very different from European values and also from all the obligations stemming from the globalisation process, then along the shores of the Mediterranean the alternative offered by Islam is not to be underestimated; although one must certainly deny any legitimacy to fundamentalism as such and to violence. Islam could be considered as a doctrine which tries to better serve human needs and the dignity of man; with the aim to harmonise the relations between those who enjoy power and privileges and those who are on the receiving end.[50] If with such a philosophy we can imagine a contribution to the solution of the actual problems of mankind, how could we expect that Islam should accede to certain tenets, which range from the territorial basis of nations to the equality of all political entities, or the recognition of western freedom or peace; with the ultimate goal being valid for everybody? Should Islam not prepare itself for a post Islamic era?[51]

Is it the case then, that human rights, starting with the 1948 Declaration, in the interpretation which the Westernised world expects and which has been elaborated from a Western point of view and on the basis of a centuries old Western political culture and which has been historically embodied in international documents constructing a universal international rule, are deprived of an absolute validity *erga omnes* within the international society?

10. To draw a conclusion is not that easy. It should be repeated that respect for human rights is the obligation of every member of the international community, both for its own benefit and for the

[50] See Pasha – A I Samatar, *The resurgence of Islam* in JH Mittelman (ed.), *Globalisation,* Boulder, Lynne Rienner, 1996; AA Mazrui, *Islamic and Western Values,* (Foreign Affairs), 1997/5, p 118 ff.; IA Karawn, *The Islamis Impasse,* Adelphi Paper 1997/31; T Hadar, *What Green Peril?,* (Foreign Affairs), LX!!, 1993 /2", p 27 and J Miller, *The Challenge of Radical Islam,* ibid., p 43, see also the many important wriging of B. Tibi.

[51] See F.Ajami, *The Arab inheritance,* (Foreign Affairs), 1997/5, p. 133 ff.

benefit of the entire international society. Without human rights, peace and stability are hardly conceivable. The international community therefore demands general recognition, implementation and respect of international human rights and above all of some of them, such as allowing for potential changes in political guidance, the free flow of information and freedom of expression and, finally, the all encompassing rule of law.

The content of human rights which should be considered valid all over the world, is inspired by a Western/European way of thinking, on the basis of a long and continuous history. Nevertheless, we cannot ignore the fact that some states, many of which are located along the shores of the Mediterranean, are not ready or willing to adopt, without passing them through some sort of cultural "filter" or process of modification, certain tenets of the human rights complex integrated into the international system. The attitude of these states is justified by the need to pay attention to their own society. Of course, this may only be a pretext to justify violence, the arbitrary exercise of power, lawlessness or dictatorship, oppression and brutality.[52] However it may also represent a non-rational reaction, understandable although not necessarily justifiable, to emotions stemming from feelings of exclusion, due in their turn to the process of economic globalisation and the resulting powerlessness, or incapability, to pursue their own interests . In other words, refusal or the reticence to comply with general rules concerning human rights, could express the fear of being on the losing side in the development of the international society.

Human rights should, of course, take into consideration the various characteristics of different cultures or civilisations. However, if the above mentioned three elements are not at least present, this reaction of fear and weakness to the point of rejecting human rights or denuding them of their significance, will lead the peoples and states concerned to a dead end with no prospects for the future. These peoples and states have to pay detailed attention to the undeniable fact that we are on the eve of a new century in which human rights

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[52] See for a comparative study on legislation E.Ferrari, *I diritti dell'uomo nelle costituzioni dei paesi arabi del Mediterraneo*, Roma, Università Luiss, 1998, not in print, with an exhaustive bibliography on Arab legislation on Human Rights.

will have a central position and individuals, both men and women, will be called upon to express themselves freely, without being compelled to conceal themselves behind a veil or a border. International society should consistently maintain the position that even though the many declarations on Human Rights are subject to interpretation, certain basic principles have to be fully applied. To refuse to face such a challenge only means that one is on the losing side. To deny the very existence of a set of human rights does not mean that one is protecting a specific culture or specific ideals; it is only a way which leads to defeat. Cultures have to compete openly and in an atmosphere of tolerance, which should not be destroyed by hegemonies. Cultural diversity should rather be viewed as a general enrichment. This is the best possible option to pave the way for the blossoming of human rights, fifty years after the great United Nations Declaration.

This debate should be launched in order to reach an acceptable solution to a common problem: how to respect the dignity of the human being as a necessary basis for peace and stability in the world.

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LES ENQUÊTES DU COMITÉ DES NATIONS UNIES CONTRE LA TORTURE SUR LA PRATIQUE SYSTÉMATIQUE DE LA TORTURE EN TURQUIE ET EN EGYPTE

DIDIER ROUGET

The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984 by the General Assembly of the United Nations, entered into force on 26 June 1987. It created the Committee against Torture (CAT) which monitors the implementation of the Convention by the States Parties. Like many other international bodies protecting human rights, the CAT examines the reports which all the States Parties regularly address to it and can receive individual complaints or complaints by one State Party against another. Compared to other human rights treaties, the Convention against Torture more originally confers in its Article 20 an investigative procedure concerning allegations that torture is being systematically practised in the territory of a State Party. This specific procedure, which combines fact finding, *in situ* visits, dialogues with the State Party, comments and suggestions, has already been implemented in two Mediterranean States where the CAT has determined that torture is being systematically practised : Turkey and Egypt.

Introduction

1. La *Convention des Nations Unies contre la torture et autres peines ou traitements cruels, inhumains ou dégradants* a été adoptée le 10 décembre 1984 par l'Assemblée générale des Nations Unies et est entrée en vigueur le 26 juin 1987[1]. Après avoir défini la torture

[1] R.T.N.U. Volume 1465, page 85. Au 31 décembre 1997, 104 Etats ont adhéré à la Convention ou l'ont ratifiée.

dans son article 1, la Convention précise dans ses articles 2 à 16 les obligations spécifiques des États au regard de la prohibition absolue de la torture et des autres formes de mauvais traitements. Puis, en vertu de l'article 17 de la Convention, a été créé le Comité contre la torture composé de 10 experts élus par les États parties et siégeant à titre individuel; il est entré en fonction le 1er janvier 1988. Enfin, la Convention prévoit divers mécanismes de contrôle du respect des engagements étatiques. Comme de nombreux autres organes internationaux de protection des droits de la personne, le Comité contre la torture examine les rapports qui lui sont périodiquement adressés par tous les Etats parties (article 19). Il peut être également saisi de plaintes interétatiques (article 21) et de communications individuelles (article 22) à l'égard des Etats ayant déclaré avoir accepté la compétence du Comité à cet effet[2].

2. Mais, c'est de façon tout à fait originale par rapport aux autres traités de protection des droits humains que la Convention contre la torture prévoit en son article 20 un mécanisme d'enquête concernant les allégations de pratique systématique de torture dans les Etats parties[3]. Cette procédure spécifique qui combine établissement des faits, visite *in situ*, dialogue avec l'Etat partie, constatations et

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[2] Au 31 décembre 1997, 39 des 104 Etats parties à la Convention ont déclaré reconnaître la compétence du Comité pour recevoir des communications individuelles et 41 ont déclaré reconnaître la compétence du Comité pour recevoir des communications interétatiques.

[3] L'article 20 de la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants est ainsi rédigé:
"1. Si le Comité reçoit des renseignements crédibles qui lui semblent contenir des indications bien fondées que la torture est pratiquée systématiquement sur le territoire d'un Etat partie, il invite ledit Etat à coopérer dans l'examen des renseignements et, à cette fin, à lui faire part de ses observations à ce sujet.
2. En tenant compte de toutes observations éventuellement présentées par l'Etat partie intéressé et de tous autres renseignements pertinents dont il dispose, le Comité peut, s'il juge que cela se justifie, charger un ou plusieurs de ses membres de procéder à une enquête confidentielle et de lui faire rapport d'urgence.
3. Si une enquête est faite en vertu du paragraphe 2 du présent article, le Comité recherche la coopération de l'Etat partie intéressé. En accord avec cet Etat partie, l'enquête peut comporter une visite sur son territoire.
4. Après avoir examiné les conclusions du membre ou des membres qui lui sont soumises conformément au paragraphe 2 du présent article, le Comité transmet

recommandations du Comité a déjà été mise en oeuvre à deux reprises. Ces enquêtes ont concerné deux Etats méditerranéens où le Comité a constaté qu'il y avait pratique systématique de la torture: la Turquie et l'Egypte[4].

A. L'origine du pouvoir d'enquête du Comité

3. L'article 17 du projet de Convention contre la torture, présenté par le Gouvernement suédois à la Commission des droits de l'Homme des Nations Unies le 18 janvier 1978, confiait au futur organe conventionnel le soin de désigner un ou plusieurs de ses membres pour procéder à une enquête sur place s'il a reçu l'information selon laquelle la torture est systématiquement pratiquée dans un Etat partie[5]. Pour imaginer cette nouvelle procédure, les rédacteurs de

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ces conclusions à l'Etat partie intéressé, avec tous commentaires ou suggestions qu'il juge appropriés compte tenu de la situation.
5. Tous les travaux du Comité dont il est fait mention aux paragraphes 1 à 4 du présent article sont confidentiels et, à toutes les étapes des travaux, on s'efforce d'obtenir la coopération de l'Etat partie. Une fois achevés ces travaux relatifs à une enquête menée en vertu du paragraphe 2, le Comité peut, après consultations avec l'Etat partie intéressé, décider de faire figurer un compte rendu succinct des résultats des travaux dans le rapport annuel qu'il établit conformément à l'article 24."

[4] Activités du Comité contre la torture en application de l'article 20 de la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants. *Compte rendu succinct des résultats des travaux concernant l'enquête sur la Turquie* (ci-après *Enquête Turquie*), rendu public le 19 novembre 1993, Nations Unies, A/48/44/Add.1 du 9 novembre 1993. *Compte rendu succinct des résultats des travaux concernant l'enquête sur l'Egypte* (ci-après *Enquête Egypte*), Nations Unies, Rapport annuel du Comité, A/51/44.

[5] Cette proposition fut reprise par l'article 30 du nouveau projet suédois présenté le 22 décembre 1981 (Doc. E/CN.4/1493) et par l'article 20 du projet présenté le 24 décembre 1982 par le Groupe de Travail chargé d'examiner le projet de Convention mis en place par la Commission des droits de l'Homme (Doc. E/CN.4/1983/WG.2/2). Sur l'historique de la Convention des Nations Unies contre la torture, voir J. Herman BURGERS et Hans DANELIUS, *The United Nations Convention against Torture, A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhoff Publishers, Dordrecht, 1988, 251 pages. Sur la Convention, voir aussi Andrew BYRNES, *The Committee against Torture*, in Philip ALSTON (ed.), *The United Nations and Human Rights,*

la Convention se sont inspirés des enquêtes confidentielles que peut décider la Commission des droits de l'Homme en application de la résolution "1503"[6] et des missions *in situ* réalisées dans le cadre de la procédure dite de "contacts directs" au sein de l'Organisation Internationale du Travail[7]. Au cours des débats préparatoires à la

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A Critical Appraisal, Clarendon Press, Oxford, 1994, pages 509-546; Christine CHANET, *La Convention des Nations Unies contre la torture et autre peines ou traitements cruels, inhumains ou dégradants*, AFDI, Vol. 30, 1984, pages 625-636; C. CHANET, *Le Comité contre la Torture*, AFDI, Vol. 37, page 553; Christian DOMINICÉ, *Convention contre la torture : de l'ONU au Conseil de l'Europe*, in *Völkerrecht im Dienste des Menschen, Festschrift für Hans Haug*, Verlag Paul Haupt, Bern, 1986, pages 57-1986; Agnès DORMENVAL, *UN Committee against Torture: Practice and Pespectives*, Netherlands Quaterly of Human Rights, 1990, Vol. 8 n° 1, pages 26-45; Manfred NOWAK, *The implementation Functions of the UN Committee against Torture*, in NOWAK, STEURER, TRETTER (eds.), *Fortschritt im Bewußtsein der Grund-und Menschenrechte : Festschrift für Felix Ermacora*, 1988, pages 493-526; Manfred NOWAK et Walter SUNTINGER, *International Mechanisms for the Prevention of Torture*, in *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms*, Martinus Nijhoff Publishers, Dordrecht, 1993, pages 145-168; Maxime E. TARDU, *The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Nordic Journal of International Law,1987, Vol. 56 n° 4, pages 303-321; Carlos VILLGħN DURGħN, *La Convención contra la tortura y su contribución a la definición del derecho a la integridad física y moral en el derecho internacional*, Revista española de derecho internacional, 1985, Vol. 37 n° 3, pages 377-402; Joseph VOYAME, *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Bulletin of Human Rights, United Nations, 89/1, pages 73-80; Joseph VOYAME, La *Convention des Nations Unies contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*, in Antonio CASSESE (ed.), *The International Fight Against Torture, La lutte internationale contre la torture*, Nomos Verlagsgesellschaft, Baden-Baden, 1991, pages 43-55.

[6] Voir notamment les articles 6 et 7 de la résolution 1503 (XLVIII) adoptée par le Conseil économique et social le 27 mai 1970, doc. off. ECOSOC, 48ème session, suppl. n° 1A.

[7] Selon cette procédure, à la demande ou avec l'accord du gouvernement intéressé, un représentant du Directeur général du Bureau International du Travail se rend dans le pays pour examiner avec les services gouvernementaux compétents les questions soulevées par l'application des conventions, les difficultés de soumission aux autorités nationales des instruments de l'OIT, les problèmes relatifs à l'envoi des rapports dus et les obstacles à la ratification d'une convention donnée. Il doit aussi prendre contact avec les organisations d'employeurs et de travailleurs (Voir *Les normes internationales du travail*, Bureau international du Travail, Lausanne, 1981, pages 26, 31 et 32).

Convention contre la torture, le pouvoir d'enquête du Comité a constitué l'enjeu des négociations jusqu'au 29 novembre 1984, soit quelques jours avant l'adoption définitive du projet de Convention. En effet, l'URSS avait rejeté cette procédure d'enquête dans les termes suivants : "Une pratique systématique de la torture a toujours été le signe d'une situation caractérisée par des violations massives et flagrantes des droits de l'Homme_ Les situations de ce genre étant immédiatement connues de tous, il n'y a pas lieu de créer un groupe spécial en vue de leur reconnaissance. Au cas cependant où l'existence d'une situation de ce genre ne serait pas avérée, le dispositif proposé pourrait être exploité en vue d'ingérences illégales dans les affaires intérieures d'Etats souverains"[8].

B. Un mécanisme facultatif

4. Après avoir été envisagé à l'origine comme un mécanisme de plein droit, le système d'enquête et de visite effectuées par le Comité contre la torture a été sérieusement limité lors de la rédaction définitive de la Convention. Au cours des négociations, les Etats opposés à la nouvelle procédure, et notamment l'Union Soviétique, la République Démocratique Allemande et la République Soviétique d'Ukraine, firent tout leur possible jusqu'au dernier moment pour que le mécanisme d'enquête soit optionnel. Ainsi, le 26 novembre 1984, l'Union Soviétique soutenue par de nombreux autres Etats socialistes proposait que la nouvelle procédure ne soit applicable qu'à l'égard des Etats parties ayant déjà accepté la compétence du Comité pour recevoir à la fois les communications individuelles et les requêtes interétatiques. Puis, trois jours plus tard, le 29 novembre 1984, la délégation Biélorusse proposa l'insertion d'un nouvel article 28 ainsi rédigé:

> "(1) Chaque Etat pourra, au moment où il signera ou ratifiera la présente Convention ou y adhérera, déclarer qu'il ne reconnaît pas la compétence accordée au Comité aux termes de l'article 20.

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[8] Nations Unies, Doc. E/CN.4/1984/72, § 52. Voir MANIN A., *De quelques autorités internationales indépendantes*, Annuaire Français de Droit International, 1989, page 233.

(2) Tout Etat partie qui aura formulé une réserve conformément aux dispositions du paragraphe 1 du présent article pourra à tout moment lever cette réserve par une notification adressée au Secrétaire général de l'Organisation des Nations Unies".

Finalement, un consensus se fit autour de cette proposition qui satisfaisait à la fois les partisans de la nouvelle procédure et les Etats qui ne désiraient pas y adhérer[9]. Ce compromis permit l'adoption de la Convention le 10 décembre 1984 par l'Assemblée Générale des Nations Unies.

5. De fait, la procédure de visite effectuée au cours de l'enquête prévue par l'article 20 de la Convention contre la torture est devenue

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[9] A vrai dire, le fait qu'en application de l'article 28 § 1 de la Convention, les Etats soient obligés de faire une déclaration négative pour décliner la compétence du Comité semble avoir dissuadé les gouvernements récalcitrants, puisqu'au 31 décembre 1997, seulement 10 des 104 Etats parties ont effectué une telle déclaration. Ce sont donc 94 Etats qui ont reconnu la compétence du Comité au titre de l'article 20 alors que par contre seulement 39 Etats ont reconnu la compétence du Comité au titre de l'article 22 (communications individuelles) et 41 au titre de l'article 21 (communications interétatiques). A noter, qu'en ratifiant la Convention le 9 septembre 1987, la République Démocratique Allemande avait, après avoir décliné la compétence du Comité en application de l'article 20 de la Convention et avoir refusé les procédures de communications individuelles et étatiques, fait une bien curieuse "déclaration" ainsi libellée : "La République Démocratique Allemande déclare qu'elle ne participera à la prise en charge des dépenses (de fonctionnement du Comité)_ que dans la mesure où elles résultent d'activités correspondant à la compétence que la République démocratique reconnaît au Comité" (Nations Unies, Traités multilatéraux déposés auprès du Secrétaire Général, état au 31 décembre 1988, page 189). Dix-sept Etats ont formulé des objections à cette déclaration considérée comme incompatible avec l'objet et le but de la Convention, et, en septembre 1990, la RDA a retiré sa déclaration tout en reconnaissant la compétence du Comité en application des articles 20, 21 et 22. Le 3 octobre 1990, les deux Etats allemands s'unifiaient. Voir Massimo COCCIA, *The GDR Declaration on the UN Convention against Torture, A Controversial Declaration on the U.N. Convention Against Torture*, European Journal of International Law (EJIL), Vol.1, N° 1/2, 1990, pages 315-327; Manfred MOHR, *The German Democratic Republic's Declaration on the Anti-Torture Convention and its Consequences : an Attempt at Evaluation*, EJIL, Vol.1, N° 1/2, 1990, pages 328-331; G. GORNIG et M. NEY, *Die Erklärung der DDR zur UN-Anti-Folterkonvention aus völkerrechtlicher Sicht : Ein Beitrag zur Zulassigkeit von Vorbehalten und ihren Rechtsfolgen*, Juristenzeitung, 1988, Vol. 43, pages 1048-1053.

doublement facultative. D'une part, le pouvoir d'enquête du Comité contre la torture des Nations Unies n'a pas de caractère universel, car il ne concerne qu'une catégorie d'Etats parties, le paragraphe 1 de l'article 28 permettant à tout Etat partie de faire une réserve sur cette compétence attribuée au Comité. D'autre part, dans sa rédaction initiale, l'article 17 du projet suédois insistait sur le consentement de l'Etat pour permettre à l'organe enquêteur d'entrer sur son territoire et d'y séjourner. Ainsi, au cours de son enquête, le Comité doit recueillir en vertu du paragraphe 3 de l'article 20 de la Convention l'accord de l'Etat concerné pour effectuer une visite sur son territoire[10]. Toutefois, le refus de l'Etat d'autoriser une telle visite n'empêche pas le Comité de continuer son enquête.

C. Un droit d'initiative du Comité

6. L'une des spécificités de la procédure prévue par l'article 20 de la Convention réside dans la faculté d'auto-saisine du Comité qui dispose d'une totale liberté d'initiative pour déclencher cette enquête. En effet, contrairement aux systèmes de plainte et de rapport étatique, l'enquête du Comité n'est pas subordonnée à la présentation d'une plainte par un particulier ou par un Etat, ni au dépôt d'un rapport par un Etat. De même, trois grandes différences distinguent l'enquête du Comité contre la torture de la procédure prévue par la résolution "1503". D'une part, l'enquête prévue par l'article 20 de la Convention n'a pas à être déclenchée par des communications. D'autre part, il n'est pas besoin que tous les recours internes aient été utilisés et épuisés, contrairement à ce que prévoit l'article 5-b) i) de la résolution 1503. Enfin, à la différence de l'article 5-b) ii) de la même résolution, la situation examinée par le Comité peut être en cours d'examen par d'autres instances internationales.

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[10] Convention contre la torture, article 20, § 3 : "Si une enquête est faite en vertu du paragraphe 2 du présent article, le Comité recherche la coopération de l'Etat partie intéressé. En accord avec cet Etat partie, l'enquête peut comporter une visite sur son territoire".

D. Un mandat limité à la torture

7. L'article 20 ne permet au Comité de déclencher une enquête qu'eu égard à la pratique de la torture dans un Etat partie. Une telle enquête ne peut donc être mise en oeuvre lorsque, dans un pays, il y a seulement existence de peines ou traitements cruels, inhumains ou dégradants. Et, pour déterminer si les mauvais traitements pratiqués peuvent être qualifiés de torture, le Comité s'appuie, selon l'article 75 paragraphe 2 de son règlement intérieur[11], sur la définition donnée par l'article 1 de la Convention. En effet, selon cette disposition,

> "le terme torture désigne tout acte par lequel une douleur ou des souffrances aiguës, physiques ou mentales, sont intentionnellement infligées à une personne aux fins notamment d'obtenir d'elle ou d'une tierce personne des renseignements ou des aveux, de la punir d'un acte qu'elle ou une tierce personne a commis ou est soupçonnée d'avoir commis, de l'intimider ou de faire pression sur elle ou d'intimider ou de faire pression sur une tierce personne, ou pour tout autre motif fondé sur une forme de discrimination quelle qu'elle soit, lorsque de telles douleurs ou souffrances sont infligées par un agent de la fonction publique ou toute autre personne agissant à titre officiel ou à son instigation ou avec son consentement exprès ou tacite. Ce terme ne s'étend pas à la douleur ou aux souffrances résultant uniquement de sanctions légitimes, inhérentes à ces sanctions ou occasionnées par elles".

Ainsi, dans le droit fil de cette définition, il est constaté par le Comité qu'en Egypte, "la torture servirait non seulement de moyen d'obtenir des renseignements et d'arracher des aveux, mais aussi de moyen de représailles visant à détruire la personnalité de la personne arrêtée, à intimider et à terroriser sa famille ou le groupe auquel elle appartient"[12].

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[11] Règlement intérieur du Comité contre la torture, adopté par le Comité à ses première et deuxième sessions et modifié à ses treizième et quinzième sessions, CAT/C/3/Rev.2, 31 janvier 1997, 36 pages.

[12] *Enquête Egypte*, § 204.

8. En conséquence, les allégations ne pourront faire l'objet d'une enquête du Comité que si elles concernent des mauvais traitements dont la gravité et l'intensité des souffrances provoquées sont telles qu'ils puissent être qualifiés de torture, et pas seulement de peines ou traitements cruels, inhumains ou dégradants. La Convention contre la torture ne contient pas de définition des "peines ou traitements cruels, inhumains ou dégradants". De même, dans sa jurisprudence, le Comité n'a pas eu encore l'occasion de donner une définition de ces formes de mauvais traitements. Référence pourrait être faite aux distinctions déjà opérées en cette matière par les autres organes internationaux de protection des droits humains, et notamment par la Commission et la Cour européennes des droits de l'Homme[13].

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[13] La Commission et la Cour européennes des droits de l'Homme ont en effet distingué les notions de torture, de traitement inhumain et de traitement dégradant selon l'intensité des souffrances infligées aux victimes. Pour la Commission, "la torture est un traitement inhumain ayant pour but d'obtenir des informations ou des aveux, ou d'infliger une peine, et c'est une forme aggravée de traitement inhumain" (*Affaire grecque*, rapport du 18 novembre 1969), et pour la Cour européenne des droits de l'Homme, "la torture est un traitement inhumain infligé délibérément et provoquant des souffrances très graves et cruelles" (Arrêt *Irlande contre Royaume Uni* du 18 janvier 1978, Série A n° 25 § 167), cette distinction paraissant "avoir été consacrée pour marquer d'une spéciale infamie" la pratique de la torture (Arrêt *Aksoy contre Turquie* du 18 décembre 1996, § 63). Pour le Comité des droits de l'Homme, les distinctions entre les différentes formes de peines ou traitements interdits "dépendent de la nature, du but et de la gravité du traitement infligé" (*Observation générale n° 20 (44) sur l'article 7 du Pacte international relatif aux droits civils et politiques*, Nations Unies, HRI/GEN/1/ Rev.2, 29 mars 1996, p. 34, § 4). Sur la jurisprudence relative à l'article 3 de la CEDH, voir notamment les ouvrages suivants : BERGER V., *Jurisprudence de la Cour européenne des droits de l'Homme*, Sirey, Paris. 5e édition. 1996, pages 13-42; COHEN-JONATHAN G., *La Convention européenne des droits de l'Homme*, Ed. Economica, 1989, pages 286-310; *Digest of Strasbourg Case-Law relating to the European Convention of Human Rights*, Volume 1 (Articles 1-5), Carl Heymanns-Verlag KG Köln, 1987, pages 89-235; FAWCETT J. E. S., *The application of the European Convention on human rights*, Clarendon Press. Oxford, 1987; HARRIS D.J., O'BOYLE M., WARBRICK C., *Law of the European Convention on human rights*, Butterworths, 1995, pages 54-89; VELU J. et ERGEC R., *La Convention européenne des droits de l'Homme*, Ed. Bruylant, Bruxelles, 1990, pages 236-267. Et les articles suivants: CASSESE A., *Prohibition of Torture and Inhuman or Degrading Treatment or Punishment*, in *The European System for the Protection*

9. Toutefois, on peut considérer que, s'agissant de la mise en oeuvre de l'article 20 de la Convention, le Comité peut adopter une approche plus souple qu'un organe juridictionnel, car il ne s'agit pas pour lui de qualifier des traitements prohibés en vue de les "juger" et de condamner un Etat partie, mais de réaliser une enquête, donc de réunir et de décrire des informations factuelles. A cet égard, le Comité a intérêt à conserver une démarche empirique qui lui offre plus de flexibilité et accroît l'effectivité de ses activités. Dans cette optique, le Comité considère que la torture peut être pratiquée dans un Etat partie sans qu'elle résulte de l'intention directe du gouvernement. "En effet, celle-ci peut être la conséquence de facteurs que le gouvernement peut avoir des difficultés à contrôler, et son existence peut signaler une lacune entre la politique déterminée au niveau du gouvernement central et son application au niveau de l'administration locale"[14].

10. Selon une interprétation stricte de l'article 20 de la Convention, le Comité ne devrait s'intéresser aux lieux de détention que si ces lieux "soulèvent" des problèmes "au regard de l'application de l'article 20 de la Convention", du fait de la persistance d'une pratique systématique de la torture dans divers locaux de ce type[15]. En outre, pour le Comité, certains lieux de détention, par leur structure ou par les conditions qui y règnent, constituent en eux-mêmes une forme de torture. La configuration et l'utilisation de ces lieux, comme par exemple des cellules d'isolement, peuvent donc se

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of Human Rights, par MACDONALD R. St. J. et al. (eds.), 1993, Kluwer, pages 225-261; DOSWALD-BECK L., *What does the prohibition of 'torture or inhuman or degrading treatment or punishment' mean ? The interpretation of the european commission and court of human rights*, Netherlands International Law Review, Volume 25, 1978, pages 24-50; DUFFY P. J., *Article 3 of the European Convention of Human Rights*, I.C.L.Q., Volume 32, 1983, Part 2, pages 316-346; EISSEN M.-A., *Le Conseil de l'Europe et la lutte internationale contre la torture*, Seconds entretiens juridiques, organisés les 11, 12 et 13 octobre 1984 par la Faculté de Droit, Université Jean Moulin, Lyon, 1985, pages 297-314; SUDRE F., *La notion de 'peines et traitements inhumains ou dégradants' dans la jurisprudence de la Commission et de la Cour européennes des droits de l'Homme*, R.G.D.I.P. 1984, pages 827 et s..

[14] *Enquête Turquie*, § 39; *Enquête Egypte*, § 214.

[15] *Enquête Turquie*, § 50 et 51.

révéler par elles-mêmes contraires aux dispositions de la Convention[16]. Cette approche spécifique du Comité constitue, sur le plan normatif, un enrichissement notable de la définition de la torture et des autres formes de mauvais traitements. En effet, le plus souvent, les traitements dénoncés se rapportent à des "pratiques" et non à des "situations", alors que, pour le Comité contre la torture, des conditions extrêmes de détention et la structure même d'un lieu de privation de liberté peuvent aussi constituer, par elles-mêmes, des formes aggravées de mauvais traitements.

11. Cependant, dans la pratique, le Comité contre la torture étend son contrôle aux conditions de privation de liberté qui ne constituent pas des formes de torture, lorsque celles-ci sont des facteurs d'aggravation de la situation. Ce faisant, il joue aussi un rôle de prévention des traitements inhumains et dégradants, car il n'hésite pas à formuler en ce domaine des recommandations beaucoup plus larges, notamment au sujet des conditions de détention, des problèmes du surpeuplement et de l'hygiène dans les lieux de privation de liberté[17]. Pour ceci, le Comité peut utiliser d'autres standards que ceux qui sont établis par la Convention contre la torture, en faisant notamment référence à l'Ensemble des règles minima pour le traitement des détenus[18].

E. L'exigence d'une "pratique systématique" de la torture

12. Selon le paragraphe 1 de l'article 20 de la Convention, la procédure d'enquête ne doit être mise en oeuvre que s'il y a pratique systématique de la torture dans un Etat partie. Aucune définition n'est donnée par la Convention de l'expression "pratique systématique". Or, pour concevoir l'article 20, les rédacteurs de la

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[16] *Enquête Turquie*, § 52 et 55 b).

[17] *Enquête Turquie*, § 54 à 56.

[18] *Ensemble de règles minima pour le traitement des détenus*, adopté par le premier Congrès des Nations Unies pour la prévention du crime et le traitement des délinquants et approuvé par le Conseil économique et social dans ses résolutions 663 C (XXIV) du 31 juillet 1957 et 2076 (LXII) du 13 mai 1977.

Convention se sont référés aux enquêtes confidentielles réalisées dans le cadre de la procédure "1503" par le groupe de travail de la Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités lorsqu'il examine les communications "qui semblent révéler l'existence d'un ensemble de violations flagrantes et *systématiques*" des droits humains et des libertés fondamentales. Mais, la résolution "1503" du Conseil économique et social ne donne pas non plus de définition de la *violation systématique*[19]. Référence peut être faite aux travaux de la Commission du droit international, pour laquelle "le caractère *systématique* (des violations des droits de la personne) se rapporte à une pratique d'un caractère constant ou à un dessein méthodique de procéder à ces violations"[20].

13. C'est donc le Comité qui a été conduit, au cours de la mise en oeuvre de la procédure d'enquête, à donner une définition de la pratique systématique de la torture.

En effet, il "considère qu'il y a pratique systématique de la torture lorsqu'il apparaît que les cas de torture rapportés ne se sont pas produits fortuitement en un endroit ou à un moment donné, mais comportent des éléments d'habitude, de généralité et de finalité déterminée au moins sur une portion non négligeable du territoire du pays en cause. De plus, la torture peut avoir un caractère systématique sans qu'elle résulte de l'intention directe d'un gouvernement. En effet, celle-ci peut être la conséquence de facteurs que le gouvernement peut avoir des difficultés à contrôler, et son

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[19] Pour les auteurs E. SCHWELB et P. ALSTON, "the formula (_) is not susceptible to precise definition and in practice has been interpreted increasingly liberally", in "The Principal Institution Founded under the Charter", *The international Dimensions of Human Rights* (K. Vasak ed.), Westport/Paris, Greenwood Press/ UNESCO, 1982, vol. 1, page 295. Pour Agnès DORMENVAL, "la définition (de cette expression) ne peut_ être que le résultat d'un accord politique", *Procédures onusiennes de mise en oeuvre des droits de l'Homme, limites ou défauts*, PUF, Paris, 1991, page 58.

[20] La Commission du droit international a donné cette définition dans son commentaire de l'article 21 de son projet de code de crimes contre la paix et la sécurité de l'humanité, relatif "aux violations systématiques ou massives des droits de l'Homme" (Voir rapport de la CDI, 43° session 1991, Doc. AG-ONU, sup. n° 10 A/46/10, pages 288-290).

existence peut signaler une lacune entre la politique déterminée au niveau du gouvernement central et son application au niveau de l'administration locale. Une législation insuffisante qui laisse en fait la possibilité de recourir à la torture peut encore ajouter au caractère systématique de cette pratique"[21].

14. Cette importante définition comporte plusieurs éléments. Le premier est l'existence d'actes répétés, d'une pratique constante ou habituelle et non fortuite, et d'une finalité déterminée. Ces caractéristiques peuvent être rapprochées de la définition donnée par les organes de la Convention européenne des droits de l'Homme lorsqu'ils constatent l'existence d'une *pratique administrative* de mauvais traitements[22]. La notion de *pratique administrative* implique en effet comme la *pratique systématique*, la répétition d'actes, c'est-à-dire une "accumulation de manquements de nature identique ou analogue, assez nombreux et liés entre eux pour ne pas se ramener à des incidents isolés, ou à des exceptions, ou pour former un ensemble ou système"[23]. Pour être qualifiée de systématique, la pratique de la torture doit avoir lieu pendant une période significative et sur une portion non négligeable de l'Etat partie.

15. Un des éléments constitutifs de la pratique administrative est la tolérance officielle dont bénéficient les auteurs d'actes de torture, ce qui suppose que les supérieurs immédiats des agents responsables des actes incriminés ne font cesser pas ces actes ou que l'autorité supérieure ne prend pas de mesure suffisante pour mettre fin à la répétition des actes ou, face à de nombreuses allégations, se montre indifférente en refusant toute enquête sérieuse sur leur vérité ou leur fausseté ou que dans la procédure judiciaire, ces plaintes ne

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[21] *Enquête Turquie*, § 39. *Enquête Egypte*, § 214.

[22] Pour la Commission européenne des droits de l'Homme, il y a pratique administrative s'il y a répétitions d'actes et tolérance officielle même au niveau inférieur seulement et en dépit de réactions isolées des autorités (*France, Norvège, Danemark, Suède, Pays-Bas contre Turquie*, Requêtes n° 9940 à 9944/82, décision du 6 décembre 1983, D.R., Vol. 35, page 135).

[23] Cour eur. D.H., Arrêt *Irlande contre Royaume Uni* du 18 janvier 1978, Série A n° 25, page 64, § 159.

sont pas entendues équitablement[24]. A cet égard, le Comité contre la torture a constaté, en Turquie comme en Egypte, que les auteurs d'actes de torture bénéficiaient d'une véritable impunité[25].

16. De plus, dans ces deux pays, le Comité considère que les forces de sécurité se comportent "comme un Etat dans l'Etat" et "elles semblent échapper au contrôle des autorités supérieures" ou de la "hiérarchie"[26]. Sont notamment mis en cause les membres des Service de renseignements de la Sûreté de l'Etat en Egypte et de certains services du Ministère de l'Intérieur en Turquie. En effet, dans les Etats où la violence politique est importante et où une législation d'exception est à l'oeuvre, les forces de sécurité spécialisées dans la lutte antiterroriste acquièrent un poids stratégique essentiel ce qui favorise leur tendance à l'autonomisation et encouragent tous les dérapages (guerre sale, tortures, disparitions et exécutions extrajudiciaires, détentions arbitraires, corruption, délinquance organisée, trafics divers_). Ainsi, comme le souligne le Comité, "la torture peut avoir un caractère systématique sans qu'elle résulte de l'intention directe d'un gouvernement. En effet, celle-ci peut être la conséquence de facteurs que le gouvernement peut avoir des difficultés à contrôler et son existence peut signaler une lacune entre la politique déterminée au niveau du gouvernement central et son application au niveau local"[27]. Cette appréciation concorde avec celle de la Commission européenne des droits de l'Homme qui déclare:

> "Au regard de la Convention, la responsabilité d'un Etat peut être engagée pour les actes de tous ses organes, agents et fonctionnaires. Comme pour la responsabilité au regard du droit international en général, le rang de ceux-ci n'importe pas, en ce sens qu'en tout état de cause leurs actes sont imputés à l'Etat. _ses obligations (celles de l'Etat) existantes peuvent être violées également par une

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[24] Commission eur. D.H., Affaire *Irlande contre Royaume Uni*, Rapport du 25 janvier 1976, page 461. *Première affaire grecque*, Rapport de la Commission, vol. II, 1ère partie, page 13.

[25] *Enquête Turquie*, § 35. *Enquête Egypte*, § 206.

[26] *Enquête Turquie*, § 43. *Enquête Egypte*, § 212.

[27] *Enquête Turquie*, § 39.

> personne exerçant une fonction officielle qui lui est confiée, quel que soit le niveau, même le plus bas, sans autorisation expresse, voire en-dehors ou à l'encontre d'instructions"[28].

17. De même, selon l'article 10 du Projet de la Commission du droit international sur la responsabilité des Etats, "le comportement d'un organe de l'Etat, d'une collectivité publique territoriale ou d'une entité habilitée à l'exercice de prérogatives de la puissance publique, ledit organe ayant agi en cette qualité, est considéré comme un fait de l'Etat d'après le droit international même si, en l'occurrence, l'organe a dépassé sa compétence selon le droit interne ou a contrevenu aux instructions concernant son activité"[29]. La Cour européenne des droits de l'Homme ajoute :

> "On n'imagine pas que les autorités supérieures d'un Etat ignorent, ou du moins soient en droit d'ignorer, l'existence de pareille pratique. En outre, elles assument au regard de la Convention la responsabilité objective de la conduite de leurs subordonnés; elles ont le devoir de leur imposer leur volonté et ne sauraient se retrancher derrière leur impuissance à la faire respecter"[30].

18. Enfin, pour le Comité contre la torture, "une législation insuffisante qui laisse en fait la possibilité de recourir à la torture peut encore ajouter au caractère systématique de cette pratique"[31]. A cet égard, au cours de ses enquêtes relatives à la Turquie et l'Egypte, le Comité contre la torture a examiné l'infrastructure juridique et judiciaire dont sont dotés ces pays, et notamment

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[28] Commission eur. D.H., Affaire *Irlande contre Royaume Uni*, Rapport du 25 janvier 1976, page 393.

[29] Rapport de la CDI à l'Assemblée générale, *Annuaire de la CDI*, 1975, vol. II, page 67. Voir Haritini DIPLA, *La responsabilité de l'Etat pour violation des droits de l'Homme, Problèmes d'imputation*, Publications de la Fondation Marangopoulos pour les droits de l'Homme Série n° 1, Ed. Pedone, 1994, 116 pages. Voir aussi les conclusions de la Cour interaméricaine des droits de l'Homme dans l'arrêt *Vélásquez Rodríguez contre Honduras* du 29 juillet 1988, Série C n° 4.

[30] Cour eur. D.H., Arrêt *Irlande contre Royaume Uni*, 18 janvier 1978, Série A n° 25, page 64, § 159.

[31] *Enquête Turquie*, § 39; *Enquête Egypte*, § 214.

l'ensemble du cadre législatif concernant la procédure pénale, la garde à vue, la lutte contre le terrorisme, ainsi que les mécanismes nationaux de lutte contre la torture. Il s'agit pour lui d'évaluer si les dispositions pertinentes de la Convention contre la torture ont été respectées. En effet, "l'Etat _ est non seulement responsable pour avoir édicté une législation contraire à la Convention, mais également pour ne pas avoir introduit d'une manière positive la législation adéquate permettant la jouissance effective des droits protégés"[32].

19. La procédure de l'article 20 de la Convention a donc un seuil de déclenchement élevé, car elle ne concerne, d'une part, que la torture et pas les peines ou traitements cruels, inhumains ou dégradants et elle exige, d'autre part, que la pratique des traitements prohibés ait un caractère systématique[33]. A cet égard, il existe des différences notables entre le mécanisme d'enquête prévu par la Convention des Nations Unies contre la torture et le système de visites mis en place par la Convention européenne pour la prévention de la torture[34]. En effet, le mécanisme de la Convention européenne pour la prévention de la torture n'exige le franchissement d'aucun seuil préalable pour être mis en oeuvre, concerne toutes les formes de mauvais traitements et a un caractère essentiellement préventif, alors que les enquêtes du Comité des Nations Unies contre la torture ont un caractère exceptionnel et ne sont effectuées qu'*a posteriori* lorsque la torture est pratiquée systématiquement sur le territoire d'un Etat partie. En outre, pour le Comité européen pour la prévention de la torture,

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[32] Haritini DIPLA, *La responsabilité de l'État pour violation des droits de l'Homme, Problèmes d'imputation*, Publications de la Fondation Marangopoulos pour les droits de l'Homme Série n° 1, Ed. Pedone, 1994, page 22. Dans le même sens, pour la Commission Interaméricaine des droits de l'Homme "si les États dans la pratique affaiblissent l'indépendance du pouvoir judiciaire et des voies de recours dont le but est de sauvegarder l'intégrité personnelle des détenus, et si, en plus, ils élargissent excessivement le temps de prévention et d'isolement, ils justifient l'accusation de créer eux-mêmes les conditions indispensables pour que la torture ait lieu; c'est-à-dire, ils peuvent être inculpés de la tolérer_" (Commission Interaméricaine des droits de l'Homme, *Informe sobre la situacíon de los derechos humanos en Chile*, OEA/Ser.L/V/II.66 doc. 17, 27 septembre 1985, page 91).

[33] A titre de comparaison, le Rapporteur spécial des Nations Unies sur la torture est habilité à recevoir toutes informations faisant état de torture ou de sévices graves.

le droit de visite dans un Etat partie ne peut être remis en cause, alors qu'il est soumis à l'accord de l'Etat concerné pour le Comité des Nations Unies.

F. Un mécanisme qu'aucune circonstance exceptionnelle ne peut limiter

20. La prohibition de la torture a un caractère absolu. Dans ce cadre, aucune circonstance exceptionnelle ne permet à un Etat partie de refuser ou d'empêcher la réalisation d'une enquête par le Comité qui peut exercer son mandat en temps de paix comme en temps de guerre[35]. A l'égard du contexte particulier de la lutte antiterroriste en Turquie et en Egypte, le Comité déplore et condamne tout acte de violence perpétré par des groupes armés, de quelque origine qu'ils soient, en particulier, s'ils sèment la terreur au sein de la population ou essayant de déstabiliser les institutions démocratiques[36]. Mais, il tient néanmoins à rappeler qu'aux termes du paragraphe 2 de l'article 2 de la Convention, "aucune circonstance exceptionnelle, quelle qu'elle soit, qu'il s'agisse de l'état de guerre ou de menace de guerre, d'instabilité politique intérieure ou de tout autre état d'exception, ne peut être invoquée pour justifier la torture"[37]. Il ajoute que les Etats parties se sont engagés à respecter toutes les dispositions de la Convention, y compris celle du paragraphe 2 de l'article 2 et leur recommande donc de prendre des mesures de nature à garantir l'application stricte de ces dispositions par toutes les instances de

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[34] La *Convention européenne pour la prévention de la torture et des peines ou traitements inhumains ou dégradants*, signée le 26 novembre 1987 et entrée en vigueur le 1er février 1989, habilite le Comité européen pour la prévention pour la torture (ci-après CPT) à visiter sur le territoire des Etats parties tous lieux où des personnes sont privées de liberté par une autorité publique. Le CPT peut formuler des recommandations en vue de renforcer, le cas échéant, la protection des personnes privées de liberté contre la torture et les peines ou traitements inhumains ou dégradants.

[35] Au contraire, la Convention européenne pour la prévention de la torture (ci-après CEPT) accorde par son article 17 § 3, en temps de guerre, une priorité aux visites du Comité International de la Croix-Rouge par rapport à celles du CPT.

[36] *Enquête Turquie*, § 40; *Enquête Egypte*, § 211.

[37] *Enquête Turquie*, § 41; *Enquête Egypte*, § 211.

l'Etat, et tout particulièrement dans les régions ou provinces sous état d'urgence[38].

G. Coopération et confidentialité

21. Pour le Centre pour les des droits de l'Homme des Nations Unies, "la procédure visée à l'article 20 de la Convention est caractérisée par deux éléments : le caractère confidentiel et la recherche de la coopération des Etats parties concernés"[39]. Ces deux aspects sont intimement liés, car la confidentialité des travaux du Comité apparaît comme la contrepartie de la coopération de l'Etat partie. La Convention insiste avec force, notamment au paragraphe 5 de l'article 20, sur la nécessité pour le Comité de s'efforcer de rechercher cette coopération de l'Etat concerné à toutes les étapes de la procédure. Ainsi, ce principe de coopération est mis en relief notamment aux paragraphes 1 (examen des renseignements concernant l'Etat), 3 (au cours de l'enquête, l'accord de l'Etat est nécessaire pour réaliser une visite) et 5 (transmission des conclusions du Comité) de l'article 20. De même, pour établir tout au long de l'enquête un dialogue permanent avec l'Etat intéressé, le Comité a prévu, par l'article 79 de son règlement intérieur, de demander à cet Etat partie :

a) de désigner un représentant accrédité chargé de rencontrer les membres désignés par le Comité;
b) de fournir aux membres chargés de l'enquête les renseignements qu'ils jugent ou que l'Etat partie juge utiles pour établir les faits relatifs à l'enquête;
c) d'indiquer toute autre forme de coopération que l'Etat peut désirer apporter au Comité ou à ses membres chargés de l'enquête afin de faciliter le déroulement de celle-ci.

22. Toutefois, aucune disposition de la Convention n'oblige l'Etat partie à coopérer à cette enquête, et notamment à accepter la visite

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[38] *Enquête Turquie*, § 42; *Enquête Egypte*, § 212.

[39] Centre pour les droits de l'Homme, *Le Comité contre la torture*, Fiche d'information sur les droits de l'Homme n° 17, Office des Nations Unies à Genève, 1992, page 4.

du Comité sur son territoire[40]. Cependant, on peut penser qu'une obligation étatique de coopération avec le Comité découle plus généralement de la ratification par l'Etat partie de la Convention des Nations Unies contre la torture qui implique que les autorités de cet État partie collaborent totalement avec le Comité dans le but d'assurer un respect effectif des obligations découlant du traité. De même, le fait qu'un Etat n'a pas décliné la compétence du Comité en vertu de l'article 20 de la Convention doit inciter les autorités de ce pays a coopéré pleinement dans le cadre de la réalisation d'une telle enquête. Cette obligation de coopération a une base juridique certaine, car elle est fondée sur l'article 56 de la Charte des Nations Unies par lequel les États membres se sont engagés "à agir, tant conjointement que séparément, en *coopération* avec l'Organisation" des Nations Unies en vue d'atteindre les buts énoncés par l'article 55 de la Charte, c'est-à-dire d'assurer "le respect universel et effectif des droits de l'Homme et des libertés fondamentales"[41]. Or, le préambule de la Convention des Nations Unies contre la torture fait une référence expresse à la Charte des Nations Unies, et notamment à son article 55.

23. En outre, rien n'indique dans l'article 20 de la Convention que si l'Etat refuse de coopérer, ce refus puisse empêcher le Comité de mener à bien son enquête. Ainsi, le 4 mai 1990, le Comité avait invité le Gouvernement turc à coopérer à l'examen des renseignements dont il disposait et à lui faire part de ses observations avant le 31 août 1990. Le Gouvernement a fait savoir, le 31 août 1990, qu'il considérait que la démarche du Comité outrepassait les pouvoirs qui lui avaient été conférés par la Convention. Lors de ses cinquième et sixième sessions en novembre 1990 et en avril 1991, le Comité a réfuté les arguments du Gouvernement turc et lui a renouvelé son invitation à coopérer à l'examen des renseignements

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[40] A l'inverse, l'article 3 de la Convention européenne pour la prévention de la torture stipule que le CPT et les autorités nationales doivent coopérer en vue de l'application de la Convention. De plus, si un Etat partie ne coopère pas, le CPT peut en application de l'article 10 paragraphe 2 de la Convention, faire une déclaration publique à ce sujet.

[41] Charte des Nations Unies signée à San Francisco le 26 juin 1945.

reçus. Cette coopération lui a été refusée[42]. De même, lors de la mise en oeuvre de cette procédure à l'égard de l'Egypte, le Comité n'a pu se rendre sur le territoire égyptien, aucun accord n'ayant pu être réalisé à ce propos malgré de longues négociations. Toutefois, ces refus de coopération à divers stades de la procédure n'ont pas empêché le Comité de mener son enquête jusqu'à son terme. En outre, la mauvaise volonté des autorités égyptiennes d'autoriser la visite du Comité et de lui permettre de réaliser ainsi une enquête véritablement contradictoire apparaît en définitive comme un élément défavorable pour le Gouvernement concerné, le Comité n'ayant pu par une visite sur place "ni soutenir la position du Gouvernement, ni mettre en question les allégations de torture et il a dû établir ses conclusions sur la base des renseignements dont il disposait"[43].

24. Conformément aux dispositions de l'article 20 de la Convention et des articles 72 et 73 du règlement intérieur du Comité, tous les documents et tous les travaux de ce dernier afférents aux fonctions qui lui sont confiées en vertu de l'article 20 sont confidentiels. Toutes les séances concernant ces travaux sont privées. Mais cette confidentialité n'est que relative, car elle ne concerne que les travaux du Comité destinés à la réalisation concrète d'une enquête relative à un Etat déterminé. En effet, d'une part, les séances au cours desquelles le Comité examine des questions d'ordre général telles que les procédures d'application de l'article 20 sont publiques, à moins qu'il n'en décide autrement[44]. D'autre part, conformément au paragraphe 5 de l'article 20, le Comité peut décider de faire figurer dans son rapport annuel aux Etats parties et à l'Assemblée générale des Nations Unies un compte rendu succinct des résultats desdits travaux. Cette publicité des travaux du Comité doit se faire après consultations avec l'Etat partie intéressé, mais, même si ce dernier s'y oppose, le Comité peut publier le résultat de son enquête[45]. Enfin,

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[42] *Enquête Turquie*, § 6 et 7.
[43] *Enquête Egypte*, § 218.
[44] Règlement intérieur, article 73 § 2.
[45] A titre de comparaison, selon l'article 11 de la Convention européenne pour la prévention de la torture, la confidentialité des rapports établis par le CPT à l'occasion de ses visites est absolue, à moins que l'Etat concerné n'en demande la

le Comité peut décider de publier, à l'intention des moyens d'information et du public, des communiqués concernant ses activités au titre de l'article 20[46].

H. Les quatre phases de la procédure

25. La réalisation d'une enquête par le Comité en application de l'article 20 de la Convention est un processus prolongé qui peut s'étendre sur plusieurs années au cours desquelles de nombreux échanges s'instaurent entre le Comité et l'Etat partie intéressé. Ainsi, pour l'Egypte, la procédure confidentielle prévue aux paragraphes 1 à 4 de l'article 20 a débuté en novembre 1991 et s'est achevée en novembre 1994. Des consultations avec l'Etat partie ont eu lieu jusqu'en mai 1996, et le 7 mai 1996, le Comité adoptait le compte rendu succinct du résultat de ses travaux relatifs à l'Egypte. Pour la Turquie, l'enquête confidentielle a commencé en avril 1990 et fut terminée en novembre 1992. Les consultations avec l'Etat partie ont eu lieu jusqu'en avril 1993. Puis, le 9 novembre 1993, le Comité décidait de rendre public le compte rendu des résultats des travaux relatifs à l'enquête sur la Turquie. L'article 20 de la Convention distingue quatre phases de la procédure : le recueil et l'examen de renseignements (a), la phase d'enquête (b), la communication des conclusions, observations ou suggestions du Comité à l'Etat partie (c) et la publication d'un compte rendu succinct des résultats (d).

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publication. En vertu de l'article 10 § 2, si un Etat partie ne coopère pas ou refuse d'améliorer la situation à la la lumière des recommandations du Comité, celui-ci peut décider de faire une déclaration publique à ce sujet.La déclaration publique du CPT a un caractère exceptionnel. Depuis sa création en 1989, le CPT a déjà fait, le 15 décembre 1992 et le 6 décembre 1996, deux déclarations publiques qui concernent le même pays, la Turquie. A l'égard de ce pays, les deux Comités des Nations Unies et du Conseil de l'Europe se sont appuyés tous deux sur des situations équivalentes de pratique systématique d'une part, et de constatations répétées, d'autre part, de torture. Toutefois, contrairement à la Convention européenne, la publicité des résultats d'enquête du Comité des Nations Unies contre la torture n'est soumise à aucune condition particulière, ce dernier n'ayant pas à établir notamment le refus de coopération ou d'améliorer la situation de l'Etat concerné.

[46] Règlement intérieur, article 73 § 2.

26. Pour tous les Etats qui ont accepté la procédure visée à l'article 20, le Comité peut recevoir des renseignements concernant l'existence d'une pratique de torture. La Convention ne précisant pas quelles sont les sources d'information du Comité, les renseignements peuvent donc être d'origine très diverse : individus, groupe d'individus, organisations gouvernementales ou non gouvernementales, autres organes internationaux, etc. Ces renseignements sont transmis au Comité par l'intermédiaire du Secrétariat général[47], et notamment du Centre pour les droits de l'Homme des Nations Unies. Ces renseignements ne sont pas des "communications" ou des "plaintes" et ne sont donc soumis à aucun critère de recevabilité[48].

a) Le Recueil et l'examen desrenseignements

27. Le recueil et l'examen des renseignements par le Comité se déroulent en plusieurs étapes destinées à lui permettre de forger sa conviction et à établir s'il y a pratique systématique de la torture dans un Etat partie. Lors des enquêtes concernant la Turquie et l'Egypte, c'est l'organisation Amnesty International qui au départ, en application de l'article 20 de la Convention, avait transmis au Comité des renseignements sur ces Etats[49]. D'abord, le Comité procède à huis clos à un examen préliminaire des renseignements

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[47] Règlement intérieur, article 69.

[48] Au contraire, dans le cadre de la procédure "1503", les communications sont soumises à un ensemble de conditions de recevabilité. En effet, elles ne doivent pas être anonymes, doivent émaner de toute personne ou tout groupe de personnes, victimes de violations des droits humains, ou qui a connaissance directe et sûre de ces violations ou d'organisations non gouvernementales. Elles ne doivent pas être exclusivement fondées sur des nouvelles diffusées par la presse et ne doivent pas concerner des cas qui ont été résolus par l'Etat en cause. Elles sont irrecevables si les recours internes n'ont pas été épuisés et si elles ne sont pas présentées dans un délai raisonnable après l'épuisement des recours internes. Elles sont irrecevables si elles sont incompatibles avec les principes de la Charte et des instruments de protection des droits humains, si elles sont rédigées en des termes essentiellement abusifs ou si elles sont manifestement motivées pour des raisons politiques. Enfin, la même question ne doit pas être en cours d'examen par une autre instance internationale (Voir Résolution 1503 précitée. Voir aussi la Résolution 1 (XXIV) de la Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités, adoptée le 13 août 1971).

[49] *Enquête Turquie*, § 3.*Enquête Egypte*, § 182.

reçus et peut vérifier, par l'intermédiaire du Secrétaire général, la *crédibilité* de ces renseignements et/ou des sources d'information. Il peut aussi obtenir des renseignements supplémentaires corroborant les faits[50]. Puis, le Comité détermine si les renseignements reçus lui semblent contenir des *indications bien fondées* que la torture est pratiquée systématiquement sur le territoire d'un Etat partie[51].

28. Si les renseignements reçus paraissent crédibles et contenir des indications bien fondées que la torture est pratiquée systématiquement dans un Etat partie, le Comité doit alors engager une deuxième étape d'examen contradictoire de ces renseignements, en tenant compte de toutes observations éventuellement présentées par l'Etat intéressé et de tous autres renseignements pertinents dont il dispose[52]. Pour ceci, il doit inviter l'Etat concerné à coopérer à son examen des renseignements et, à cette fin, à lui faire part de ses observations à ce sujet[53].

Le Comité peut décider, sous la forme et de la manière qu'il jugera le plus appropriées, d'obtenir des représentants de l'Etat partie, des organisations gouvernementales et non gouvernementales ainsi que de particuliers, des renseignements supplémentaires ou des réponses aux questions relatives aux renseignements à l'examen[54]. Pour examiner les renseignements reçus, le Comité peut à tout moment obtenir tous documents pertinents des autres organes des Nations Unies et des institutions spécialisées qui peuvent l'aider[55]. Lors de l'examen des renseignements concernant la Turquie et l'Egypte, le Comité s'est notamment fondé sur les rapports du Rapporteur spécial de la Commission des droits de l'Homme sur les questions relatives à la torture.

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[50] Règlement intérieur, article 75 § 1. Ainsi, pour l'Egypte, le Comité a invité Amnesty International à soumettre des renseignements supplémentaires, dont des statistiques, corroborant les faits (*Enquête Egypte*, § 182).

[51] Règlement intérieur, article 75 § 1. *Enquête Turquie*, § 5.

[52] Règlement intérieur, article 76 § 3.

[53] Règlement intérieur, article 76 § 1. Ainsi, lors de l'examen des renseignements reçus, le gouvernement égyptien a présenté ses observations à trois reprises, au début de 1992, en octobre et en novembre 1992, et en avril 1993.

[54] Règlement intérieur, article 76 § 4 et 5. Le Comité a demandé des renseignements supplémentaires à des sources non gouvernementales (*Enquête Egypte*, § 182).

[55] Règlement intérieur, article 77.

Afin d'éviter des retards excessifs dans ses travaux, le Comité fixe un délai pour la soumission des observations de l'Etat partie concerné[56]. De même, si l'Etat refuse de coopérer lors de cette phase d'examen des renseignements reçus, le Comité peut néanmoins continuer la procédure[57].

29. Pour réaliser la phase d'examen des renseignements, le Comité peut constituer un groupe de travail informel constitué de deux ou trois de ses membres et chargé d'analyser les informations reçues et de soumettre au Comité des propositions quant à la suite à donner[58]. Pour juger s'il est justifié de procéder à l'enquête prévue par l'article 20, le Comité s'appuie sur un faisceau d'indices ou d'éléments d'évaluation:

- La crédibilité des renseignements reçus et leur concordance, la fiabilité et le sérieux des sources d'information qui doivent être jugées dignes de foi[59]. Pour établir la crédibilité de ces renseignements, le Comité peut notamment s'appuyer sur le fait qu'ils proviennent de sources qui se sont révélées fiables à propos d'autres activités du Comité[60];
- Les réponses de l'Etat partie et les renseignements supplémentaires fournies par le gouvernement, par d'autres sources non gouvernementales et par des particuliers;

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[56] Règlement intérieur, article 76 § 2. Dans les procédures relatives à la Turquie et à l'Egypte, le délai fixé par le Comité était de quatre mois.

[57] *Enquête Turquie*, § 7.

[58] *Enquête Turquie*, § 8. *Enquête Egypte*, § 185.

[59] A titre de comparaison, selon la Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités, s'agissant de la mise en oeuvre de la procédure "1503", "les communications ne seront recevables que si, après l'examen de leur teneur et de la réponse transmise, le cas échéant, par le gouvernement intéressé, on a raisonnablement lieu de croire qu'elles peuvent révéler l'existence d'un ensemble de violations flagrantes et systématiques, dont on a des preuves dignes de foi, des droits de l'Homme et des libertés fondamentales" (Résolution 1 (XXIV) de la Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités, adoptée le 13 août 1971, § 1 b)). De même, le Rapporteur spécial sur la torture doit "transmettre aux gouvernements des résumés de toutes les informations crédibles et fiables qui lui sont communiquées et qui font état de cas de torture et de la pratique de torture" (Doc. E/CN.4/1994/31, §11).

[60] *Enquête Egypte*, § 219.

– D'autres renseignements peuvent être fournis lors de l'examen par le Comité des rapports périodiques présentés par les Etats parties en application de l'article 19 de la Convention;
– L'existence de nombreuses plaintes individuelles formulées devant le Comité ou d'autres organes de protection des droits de la personne peuvent être un indice de l'existence d'une pratique de mauvais traitements;
– Des indications sérieuses et crédibles de l'existence d'une telle pratique sont susceptibles d'être apportées par les constatations des autres organes de protection des droits de la personne, au plan international (Comité des droits de l'Homme, rapporteurs spéciaux et groupes de travail, et notamment sur la question de la torture,_), comme au plan régional (Comité européen pour la prévention de la torture, Commission interaméricaine des droits de l'Homme, Commission africaine des droits de l'Homme et des Peuples,_).

b) La phase d'enquête

30. A l'issue de cette étape préliminaire de recueil et d'examen des renseignements, le Comité, s'il juge que les renseignements recueillis le justifient, peut charger un ou plusieurs de ses membres de procéder à une enquête confidentielle. Dans ce cas, il invite l'Etat intéressé à coopérer avec lui à la conduite de l'enquête. A cette fin, le Comité peut demander à l'Etat partie intéressé de désigner un représentant chargé de rencontrer les membres chargés de l'enquête afin de fournir les renseignements qu'ils jugent nécessaires.

31. Pour réaliser une enquête complète et efficace, le Comité dispose de plusieurs méthodes de travail. Les consultations avec l'Etat partie peuvent être conduites par échanges de lettres ou par l'organisation de rencontres entre les membres du Comité chargés de l'enquête ou le Comité lui-même et des représentants de l'Etat partie, à l'Office des Nations Unies à Genève. Il peut aussi effectuer une visite *in situ*, procéder à des auditions et solliciter l'assistance d'experts[61].

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[61] Ainsi, dans le cadre de l'article 20, le Comité des Nations Unies contre la torture peut mettre en oeuvre des méthodes d'investigation assez étendues et comparables

L'enquête peut en effet comporter, si le Comité l'estime nécessaire, une mission de visite d'un ou plusieurs de ses membres sur le territoire de l'Etat partie intéressé. Pour ceci, il demande l'accord dudit Etat partie et informe les autorités de ses souhaits quant aux dates de la mission et aux facilités nécessaires pour permettre aux membres du Comité de l'enquête de s'acquitter de leur tâche[62]. Ainsi, après avoir décidé, en novembre 1991 à sa septième session, d'entreprendre une enquête confidentielle relative à la Turquie, le Comité a demandé au Gouvernement turc de donner son accord à la visite des membres du Comité chargés de l'enquête en Turquie et a souhaité qu'une telle visite puisse avoir lieu en février 1992. Après consultations avec le nouveau Gouvernement turc, la mission de visite en Turquie s'est déroulée du 6 au 18 juin 1992. Pendant cette mission, la délégation du Comité qui était composée de deux membres, M. Dipanda Mouelle et M. Voyame, a visité à Ankara et à Diyarbakir des lieux de détention dépendant du Ministère de l'intérieur, et d'autres dépendant du Ministère de la justice, mais l'accès à certains locaux dépendant du Ministère de l'intérieur à Diyarbakir lui a été interdit. A l'égard de l'Egypte, le Comité avait prié, le 18 novembre 1993, le Gouvernement d'accepter une visite de ses membres chargés de l'enquête, visite qui devait avoir lieu le 15 mars 1994 au plus tard. Pour le Comité, "l'objectif de la visite n'était pas d'accuser l'Etat partie,_ mais d'examiner, en étroite coopération avec le Gouvernement, si la torture était ou non pratiquée systématiquement, en particulier par des membres des forces de sécurité"[63]. Malgré ces assurances et plusieurs demandes du Comité, aucun accord n'a pu être trouvé avec l'Etat partie permettant la réalisation de cette visite.

Dans le cadre de l'enquête, les membres du Comité qui en sont chargés peuvent décider de procéder à des auditions s'ils le jugent approprié. Ainsi, ils peuvent entendre des responsables de l'Etat,

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aux pouvoirs dont disposent, pour réaliser des enquêtes, d'autres organes internationaux de protection des droits humains, et notamment le Comité européen pour la prévention de la torture. Toutefois, à la différence du CPT qui dispose de plein droit de ces compétences, le Comité des Nations Unies ne peut mettre en application ces techniques qu'avec l'accord de l'Etat concerné.

[62] Règlement intérieur, § 80.

[63] *Enquête Egypte,* § 188.

civils ou militaires, au niveau national ou au niveau local, des autorités judiciaires, des représentants d'organisations non gouvernementales, des parlementaires, des particuliers, et notamment des personnes privées de liberté. Les membres du Comité déterminent, en coopération avec l'Etat partie, les conditions et les garanties nécessaires pour procéder à ces auditions. Il est notamment demandé à l'Etat partie de veiller à ce que les témoins et les autres particuliers désireux de rencontrer les membres du Comité ne se heurtent pas à des obstacles et qu'aucune mesure de représailles ne soit prise contre ces particuliers ou leurs familles. Toute personne qui comparaît devant les membres du Comité afin de témoigner doit prêter serment ou faire une déclaration solennelle concernant la véracité de son témoignage et le respect du caractère confidentiel des travaux[64]. En Turquie, les membres du Comité, M. Dipanda Mouelle et M. Voyame ont eu à Ankara, des entretiens avec les Ministres des affaires étrangères, de la justice, de l'intérieur, et avec le Ministre aux droits de l'Homme, ainsi qu'avec d'autres hauts responsables de l'administration turque. Ils se sont entretenus également avec des autorités judiciaires, telles que le Président et le Vice-Président de la Cour constitutionnelle et le Procureur d'Ankara, ainsi qu'avec plusieurs membres de la Commission des droits de l'Homme de la grande Assemblée nationale (Parlement turc). A Diyarbakir, les membres du Comité se sont entretenus avec les autorités locales, civiles et militaires, et entre autres, avec le préfet de la région chargé de l'application de l'état d'urgence. Pendant sa mission, la délégation du Comité a pu

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[64] Règlement intérieur, § 81. L'instauration de cette prestation de serment peut paraître curieuse, car le Comité ne remplit pas de fonction juridictionnelle lorsqu'il réalise une enquête. Au contraire, selon l'article 69 du Rapport explicatif de la Convention européenne pour la prévention de la torture, le droit reconnu au CPT pendant une visite d'entrer en contact librement avec toute personne dont il pense qu'elle peut lui fournir des informations utiles "ne l'autorise toutefois pas à organiser des auditions formelles, au sens juridique du terme, avec toutes les conditions de procédure que cela impliquerait; par exemple nul ne peut être obligé de témoigner sous serment" (Document du Conseil de l'Europe H (87) du 7 juillet 1987). Cette interdiction a été formulée par les rédacteurs de la Convention pour bien souligner le fait que le CPT n'a pas le caractère d'une juridiction et ne peut empiéter sur les prérogatives des organes de la Convention européenne des droits de l'Homme.

s'entretenir librement avec des prisonniers. A Ankara et à Diyarbakir, ses membres ont eu également des entretiens avec des responsables et des membres de cinq organisations non gouvernementales turques des droits de l'Homme, ainsi qu'avec plusieurs particuliers.

Pour réaliser une enquête et/ou la mission de visite dans le territoire de l'Etat intéressé, le Secrétariat général des Nations Unies fournit au Comité personnel et des facilités. De plus, les membres du Comité chargés de l'enquête peuvent inviter diverses personnes à leur apporter leur concours à tous les stades de l'enquête. Il peut s'agir notamment d'experts ayant des compétences particulières dans le domaine médical ou dans celui du traitements des prisonniers, ou d'interprètes. Ainsi, en Turquie, un expert médical a accompagné les membres du Comité et a effectué des examens sur des victimes présumées de torture. Lorsque ces experts et interprètes ne sont pas liés par serment à l'Organisation des Nations Unies, ils devront déclarer solennellement qu'ils s'acquitteront de leurs devoirs de bonne foi, loyalement et avec impartialité et respecteront notamment le principe de confidentialité[65].

32. S'agissant de l'Egypte, il a été impossible pour le Comité d'obtenir l'accord des autorités pour organiser une visite dans ce pays. Selon la Convention, ce refus des autorités n'empêche le Comité de continuer ses travaux. En l'occurrence, après plusieurs démarches demeurées infructueuses, le Comité a fixé aux autorités égyptiennes un délai de réponse en précisant qu'après cette date, à défaut de réponse ou si la réponse du gouvernement était négative, le Comité poursuivrait la procédure prévue à l'article 20 de la Convention[66]. En définitive, la mauvaise volonté des autorités égyptiennes d'autoriser la visite du Comité et de lui permettre de réaliser ainsi une enquête véritablement contradictoire a plutôt desservi le gouvernement. De plus, un tel refus de visite altère la qualité des travaux du Comité, car la réalisation d'une visite *in situ* permet incontestablement de donner une plus grande efficacité à l'enquête. La visite permet en effet la corroboration des

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[65] Règlement intérieur, § 82.

[66] *Enquête Egypte*, § 193.

allégations[67], l'inspection des lieux de privation de liberté, la collection de témoignages, le dialogue avec l'Etat partie, les autorités politiques, administratives et judiciaires, les organisations non gouvernementales, l'analyse du cadre politique et législatif ainsi qu'une meilleure appréhension du contexte. Les résultats de l'enquête ne pourront qu'en être améliorés, les constatations et les recommandations du Comité plus riches.

c) La communication des conclusions, commentaires ou suggestions du Comité à l'Etat partie

33. Au cours de l'enquête elle-même, les membres chargés de la réaliser ont la possibilité de présenter au Comité un ou plusieurs rapports intérimaires qui, afin d'instaurer un véritable dialogue avec l'Etat, pourront être transmis au Gouvernement qui pourra formuler ses observations. Enfin, aux termes d'un délai que le Comité pourra fixer, les membres chargés de l'enquête lui feront un rapport final en lui soumettant leurs conclusions. Après les avoir examinées, le Comité transmet à l'Etat partie intéressé ses propres conclusions, avec tous commentaires ou suggestions qu'il juge appropriés compte tenu de la situation. Le Comité peut estimer que certaines de ces suggestions devraient être mises en oeuvre "dans l'immédiat" par les autorités[68]. Le Comité invite l'Etat partie à informer le Comité des mesures qu'il compte prendre au sujet des conclusions du Comité relatives à l'enquête, en lui fixant un délai de réponse. Les travaux de l'enquête proprement dite se terminent par l'examen des réponses du Gouvernement, ainsi que de ses observations sur le rapport d'enquête.

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[67] En effet, comme le souligne le Rapporteur spécial des Nations Unies sur les exécutions extrajudiciaires, sommaires ou arbitraires, lorsque les contradictions entre les allégations et les réponses du gouvernement paraissent véritablement insurmontables, il demande à l'Etat de l'inviter à effectuer une visite sur place, seul moyen, selon lui d'évaluer de manière objective la situation (E/CN.4/1995/61, § 172 et 315).

[68] *Enquête Turquie*, § 48.

d) La publication d'un compte rendu succinct des résultats de l'enquête

34. Lorsque le Comité a achevé tous les travaux relatifs à l'enquête il peut décider de faire figurer un compte rendu succinct des résultats de son enquête dans son rapport annuel d'activités. Il est important de souligner que la Convention ne soumet à aucune condition de fond la publication de ce compte rendu par le Comité qui jouit donc d'une très grande liberté en la matière pour décider de faire une telle publication et pour en déterminer le contenu. Cette forme de publicité donne un impact manifeste aux travaux du Comité. C'est pourquoi les Etats concernés ont tenté de le dissuader de réaliser une telle publication.

35. L'article 20 prévoit qu'avant de décider s'il va publier un compte rendu des résultats de l'enquête, le Comité doit consulter l'Etat concerné. Ainsi, le Comité a invité, le 20 avril 1993, le Gouvernement turc et, le 4 mai 1995, les autorités égyptiennes à l'informer de leurs vues sur la question de faire figurer un compte rendu succinct des résultats de ses enquêtes dans son rapport annuel aux Etats parties et à l'Assemblée générale. Les consultations avec la Turquie ont eu lieu le 27 avril 1993 au cours d'une séance à huis clos du Comité. A chaque fois, les représentants des deux Etats étaient d'avis que la publication d'un compte rendu des résultats de l'enquête n'était pas justifiée. Ainsi, dans plusieurs réponses, le Gouvernement égyptien s'est opposé avec force à cette publication qui, selon lui, "risquait d'avoir des répercussions extrêmement préjudiciables pour ce qui était des relations entre l'Egypte et le Comité, mais aussi des principes et des buts de la Convention". C'est pourquoi il a souhaité que le Comité revoie sa position concernant une telle publication "de manière à ne pas envoyer un message inopportun aux groupes terroristes et à leurs partisans". Et il ajoute que cette publication "pourrait être interprétée comme le signe d'un appui aux groupes terroristes et encourageait ces derniers à poursuivre l'exécution de leurs plans terroristes et à défendre leurs membres criminels qui s'engagent dans des actes de terrorisme en lançant de fausses accusations de torture. En d'autres termes, elle pourrait en définitive être interprétée comme le signe que le Comité encourage indirectement les groupes terroristes, non seulement en Egypte, mais dans le

monde entier. Ce n'est assurément pas l'un des objectifs précisés dans le mandat du Comité"[69].

36. Cependant, après ces consultations, le Comité a estimé dans les deux cas que la publication d'un compte rendu succinct des travaux concernant ces enquêtes était une mesure nécessaire pour encourager le plein respect des dispositions de la Convention dans ces pays. Pour justifier cette publication, le Comité s'est appuyé dans les deux cas sur le nombre et la gravité des allégations de torture que le Comité a reçues[70]. S'agissant de la Turquie, il a également tenu compte également des constatations faites à ce sujet par les membres du Comité chargés de l'enquête et de ses propres conclusions, et a examiné les réponses et les observations fournies par les autorités turques[71]. A l'égard de l'Egypte, le Comité ajoute qu'il considère que le Gouvernement n'a pas saisi l'occasion qui lui avait été offerte de clarifier la situation en acceptant la visite des membres du Comité chargés de l'enquête, ce refus de coopération de l'Etat partie apparaissant ainsi comme un élément supplémentaire pouvant encourager la publication des résultats de l'enquête[72].

37. Le compte rendu publié par le Comité comporte d'abord un exposé du déroulement de la procédure. Puis, dans ses conclusions, le Comité expose ses constatations et ses recommandations. Une déclaration finale peut clore le compte rendu dans laquelle le Comité fait part de ses conclusions. Ainsi, concernant la Turquie, le Comité prend acte avec satisfaction de la coopération des autorités, les félicite d'avoir mis en oeuvre certaines de ses recommandations, mais fait part de ses sujets de préoccupation, et notamment du nombre et du contenu des allégations de torture reçues qui confirment l'existence et le caractère systématique de la pratique de la torture[73].

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[69] *Enquête Egypte*, § 199.

[70] *Enquête Turquie*, § 21. *Enquête Egypte*, § 199.

[71] *Enquête Turquie*, § 21.

[72] *Enquête Egypte*, § 200.

[73] *Enquête Turquie*, § 57 à 59. Cette déclaration finale est construite à l'image des "conclusions et recommandations" que le Comité contre la torture formule après avoir examiné les rapports présentés par les Etats parties en application de l'article 19 de la Convention et où il expose les aspects positifs et ses motifs de préoccupation, ainsi que ses recommandations.

I. Les constatations et suggestions du Comité

38. Dans son compte rendu, le Comité fait part de ses constatations. Il doit notamment apprécier si les informations collectées lui permettent de conclure qu'il y a pratique systématique de torture dans le pays concerné. De plus, il évalue si les dispositions pertinentes de la Convention sont respectées par les Etats parties. Enfin, il formule de suggestions pour renforcer la protection des personnes privées de liberté contre la torture. Il établit aussi des constatations et des suggestions concernant les lieux de détention. Au cours même de l'enquête, le Comité peut aussi formuler des recommandations urgentes[74].

a) La constatation de l'existence d'une pratique systématique de torture

39. Le Comité doit examiner si les allégations de torture qu'il a reçues permettent de confirmer qu'il y a pratique systématique de la torture dans l'Etat partie concerné. Pour établir sa conviction, le Comité s'appuie notamment sur :

- le grand nombre et le contenu des allégations de torture;
- la diversité et la fiabilité des sources de renseignements (organisations non gouvernementales internationales et nationales, autres organes internationaux de protection des droits humains);
- la concordance et la cohérence des témoignages recueillis dans la description des techniques de torture, des endroits où elle est pratiquée, des autorités qui les pratiquent et des circonstances dans lesquelles elles sont appliquées;

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[74] Au cours de l'enquête relative à la Turquie, le Comité a formulé de telles recommandations urgentes en novembre 1992. Il peut s'agir, d'une part, de recommandations essentielles, comme l'interdiction de l'usage du bandeau pendant les interrogatoires, le droit à l'assistance d'un avocat pendant la garde à vue et l'assistance judiciaire gratuite aux personnes gardées à vue, qui pourraient avoir immédiatement des effets positifs. D'autre part, une recommandation peut avoir un cractère immédiat, par exemple, la fermeture de certains locaux de détention parce que les conditions y sont intolérables.

- les réponses des autorités au cours des entretiens et des échanges réalisés par les membres du Comité au sujet des allégations de torture recueillies;
- les informations statistiques fournies par les autorités, telles que le nombre d'arrestations et de détentions en vertu des lois antiterroristes, celui des plaintes pour torture, des condamnations de fonctionnaires et des indemnisations versées aux victimes pour ces faits.

Lorsqu'une visite sur place a pu être organisée, le Comité se fonde aussi sur ses propres constatations, et en particulier:

- les témoignages recueillis pendant la mission par les membres du Comité à l'intérieur et en dehors des lieux de détention;
- les indications précises fournies par les examens effectués par les experts, et notamment l'expert médical, qui accompagnent la délégation du Comité.

Par contre, si le Comité a été empêché de réaliser une visite et s'il estime qu'il existe une contradiction flagrante entre les allégations de torture et les informations communiquées par le Gouvernement concerné, il estime qu'il ne peut "ni soutenir la position du Gouvernement, ni mettre en question les allégations de torture" et il doit donc "établir ses conclusions sur la base des renseignements dont il disposait"[75].

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[75] *Enquête Egypte*, § 218. Dans le même sens, le Rapporteur spécial sur la torture indique, à propos de l'Egypte, qu'"en l'absence de réponse de la part du gouvernement, (il) est enclin à penser que, dans l'ensemble, les allégations communiquées sont fondées" (E/CN.4/1995/34, paragraphe 242). De même, dans l'"*affaire grecque*", le gouvernement grec avait empêché la sous-commission, créée par la Commission européenne des droits de l'Homme pour établir les faits, d'inspecter le camp de prisonniers de l'île de Leros. La Sous-commission s'est donc appuyée sur les constatations rendues publiques du Comité International de la Croix-Rouge, pour établir que les conditions de détention au camp de Leros-Lakki étaient inacceptables, notamment le surpeuplement, et qu'elles mettaient en danger, à court terme, la santé physique et mentale du détenu (Commission eur. D.H., Requêtes n° 3321, 3322, 3323 et 3344/67, Rec. 25, page 92). Cette Sous-commission s'est également basée sur des informations recueillies par Amnesty International et la Commission Internationale des Juristes. Voir N. RODLEY, *The treatment of prisoners under international law*, page 225.

40. Les autorités nationales concernées ont nié les allégations recueillies. Ainsi, le Gouvernement turc a rejeté toutes les informations présentées par les organisations non gouvernementales, car elles seraient profondément politisées et partiales. De même, il avait repoussé les témoignages recueillis par la délégation, émanant, selon les autorités, de personnes présumées terroristes et qui, dans la logique de leur stratégie, avaient toutes les raisons de prétendre avoir été torturées[76]. De la même manière, selon le Gouvernement égyptien, "la plupart des personnes qui prétendent avoir été torturées en Egypte ont été accusées ou reconnues coupables d'actes terroristes. Les personnes ou les organisations non gouvernementales qui prennent la parole en leur nom prétendent qu'elles ont été torturées pour empêcher qu'elles ne soient condamnées". De même, le Gouvernement égyptien "rejette totalement l'utilisation par le Comité d'allégations, dont la crédibilité n'a pas été établie, pour accuser sans réfléchir un Etat partie de pratiquer systématiquement la torture sur son territoire, notamment en l'absence d'une interprétation objective de cette notion"[77].

41. Lorsque l'ensemble des éléments et des renseignements recueillis indique que les cas de torture signalés revêtent un caractère habituel, généralisé et délibéré, au moins dans une partie considérable du pays, le Comité conclut que la torture est systématiquement pratiquée. Ainsi, à propos de la Turquie et de l'Egypte, le Comité contre la torture est de l'avis que, même si l'on ne peut prouver avec une certitude absolue qu'un nombre restreint de cas de torture, les nombreux témoignages recueillis montrent une telle cohérence dans la description des techniques de torture, des autorités qui la pratiquent, des endroits et des circonstances dans lesquelles elles sont appliquées, que l'existence de la pratique systématique de la torture dans ces pays ne peut pas être niée[78].

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[76] *Enquête Turquie,* § 37.

[77] *Enquête Egypte,* § 210 et 213.

[78] *Enquête Turquie,* § 39. *Enquête Egypte,* § 219 et 220.

b) La répression des actes de torture

42. Le Comité évalue les procédures d'enquêtes sur des allégations de torture ou mauvais traitements qui doivent satisfaire aux conditions d'impartialité, de célérité, et d'efficacité posées par les articles 12 et 13 de la Convention contre la torture. Les recommandations qu'il formule à ce sujet concernent notamment l'examen médico-légal des personnes gardées à vue, le recueil et le suivi des plaintes pour mauvais traitements. A cet égard, le Comité est d'avis que la procédure d'examen médico-légal des personnes gardées à vue devrait être détachée complètement de l'élément policier; les personnes examinées devraient l'être en dehors du lieu de détention et sans que le contenu du rapport médical puisse être connu du personnel responsable de la garde à vue; de plus, les personnes gardées à vue devraient pouvoir faire établir un certificat médical par un médecin de leur choix en toute circonstance, et ce certificat devrait pouvoir être considéré comme un moyen de preuve devant la justice[79]. Au plan judiciaire, les Procureurs "chargés de mener des enquêtes sur des allégations de torture ou mauvais traitements (...) devraient procéder avec célérité et d'une manière efficace; des instructions précises à ce sujet devraient leur être adressées conformément à l'article 12 de la Convention"[80].

43. Le Comité est particulièrement préoccupé par l'impunité dont bénéficient les auteurs des actes de torture. Ainsi, le Comité, "après avoir analysé les informations et les témoignages reçus de sources différentes pendant l'enquête relative à la Turquie, tient à souligner que les peines prononcées par les tribunaux à l'encontre de tortionnaires ne devraient pas pouvoir être réduites à néant par le jeu de promotions administratives. En outre, il estime que l'échelle des peines encourues pour les actes de torture devrait être nettement réévaluée par le législateur. Les tortionnaires ne devraient pas se sentir dans un état de quasi-immunité judiciaire"[81]. Le Comité a souhaité également être informé des mesures prises pour abolir les

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[79] *Enquête Turquie*, § 27.
[80] *Enquête Turquie*, § 28.
[81] *Enquête Turquie*, § 35.

dispositions législatives qui prévoyaient qu'une instruction administrative devait être menée par les commissions préfectorales avant qu'une action juridique publique ne fût intentée à l'encontre d'un fonctionnaire accusé de torture. Le Gouvernement turc l'a informé qu'à partir du 27 janvier 1993, un fonctionnaire accusé de torture serait soumis à une action publique conformément à la procédure normale[82].

De même, en Egypte, "il apparaît également que les recours judiciaires sont souvent lents et que de fait les auteurs d'actes de torture restent impunis"[83]. Et le Comité juge inquiétant que les membres du Service de renseignements de la Sûreté de l'Etat n'aient jamais été l'objet de poursuites ou d'actions en justice depuis l'entrée en vigueur de la Convention en Egypte en 1987, alors que ce sont justement des membres de ce Service qui ont été le plus souvent mis en cause par les organisations non gouvernementales[84]. Enfin, le Comité recommande aux autorités égyptiennes de procéder sans tarder à une enquête approfondie sur le comportement des forces de police afin de déterminer si les nombreuses allégations de torture sont exactes ou non et de traduire en justice les auteurs d'actes de torture[85].

c) La protection des personnes privées de liberté contre la torture

44. Au cours de son enquête, le Comité examine le cadre législatif et réglementaire national. Il s'agit pour lui d'évaluer notamment si, comme le souligne le paragraphe 1 de l'article 2 de la Convention, les autorités nationales ont pris les mesures législatives, administratives, judiciaires et autres mesures efficaces pour empêcher que des actes de torture soient commis dans tout territoire sous sa juridiction.

A cet égard, au cours de son enquête relative à la Turquie, le Comité contre la torture a examiné l'ensemble du cadre législatif concernant la procédure pénale, la garde à vue, ainsi que la lutte

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[82] *Enquête Turquie*, § 32 et 33.
[83] *Enquête Egypte*, § 206.
[84] *Enquête Egypte*, § 207.
[85] *Enquête Egypte*, § 222.

contre le terrorisme. Ainsi, le Comité prend acte avec satisfaction de l'entrée en vigueur le 1er décembre 1992 d'une loi n° 3842, qui réduit la durée de la garde à vue, et renforce l'intervention et le rôle des avocats pour défendre un inculpé ou une personne gardée à vue. Ces dispositions et leur application effective peuvent contribuer à protéger un détenu d'actes de torture et de mauvais traitements. Toutefois, il regrette que les personnes appréhendées ou arrêtées en rapport avec des crimes contre l'Etat, liés au terrorisme, aux armes et aux stupéfiants restent privées par la loi de la plupart des mesures de garantie qui y sont énumérées[86]. S'agissant de l'Egypte, il apparaît d'après les informations communiquées par le Gouvernement que, d'une manière générale, il existe une infrastructure juridique et judiciaire qui devrait lui permettre de lutter efficacement contre le phénomène de la torture[87].

Toutefois, le Comité a constaté, dans ces deux Etats, le décalage qui existe entre les textes, les proclamations des autorités nationales et la pratique de certaines forces de sécurité qui se comportent comme des Etats dans l'Etat, paraissant échapper à la hiérarchie. A cet égard, il souhaite que l'interdiction de la torture et la législation soient appliquées strictement par tous les organes de l'Etat, qu'une stricte surveillance de l'application de la loi soit exercée à long terme et que toute violation de la loi soit effectivement sanctionnée[88]. Dans ce cadre, le Comité recommande spécifiquement à l'Egypte de renforcer son infrastructure juridique et judiciaire afin de lutter efficacement contre le phénomène de la torture[89] et de transmettre à la police des instructions claires et précises pour interdire à l'avenir tout acte de torture[90].

45. Le Comité formule un certain nombre de *suggestions* pour renforcer la protection des personnes privées de liberté, notamment

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[86] *Enquête Turquie*, § 25.

[87] *Enquête Egypte*, § 206.

[88] *Enquête Turquie*, § 31, 42 et 43. *Enquête Egypte*, § 212.

[89] *Enquête Egypte*, § 221.

[90] *Enquête Egypte*, § 222. Selon le paragraphe 2 de l'article 10 de la Convention, tout Etat doit incorporer l'interdiction de la torture "aux règles ou instructions édictées en ce qui concerne les obligations et les attributions" de toutes les personnes qui peuvent intervenir dans la garde, l'interrogatoire ou le traitement de tout individu privé de liberté.

lorsqu'elles sont gardées à vue par les forces de sécurité. Ces recommandations concernent notamment:

- La durée de la garde à vue. Ainsi, le Comité estime que le délai maximum de 30 jours de garde à vue applicable en Turquie dans des régions où l'état d'urgence a été déclaré, est excessif et peut permettre des actes de torture de la part des forces de sécurité[91].
- Le droit d'accès au médecin de son choix. Le Comité constate qu'aucune disposition de la loi turque n° 3842 n'est consacrée au droit du détenu en garde à vue d'avoir accès à un médecin de son choix[92].
- L'assistance d'un avocat. Pour le Comité, l'accès des avocats aux lieux de détention devrait être facilité. Dans le cas de personnes en garde à vue, des locaux devraient être mis à disposition où les entrevues entre le prévenu et son avocat pourraient être à portée de la vue, mais ne pourraient pas être à portée d'ouïe d'un fonctionnaire de la police ou de l'établissement. Pour le Comité, un programme d'assistance judiciaire gratuite généralisée devrait être mis sur pied permettant à toutes personnes gardées à vue, en particulier celles n'ayant qu'une connaissance relative des règles de droit, de bénéficier de toute la protection de la loi[93].
- La conduite des interrogatoires. De l'avis du Comité, des efforts devraient être entrepris afin d'informer le personnel existant chargé de l'application de la loi, et celui en train d'être formé, sur les techniques d'interrogation et d'enquête qui n'impliquent aucune forme de torture ou d'autres traitements cruels, inhumains ou dégradants[94]. Le Comité recommande que l'usage

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[91] *Enquête Turquie*, § 25.

[92] *Enquête Turquie*, § 26.

[93] *Enquête Turquie*, § 48 et 49. Il s'agit de deux recommandations urgentes du Comité auxquelles, selon les autorités turques, la nouvelle législation nationale en matière pénale répondrait de manière satisfaisante.

[94] *Enquête Turquie*, § 44. En application de l'article 11 de la Convention, "tout Etat partie exerce une surveillance systématique sur les règles, instructions, méthodes et pratiques d'interrogatoire...".

du bandeau sur les yeux pendant les interrogatoires soit interdit explicitement[95].

– La formation des responsables de l'application des lois. Conformément à l'article 10 de la Convention, le Comité estime que tout programme de formation des agents de la fonction publique devrait mettre en évidence le fait que la pratique de la torture est non seulement un acte criminel sévèrement punissable, mais aussi un acte dégradant et indigne pour ses auteurs et leurs mandants[96].

– L'illécéité des preuves obtenues par la torture[97]. Le Comité se félicite que la législation nationale consacre "la non-prise en compte par le juge de déclarations obtenues sous la contrainte" et formule à ce propos une importante recommandation, en considérant que "le juge saisi d'une plainte concernant des déclarations obtenues sous la contrainte, devrait être chargé d'examiner au principal la licéité de tels éléments de "preuves" sans attendre l'aboutissement d'une procédure connexe beaucoup trop lente"[98].

d) La mise en place d'un mécanisme national de lutte contre la torture

46. Le Comité souligne qu'il a suggéré aux gouvernements turc et égyptien de mettre sur pied un mécanisme national de lutte contre la torture ou d'enquête indépendant. De l'avis du Comité, une commission indépendante pourrait être créée, sous l'égide du Ministère chargé des droits de l'Homme lorsqu'il existe, comprenant

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[95] *Enquête Turquie*, § 48 et 49. Les autorités turques n'ont pas répondu à cette recommandation immédiate du Comité.

[96] *Enquête Turquie*, § 46. Selon l'article 10 paragraphe 1 de la Convention, "tout Etat partie veille à ce que l'enseignement et l'information concernant l'interdiction de la torture fassent partie intégrante de la formation" de tous les personnels qui peuvent intervenir dans la garde, l'interrogatoire ou le traitement de tout individu privé de liberté.

[97] Selon l'article 15 de la Convention, "tout Etat partie veille à ce que toute déclaration dont il est établi qu'elle a été obtenue par la torture ne peut être invoquée comme un élément de preuve dans une procédure, si ce n'est contre la personne accusée de torture pour établir qu'une déclaration a été faite".

[98] *Enquête Turquie*, § 26 et 28.

des membres des ordres professionnels concernés (avocats et médecins), des juges, des représentants d'organisations non gouvernementales, ainsi que des personnalités nationales reconnues pour leur lutte contre ce fléau. Cette commission aurait accès à tous les lieux de détention ou d'interrogatoire qu'elle souhaiterait visiter. Elle aurait pour tâche, entre autres, de mener des visites régulières et fréquentes dans tous les lieux de détention où il a été fait état d'actes de torture, de rencontrer les personnes qui y sont privées de liberté, de consulter les registres d'écrou, de recueillir les plaintes relatives à la torture et de les transmettre au parquet. Ce groupe indépendant aurait un rôle d'alerte immédiate des autorités nationales, lorsque les dispositions nationales garantissant que les personnes privées de liberté ne soient pas soumises à la torture ne sont pas pleinement respectées. Les rapports de cette commission seraient publics et elle aurait un rôle d'avis et d'initiatrice dans la rédaction de tout projet concernant la lutte contre la torture[99].

e) Les lieux de détention.

47. Au cours de son enquête, le Comité contre la torture s'intéresse aux lieux de détention notamment lorsque la torture y est pratiquée systématiquement. Ainsi, en Turquie, s'agissant des lieux de détention relevant du Ministère de l'intérieur, le Comité est d'avis qu'ils "soulèvent de nombreux problèmes au regard de l'application de l'article 20 de la Convention", du fait de la persistance actuelle d'une pratique systématique de la torture dans divers locaux de ce type. En l'occurrence, pour le Comité, "il existe un décalage évident entre, d'une part, les mesures prises et les intentions manifestées par les autorités s'agissant de la lutte contre la torture et, d'autre part, la pratique dans les locaux dépendant du Ministère de l'intérieur"[100]. Au contraire, s'agissant de l'application de l'article 20 de la Convention, le Comité est d'avis "que les lieux de détention dépendant du Ministère de la justice ne soulèvent pas de problèmes à cet égard"[101]. S'agissant de l'Egypte, le Comité est très préoccupé

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[99] *Enquête Turquie,* § 47. *Enquête Egypte,* § 221.
[100] *Enquête Turquie,* § 50 et 51.
[101] *Enquête Turquie,* § 54.

par les informations selon lesquelles la torture serait systématiquement pratiquée dans locaux du service de renseignements de la Sûreté de l'Etat et dans les camps militaires des forces centrales de la Sûreté. De plus, par leur statut administratif, ces locaux et ces camps échappent aux inspections et aux enquêtes organisées sur la base d'allégations de torture[102].

48. En outre, le Comité a constaté que certains lieux de détention, par leur structure ou par les conditions qui y règnent, constituent en eux-mêmes une forme de torture et que leur utilisation serait contraire aux dispositions de la Convention. En effet, selon le Comité, en Turquie, les cellules d'isolement des lieux de détention relevant du Ministère de l'intérieur qualifiées de "sarcophage", de dimension extrêmement réduites, soit environ 60 x 80 centimètres, dépourvues de lumière et d'aération adéquate et où il est possible d'y rester uniquement debout ou accroupi "constituent en elles-mêmes une forme d'instrument de torture"[103]. De même, pour le Comité, l'utilisation des cellules d'isolement de la prison n°1 de Diyarbakir "serait de toute façon contraire aux dispositions de la Convention"[104]. C'est pourquoi le Comité a demandé que l'ensemble de ces cellules d'isolement soient immédiatement démolies[105].

49. Lors de ses enquêtes, le Comité contre la torture peut étendre son contrôle aux conditions de détention, et notamment aux problèmes du surpeuplement et de l'hygiène dans les lieux de privation de liberté[106]. En Turquie, s'agissant des cellules situées dans les locaux dépendant du Ministère de l'Intérieur, et notamment

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[102] *Enquête Egypte*, § 208. Pour le Gouvernement égyptien, les locaux de la Sûreté de l'Etat sont des bâtiments administratifs et les camps de la Sûreté centrale sont des installations militaires, et ni les uns ni les autres ne font partie des lieux où des personnes peuvent être détenues (§ 209).

[103] *Enquête Turquie*, § 52.

[104] *Enquête Turquie*, § 55 b).

[105] Le Gouvernement turc s'est formellement engagé à suivre ces recommandations du Comité concernant les cellules d'isolement des lieux de détention relevant du Ministère de l'intérieur. Il a indiqué que les cellules d'isolement de la prison n°1 de Diyarbakir n'étaient pas utilisées (*Enquête Turquie*, § 53 et 56).

[106] *Enquête Turquie*, § 54 à 56.

où des personnes sont gardées à vue, le Comité a demandé que les "cellules d'isolement soient portées le plus rapidement possible au niveau des standards internationalement reconnus en la matière, tels qu'ils figurent dans l'Ensemble des règles minima pour le traitement des détenus"[107]. Quant aux lieux de détention relevant du Ministère turc de la Justice, le Comité a formulé des recommandations pour résoudre le problème de la surpopulation carcérale. "A cette fin, de nouveaux lieux de détention plus conformes aux normes internationales devraient être construits et les conditions de détention, notamment en matière d'hygiène, dans les lieux de détention existants devraient être améliorées". Le Comité a aussi demandé le transfert des prisonnières qui étaient incarcérées dans la prison n° 2 de Diyarbakir[108].

J. La riposte des Etats visés

50. Le 24 novembre 1993, soit quelques jours à peine après la publication par le Comité contre la torture du compte rendu des résultats des travaux concernant l'enquête sur la Turquie, a eu lieu la quatrième réunion des Etats parties à la Convention qui était destinée à élire cinq membres du Comité. Profitant de cette réunion, le représentant du Gouvernement turc a mené dans une très longue intervention une véritable fronde contre le Comité, proposant une "mise sous tutelle" de ce dernier par les Etats parties. Le représentant turc a d'abord disqualifié l'enquête réalisée par ses deux membres, en accusant notamment le Comité d'utiliser la "terminologie vague

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[107] *Enquête Turquie*, § 52. Le Gouvernement turc s'est formellement engagé à suivre les recommandations du Comité concernant les cellules d'isolement et l'a informé qu'il avait adopté, s'agissant des locaux de détention, une réglementation qui prévoit, notamment, des améliorations et des dimensions adéquates pour les cellules individuelles conformément aux normes et standards européens (*Enquête Turquie*, § 53).

[108] *Enquête Turquie*, § 55. Le Gouvernement turc a répondu que la capacité totale des prisons en Turquie est de 83 000 personnes tandis que le nombre de détenus est de 30 000 et que le surpeuplement relatif dans certaines prisons a été enrayé avec la mise en oeuvre de nouvelles mesures. Il a été déclaré également que les femmes détenues de la prison de Diyarbakir ont été transférées à la prison de Sanliurta (§56).

de certaines organisations non gouvernementales irresponsables" en parlant de Kurdistan et de légitimer le terrorisme[109]. Pour le représentant du Gouvernement turc, "il n'y a pas de prisonnier politique ou de prison politique en Turquie". Il ajoutait qu'aucune plainte individuelle n'a jamais été adressée contre la Turquie en application de l'article 22 de la Convention et "la Turquie est l'un des membres du Conseil de l'Europe qui a fait l'objet du plus petit nombre de communications relatives à des actes de torture". Les allégations de torture présentées notamment dans les rapports d'Amnesty International sont "sans fondement". Le Gouvernement souhaite que, dans les cas où il n'existe pas de "certitude absolue" de pratiques systématiques de la torture, le Comité s'en tienne aux preuves disponibles et agisse avec la dignité et le sens des responsabilités qu'exige une tradition juridique fort ancienne".

51. Pour le Gouvernement, "il est d'ailleurs quasiment impossible d'éliminer complètement la torture dans la lutte contre le terrorisme sauvage. ...c'est le massacre d'innocents (par les terroristes) qui constitue la violation la plus grave des droits de l'Homme. Aucune allégation ou accusation, aucun parti pris ne pourra détourner le gouvernement (turc) de son objectif principal qui est de protéger le droit à la vie". A l'égard des recommandations du Comité, il a été dit qu'elles n'ont rien de nouveau, la principale étant la réduction de la durée de la période de garde à vue. A ce propos, le représentant du gouvernement déclarait que le recours à des gardes à vue de longue durée est indispensable dans la lutte contre le terrorisme. Il ajoutait: "Le Gouvernement turc n'est pas disposé à l'heure actuelle à réduire la durée des périodes de garde à vue pour faire plaisir aux auteurs d'allégations de torture organisée, dont l'objectif est d'amoindrir la force de lutte contre le terrorisme".

52. Le Gouvernement turc a formulé une série de recommandations aux Etats parties à la Convention, afin qu'ils imposent au Comité plusieurs conditions très strictes, pour que ce dernier puisse mettre en oeuvre une enquête en application de l'article 20 de la

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[109] CAT/SP/SR.5, paragraphes 43 à 66.

Convention[110]. Selon les autorités turques, le Comité ne pourrait pas prendre de décision liée à la procédure confidentielle, sans avoir préalablement communiquer toutes les allégations dont il dispose à l'Etat concerné et sans faire connaître son point de vue. Le Comité ne devrait établir le contexte général du pays, dans le cadre duquel sont examinées les allégations de torture, qu'avec la pleine coopération de l'Etat intéressé. Le Comité devrait être extrêmement prudent quant au choix de ses membres chargés d'une enquête, et devrait notamment éviter de désigner des membres dont l'origine ethnique ou nationale les inciterait à soutenir la cause des groupes ethniques d'autres pays, "allant quelquefois jusqu'à tolérer la présence sur leur propre territoire d'organisations terroristes étrangères". Les conclusions d'une enquête du Comité ne devraient en aucune manière déboucher sur des interprétations mettant en cause l'intégrité territoriale et l'unité politique des Etats parties et "ne devraient en aucune façon conduire à fermer les yeux sur le massacre d'innocents sous le prétexte qu'on cherche à éliminer la torture". De plus, pour la Turquie, la réponse de l'Etat partie au rapport confidentiel devrait être annexée au compte rendu succinct du rapport si ce dernier est rendu public. Si ces conditions n'étaient pas remplies par le Comité, la délégation turque dissuaderait les Etats parties de coopérer avec le Comité. Enfin, le délégué turc proposa, à titre de recommandation générale, d'ajouter à l'ordre du jour des réunions des Etats parties un nouveau point concernant les travaux du Comité pour qu'ils puissent contrôler son programme d'activité. Les propositions turques reçurent un soutien vigoureux du représentant du Gouvernement égyptien qui, lui aussi, contesta avec force les travaux du Comité et proposa que les rapports du Comité relatifs à la procédure confidentielle soient soumis aux réunions des Etats Parties pour être approuvés par eux avant d'être présentés à l'Assemblée générale[111]. La Turquie fut aussi soutenue par le Yémen et le Maroc afin que les Etats parties aient un "droit de regard très actif" sur le Comité contre la torture. Les propositions turques et égyptiennes furent repoussées grâce à la vive opposition de la Suède qui s'était faite le porte-parole des autres Etats nordiques

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[110] CAT/SP/SR.5, paragraphe 64.

[111] CAT/SP/SR.5, paragraphes 71 à 83.

ainsi que de l'Australie, de l'Autriche, du Canada, de l'Italie, de la France, de l'Allemagne, des Pays-Bas, de la Nouvelle-Zélande, du Royaume -Uni, de la Fédération de Russie et de la Suisse[112].

K. La coordination avec les autres systèmes de lutte contre la torture

53. De nombreux mécanismes de lutte contre la torture coexistent aux plans universel et régional, habilitant par exemple des organes internationaux à recevoir des plaintes individuelles ou interétatiques ou à réaliser des enquêtes. Un même Etat peut faire l'objet de plusieurs de ces procédures. Comme le souligne le Centre pour les droits de l'Homme des Nations Unies, la multiplicité de ces mécanismes "pose la question de leurs relations et de l'établissement de formes de collaboration afin d'éviter des chevauchements de tâches et d'activités et de renforcer, grâce à une action commune, l'efficacité de la lutte internationale contre la torture"[113].

54. Il s'agit tout d'abord d'éviter les visites successives ou simultanées dans le même Etat. Pour cela, le Rapporteur spécial des Nations Unies chargé d'examiner les questions se rapportant à la torture a indiqué qu'il avait "présente à l'esprit la nécessité exprimée par la Commission des droits de l'Homme et par la Conférence mondiale sur les droits de l'Homme d'améliorer la coopération entre les mécanismes de l'ONU pour la surveillance des droits de l'Homme et d'éviter les doubles emplois superflus. Il ne cherchera donc pas, en principe, à se rendre dans des pays pour lesquels l'ONU a institué un mécanisme spécifique, par exemple, en désignant un rapporteur spécial de pays, sauf si une visite commune semble souhaitable aux deux rapporteurs. Pour les pays où les mandats d'autres mécanismes thématiques seraient également

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112 CAT/SP/SR. 6.

113 Centre pour les droits de l'Homme, *Le Comité contre la torture*, Fiche d'information sur les droits de l'Homme n° 17, Office des Nations Unies à Genève, 1992, page 4.

concernés, le Rapporteur spécial cherchera à consulter ces mécanismes en vue d'examiner avec le gouvernement en question, soit ensemble, soit parallèlement, la possibilité d'une visite commune. Quoi qu'il en soit, le Rapporteur spécial évite de faire des visites plus ou moins simultanées dans le temps. De même, si le Comité contre la torture examine, ou a examiné récemment, la situation dans un pays en application de l'article 20 de la Convention contre la torture_ et notamment si cet examen implique une visite ou un projet de visite dans le pays en question, le Rapporteur spécial ne cherchera pas à se rendre lui aussi dans ce pays"[114]. Le Comité contre la torture a lui -même évalué cette nécessaire coopération entre les deux organes. Pour lui, il ne s'agit pas d'établir une répartition des fonctions entre Comité et Rapporteur spécial, car leurs missions, même s'ils effectuent tous deux des visites sur place, sont différentes, mais complémentaires. Des contacts étroits et l'échange régulier d'informations, de rapports et de documents d'intérêt commun devraient permettre d'éviter tout chevauchement dans leurs activités respectives[115].

55. Toutefois, la coordination entre les différents organes pouvant effectuer des visites sur place a une portée limitée due à plusieurs facteurs. Le premier est la confidentialité des procédures à laquelle sont tenus ces organes. Par exemple, s'agissant de la coopération

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[114] E/CN.4/1994/31, § 17. Les risques de duplication sont d'autant grands que le mandat du Rapporteur Spécial sur la torture présente certaines analogies avec celui dévolu au Comité contre la torture par l'article 20. En effet, le Rapporteur spécial souhaite pouvoir: "a) transmettre aux gouvernements des résumés de toutes les informations crédibles et fiables qui lui sont communiquées et qui font état de cas de torture et de la pratique de torture;
b) analyser les réponses du gouvernement;
c) consulter éventuellement les sources des allégations au sujet de ces réponses;
d) poursuivre le dialogue avec les gouvernements si nécessaire;
e) tirer des conclusions et formuler à l'intention des gouvernements des recommandations à l'issue de cet échange d'informations systématique" (Doc. E/CN.4/1994/31, § 11). De plus, le Rapporteur peut réaliser une visite *in situ* avec l'accord de l'Etat concerné. Ainsi, il a réalisé une telle visite en Turquie du 31 août au 6 septembre 1988 (Doc. E/CN.4/1989/15, § 209-233).

[115] Comité contre la torture, Rapport annuel, Sup. N° 44 (A/45/44), 45ème session, 1990, § 27.Voir aussi A/49/44, § 16.

éventuelle entre le CPT et le Comité des Nations Unies contre la torture pour ce qui est des visites dans les Etats parties à la fois à la Convention européenne pour la prévention de la torture et à la Convention des Nations Unies, le Président du Comité contre la torture a fait observer que celle-ci semblait limitée par le caractère confidentiel des procédures respectivement applicables à de telles visites[116].

56. De plus, il ne s'agit pas, sous couvert de coordination, d'organiser un système mondial de visites. Chaque mécanisme a ses spécificités et doit avoir son autonomie et sa propre dynamique. Il ne peut être absolument pas question d'instaurer une hiérarchisation des instruments, imposant des liens de subordination entre les différents organes internationaux. De tels liens nuiraient à l'efficacité de la lutte contre la torture qui s'enrichit de ces nombreux mécanismes. Par exemple, au sein du Conseil de l'Europe et des Nations Unies, la Turquie a connu cette multiplicité de procédures. Elle présente des rapports étatiques dans le cadre de la Convention des Nations Unies contre la torture; elle a fait l'objet de requêtes individuelles ou étatiques alléguant une violation de l'article 3 de la Convention européenne des droits de l'Homme. Ces dernières années, elle a reçu les visites du Comité européen pour la prévention de la torture, du Comité des Nations Unies contre la torture, du Rapporteur spécial chargé d'examiner les questions se rapportant à la torture, de l'Assemblée parlementaire du Conseil de l'Europe, du Parlement européen et de la Commission européenne des droits de l'Homme. Loin d'annihiler leur efficacité, la mise en oeuvre échelonnée ou simultanée de plusieurs procédures complémentaires apparaît comme un atout supplémentaire pour essayer d'éradiquer la pratique de la torture et des traitements inhumains ou dégradants qui est profondément ancrée dans ce pays[117].

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[116] Comité contre la torture, Rapport annuel, Sup. N° 44 (A/45/44), 45ème session, 1990, § 32. Voir aussi Centre pour les droits de l'Homme, *Le Comité contre la torture*, Fiche d'information sur les droits de l'Homme n° 17, Office des Nations Unies à Genève, 1992, page 11.

[117] Rumpf C., *The Protection of Human Rights in Turkey and the Significance of International Human Rights Instruments*, in H.R.L.J., 1993, Vol. 14 n° 11-12, pages 394-408.

57. Une difficulté majeure peut néanmoins résulter des contradictions dans les constatations des différents organes internationaux. En effet, les différences de définition ou d'appréciation et la subjectivité sont naturellement présentes dans les opérations de qualification juridique, lorsqu'il s'agit d'évaluer, par exemple, si tel traitement ou telle condition de détention peuvent être qualifiés de torture ou de traitement inhumain ou dégradant ou s'il y a pratique systématique de la torture dans un pays. La tentation pourrait être grande pour les Etats concernés de jouer sur les éventuelles contrariétés entre les constatations des organes internationaux. La possibilité d'évaluations contradictoires est naturellement renforcée par le fait que les enquêtes ou les conclusions des organes internationaux sont confidentielles. Ainsi, les premières conclusions formulées en 1989 par le Rapporteur spécial des Nations Unies sur la torture et relatives à la Turquie paraissaient très timorées eu égard à la gravité de la situation dans ce pays et par comparaison avec celles du Comité contre la torture[118]. Par contre, s'agissant de l'Egypte, on constate une grande unité entre les deux organes[119].

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[118] En 1989, le Rapporteur spécial avait en effet noté : "A la suite de tous ces contacts, il est apparu clairement au Rapporteur spécial que la torture avait été régulièrement pratiquée dans le passé. Le grand nombre d'enquêtes qui ont été effectuées est en soi révélateur. Il est également tout à fait clair que la torture n'a pas encore été complètement éliminée et d'ailleurs nul ne le conteste. La question de savoir jusqu'à quel point elle est encore pratiquée est très sujette à controverse (souligné par nous)" (Doc. E/CN.4/1989/15, § 232). Jusqu'en 1991, en effet, le Rapporteur spécial sur la torture semble avoir privilégié le contact diplomatique avec les Etats, évitant de critiquer trop durement les gouvernements ayant accepté une visite sur leur territoire (Voir Olivier DE FROUVILLE, *Les procédures thématiques : une contribution efficace des Nations Unies à la protection des droits de l'Homme*, Publications de la Fondation Marangopoulos pour les droits de l'Homme, Editions A. Pedone, Paris 1996, page 103).

[119] Dans son rapport de 1995, le Rapporteur spécial "apprécie les réponses détaillées qu'il a reçues en ce qui concerne un certain nombre de cas". Mais, pour d'autres cas, en l'absence de réponse de la part du gouvernement, il est enclin à penser que, dans l'ensemble, les allégations communiquées en 1994 sont fondées. Et, "il n'en partage pas moins les inquiétudes du Comité contre la torture selon lesquelles "il semble que la torture soit encore couramment pratiquée en Egypte". (Doc. E/CN.4/1995/34, § 242).

58. Du point de vue des recommandations faites aux Etats, les risques de contrariété sont plus faibles. En effet, on peut observer une remarquable homogénéité dans les recommandations faites par les différents organes, car elles sont basées sur des fondements juridiques très proches, en particulier les règles minima, les codes d'éthique qui instaurent de véritables standards minimaux de traitement des personnes privées de liberté. Ainsi, un an avant la publication par le Comité contre la torture du compte rendu de l'enquête relative à la Turquie, le Comité européen pour la prévention de la torture avait réalisé en décembre 1992 une déclaration publique relative à la Turquie[120]. On observe que les conclusions des deux Comités sont très proches et l'organe des Nations Unies a sans nul doute été influencé par le CPT.

59. Un nouveau problème de coordination se posera au Comité contre la torture lorsque seront achevés les travaux d'élaboration du protocole facultatif se rapportant à la Convention des Nations Unies contre la torture, afin d'étendre au niveau mondial le mécanisme mis en oeuvre par la Convention européenne pour la prévention de la torture. Il s'agit en effet d'établir, au plan universel, un système de visites des lieux se trouvant sur le territoire relevant de la juridiction de tout Etat partie où des personnes sont privées de liberté, dans le but de prévenir la torture et les autres peines ou traitements cruels, inhumain ou dégradants[121]. L'élaboration de ce protocole qui est toujours en cours se heurte à un certain nombre de difficultés, et

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[120] CPT/Inf (93) 1. En application de l'article 10 paragraphe 2 de la Convention européenne pour la prévention de la torture, lorsqu' un Etat partie refuse de coopérer ou d'améliorer la situation à la lumière des recommandations du CPT, ce dernier peut faire une déclaration publique à ce sujet. En décembre 1996, le CPT a réalisé une deuxième déclaration publique relative à la Turquie, du fait de la persistance de la pratique de la torture dans ce pays (CPT/Inf (96) 34).

[121] Par sa résolution 1992/43 du 3 mars 1992, la Commission des droits de l'Homme a décidé de créer un groupe de travail afin d'élaborer ce projet de protocole. La deuxième lecture du projet a été engagée en 1996 et les travaux du groupe de travail se poursuivent actuellement.

notamment d'articulation avec les compétences du Comité contre la torture[122].

60. Les visites prévues par le protocole seraient effectuées par un Sous-Comité organe distinct du Comité, lié à ce dernier, mais avec une véritable autorité. On a pu se demander si ce nouveau système de visites n'aurait pas pour effet de rendre caduque la procédure prévue par l'article 20 de la Convention contre la torture. Or, ces deux procédures ont des fonctions et des circonstances de déclenchement très différentes. Les visites du Sous-Comité ont un caractère préventif et peuvent avoir lieu de plein droit sans conditions particulières alors que les enquêtes effectuées par le Comité contre la torture dans le cadre de l'article 20 ont lieu dans un but curatif et lorsqu'il y a pratique systématique de la torture. Les risques de duplication et les problèmes pratiques que poseraient des visites simultanées des deux organes pourraient être évités par une coordination souple et efficace entre les deux organes. Les modalités de cette coopération pourraient être précisées par une disposition du règlement intérieur du Sous-Comité ou réglées par la pratique. Il fut proposé que le Sous-Comité pourrait, par exemple, décider de reporter *momentanément* sa mission face à une enquête-visite effectuée par le Comité contre la torture en application de l'article 20 paragraphe 3 de la Convention contre la torture.

61. De plus, il est prévu dans le projet de protocole que le Comité contre la torture examine les rapports et les recommandations que pourra lui soumettre le Sous-Comité et, dans ce cas, le Comité sera tenu de respecter la confidentialité de ces informations; il recevra aussi un rapport général du Sous- Comité. Si l'Etat ne coopère pas ou refuse de tenir compte des recommandations du Sous-Comité, c'est le Comité qui, à la demande du Sous-Comité, pourra, après

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[122] Sur les débats qui animent le Groupe de travail sur le projet de Protocole Facultatif, voir Association pour la prévention de la Torture, *Rapport analytique de la première session du Groupe de travail sur le projet de Protocole facultatif se rapportant à la Convention des Nations Unies contre la torture et autres peines ou traitements cruels, inhumains ou dégradants* (Genève, 19-30 octobre 1992), Genève, janvier 1993, 19 pages.

avoir permis à l'Etat de s'expliquer, faire une déclaration publique ou publier le rapport. Mais, la transmission systématique des rapports de visite par le Sous-Comité au Comité remettrait en cause le principe de confidentialité, et reviendrait à une fusion de fait des missions des deux organes. C'est pourquoi le Comité a précisé, dans une proposition écrite, les rapports dont il devrait être saisi par le Sous-Comité:

a) ceux que l'Etat concerné désire publier;
b) ceux à propos desquels le Sous-Comité demande au Comité de faire une déclaration publique;
c) ceux qui, selon l'avis du Sous-Comité, révèlent une pratique systématique de torture de la part d'un Etat partie;
d) ceux concernant un Etat partie à l'égard duquel le Comité considère la possibilité de procéder à une enquête conformément à l'article 20 de la Convention.

Le Comité contre la torture examinera les rapports correspondants aux alinéas b), c) et d) en sessions privées. Ces dispositions nous éclairent, sur le plan organique, sur la nature exacte des rapports entre le Comité et le Sous-Comité. Le Sous-Comité serait un organe distinct, disposant de son autonomie fonctionnelle, mais conçu dans un rapport de subordination hiérarchique à l'égard du Comité contre la torture, qui est, en définitive, le garant de l'efficacité du Protocole, puisqu'il est le gardien de l'arme de dissuasion, en disposant seul du pouvoir de faire une déclaration publique.

Conclusion

62. La lutte contre la pratique systématique de la torture pose des problèmes spécifiques, car ce caractère systématique implique un profond ancrage de ce phénomène dans les Etats concernés. Par conséquent, son éradication ne sera pas possible sans qu'au niveau national la détermination des autorités politiques, administratives et judiciaires du pays concerné d'agir en ce sens ne soit affirmée. De plus, cela implique aussi une pression des opinions nationale et internationale. Dans cette optique, l'enquête prévue par l'article 20 de la Convention apparaît comme un outil spécifique pour combattre ce fléau en coopération avec les autorités nationales. Elle apparaît aussi comme un mécanisme complémentaire qui doit se combiner avec les autres procédures internationales afin de renforcer, grâce à une action commune, l'efficacité de la lutte internationale contre la torture.

63. En effet, au cours de la réalisation d'une enquête, le Comité remplit plusieurs fonctions qui ont des finalités différentes:

- une fonction classique d'enquête et d'établissements des faits pour laquelle l'organe conventionnel est habilité à recevoir toutes informations et à réaliser ses propres constatations, y compris par une visite *in situ*[123]. Le Comité doit évaluer la crédibilité de ces informations et si elles contiennent des indications bien fondées que la torture est pratiquée systématiquement sur le territoire d'un Etat partie;
- une fonction d'analyse et de qualification du comportement de l'Etat concerné par rapport à des normes juridiques de référence[124]. En l'occurrence, il s'agit pour le Comité de déterminer si l'ensemble des faits réunis est constitutif d'une pratique systématique de la torture telle que définie par l'article 1 de la Convention. Mais plus largement, cette fonction de contrôle a aussi pour objet d'évaluer le degré de respect de l'ensemble des obligations auxquelles se sont soumis les Etats parties en vertu de la Convention;
- une fonction consultative permettant d'établir contacts directs, coopération et dialogue avec les autorités nationales afin de réaliser un constat commun de la situation et de viser à son amélioration par l'adoption de certaines mesures appropriées;
- une fonction de surveillance et de prévention en formulant des recommandations en vue de prévenir de futures violations des dispositions de la Convention contre la torture et des droits humains;
- une fonction d'alerte qui permet, par la publication du compte rendu de l'enquête réalisée par le Comité, de porter l'attention de l'opinion internationale sur la situation particulière d'un pays.

De plus, l'apport sur le plan normatif de cette procédure spécifique est important. En effet, elle a permis au Comité de donner une définition de la pratique systématique de la torture, d'enrichir l'appréhension concrète du phénomène de la torture par les membres

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[123] Sur l'établissement des faits dans le domaine des droits de l'Homme, voir B.G. RAMCHARAN (éd.), *International Law and Fact-Finding in the Field of Human Rights*, Martinus Nijhoff, Dordrecht, 1982.

du Comité par la réalisation d'une visite et de prendre en compte la configuration et l'utilisation de certains lieux de détention. Elle lui permet enfin de formuler des recommandations pratiques pour concrétiser les obligations énoncées par la Convention et renforcer la protection des personnes privées de liberté contre la torture.

64. Sur un plan plus général, l'enquête internationale s'affirme aujourd'hui, au côté des mécanismes de rapports et de plaintes, comme l'une des procédures essentielles de protection des droits humains[125]. Certes, ce mécanisme est déjà utilisé depuis longtemps, notamment par le Comité international de la Croix-Rouge, par la Commission interaméricaine des droits de l'Homme ou au sein de l'Organisation Internationale du Travail, ou encore dans d'autres domaines que la protection des droits humains, comme le désarmement ou la fiabilité des installations nucléaires. Toutefois, cette pratique tend à présent à se généraliser, notamment par la réalisation de visites *in situ*, au niveau universel, par exemple pour les rapporteurs spéciaux et les groupes de travail des Nations Unies par thème ou par pays[126], ou au niveau régional, par la mise en oeuvre de la Convention européenne pour la prévention de la torture, par la création du Rapporteur spécial sur les prisons et les conditions de détention en Afrique ou par l'élaboration de telles procédures dans le cadre de la "dimension humaine" de l'Organisation pour la Sécurité et la Coopération en Europe (OSCE).

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[124] Sur les méthodes et les finalités du contrôle international de l'exécution des obligations des Etats, voir notamment le processus de vérification-surveillance, in J. COMBACAU, S. SUR, *Droit international public*, LGDJ Montchrestien, 1996, pages 201 et s., notamment pages 207-208.

[125] Sur l'enquête internationale, voir Georges FISCHER et Daniel VIGNES, *L'inspection internationale : quinze études sur la pratique des Etats et des organisations internationales* (réunies et introduites par), Ed. Emile Bruylant, Bruxelles, 1976, 519 pages; Association pour la Prévention de la Torture, *Standard Operating Procedures of International Mechanisms Carrying Out Visits to Places of Detention*, Genève, Novembre 1997, 33 pages.

[126] Ainsi, lors de la réunion des rapporteurs spéciaux, représentants, experts et présidents des groupes de travail chargés des procédures spéciales de la Commission des droits de l'Homme et du programme des services consultatifs, la pratique des visites dans les Etats, est présentée comme une composante naturelle de leur mandat (A/CONF.157/9).

65. A l'aube du XXIème siècle, on ne peut que constater que la torture constitue un fléau qui est encore profondément et durablement ancré dans le monde; sa pratique reste systématique dans un nombre non négligeable de pays. C'est pourquoi, malheureusement, la procédure mise en place par l'article 20 de la Convention ainsi que l'ensemble des mécanismes de lutte contre la torture sont loin d'être obsolètes. Encore faut-il que les organes compétents disposent des moyens humains, logistiques et financiers adéquats pour mettre en oeuvre dans les meilleures conditions ces mécanismes ? Or, dans ce domaine, le Comité contre la torture dont le financement est actuellement assuré par des contributions des Etats parties, est confronté à de nombreux problèmes, compte tenu notamment des retards accumulés par certains Etats dans le paiement de leurs contributions[127]. Dans ces conditions, comment la communauté internationale peut-elle exiger d'un pays qu'il exprime sa volonté de mettre fin à la pratique systématique de la torture, alors qu'elle rechigne à donner les moyens nécessaires pour mettre en oeuvre les mécanismes destinés à combattre cette violation particulièrement odieuse des droits de la personne humaine?

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[127] A cause des problèmes financiers, le Comité contre la torture a dû reporter la tenue de certaines de ses sessions. Sur le financement des activités des Nations Unies, voir A. DORMENVAL, *Procédures onusiennes de mise en oeuvre des droits de l'Homme : limites ou défauts ?*, P.U.F. 1991, pages 158 à 167. Une révision du mode de financement du Comité, modifiant les articles 17 (7) et 18 (5) de la Convention et prévoyant sa prise en charge par le budget ordinaire des Nations Unies, a été adoptée le 8 septembre 1992 par la Conférence des Etats parties et approuvée par la résolution 47/111 de l'Assemblée générale. Ces modifications n'étaient pas encore entrées en vigueur au 31 décembre 1997.

MINORITIES: THE MISSING ARTICLE IN THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

WILLIAM A. SCHABAS

The *Universal Declaration of Human Rights* contains no provisions concerning the rights of persons belonging to ethnic, linguistic and religious minorities. Early in the history of human rights, the protection of minorities had been an important theme, notably in the treaties and declarations adopted subsequent to the First World War. The first draft of the *Declaration* contained a minority rights provision, based on a text prepared by the English scholar Hersh Lauterpacht. However, the Drafting Committee Commission on Human Rights ultimately voted against including such a text in the *Declaration*. The Soviet Union, Yugoslavia and Denmark unsuccessfully attempted to revive the idea during the debate in the Third Committee of the General Assembly, in October-December, 1948. Ultimately, the Assembly adopted a distinct resolution referring the question back to the Sub-Commission for further study. European States, particularly those in Eastern Europe, where the inter-war minorities system had been in force, were keen on including a minority rights provision. Opposition came from states of immigration: South and North America, Australia and New Zealand, who feared it might inhibit assimilation. The remaining colonial powers, the United Kingdom and France, were also opposed. Proponents of minority rights succeeded in the adoption of article 27 of the *International Covenant on Civil and Political Rights*. But the unfortunate omission in the *Declaration* had long-term consequences and may partially explain the rather modest protection offered by international human rights law to both ethnic minorities and indigenous peoples.

The *Universal Declaration of Human Rights* was adopted by the United Nations General Assembly on December 10, 1948.[1] According to its preamble, its aim was to constitute a "common

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[1] G.A. Res. 217 A (III), U.N. Doc. A/810. See: Alfred VERDOODT, *Naissance et signification de la Déclaration universelle des droits de l'homme*, Louvain, Paris:

standard of achievement for all peoples and all nations." As the touchstone for international human rights law, its universal significance has been reaffirmed on countless occasions, and most notably in the *Helsinki Final Act* of 1975[2] and the *Vienna Declaration and Programme of Action* of 1993.[3] The *Declaration* was the framework upon which the two international human rights covenants were constructed,[4] and it is cited specifically in the preambles to the three major regional human rights instruments.[5] The *Declaration*'s provisions are general and often quite vague, leaving a large amount of room for interpretation and progressive development. For example, the very simple recognition of the right to life, in article 3, was meant to allow the law to develop and, eventually, to include the abolition of the death penalty among the elements making up the norm. But in 1948, any such affirmation would have been excessive and unrealistic.

Yet in one important area, the drafters of the *Universal Declaration* chose to exclude a fundamental right, that involving the protection of individuals belonging to ethnic, linguistic and religious minorities.[6] Amendments aimed at filling this void were proposed but they were systematically rejected by both the Commission on Human Rights

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Nauwelaerts, 1963; Asbjorn EIDE, *The Universal Declaration of Human Rights: A Commentary*, Oslo: Scandinavian University Press, 1992; Glen JOHNSON, *La Déclaration universelle des droits de l'homme*, Paris: UNESCO, L'Harmattan, 1991; René CASSIN, "La Déclaration universelle et la mise en œuvre des droits de l'homme," (1951) 79 *R.C.A.D.I.* 237; John HUMPHREY, "La nature juridique de la Déclaration universelle des droits de l'homme," (1981) 12 *R.G.D.* 397.[2]*Helsinki Final Act*, art. 1(a)(VII).

[3] U.N. Doc. A/CONF.157/24, preamble.

[4] *International Covenant on Economic, Social and Cultural Rights*, (1976) 993 U.N.T.S. 3, [1976] C.T.S. 46; *International Covenant on Civil and Political Rights*, (1976) 999 U.N.T.S. 171, [1976] C.T.S. 4.

[5] *Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights")*, (1955) 213 U.N.T.S. 221, E.T.S. 5; *American Convention on Human Rights*, (1979) 1144 U.N.T.S. 123, O.A.S.T.S. 36; *African Charter on Human and Peoples' Rights*, O.A.U. Doc. CAB/LEG/67/3 Rev. 5.

[6] Albert VERDOODT, "Influence des structures ethniques et linguistiques des pays membres des Nations Unites sur la rédaction de la Déclaration universelle des droits de l'homme", in *Liber Amicorum Discipulorumque René Cassin*, Paris: Pedone, 1969, pp. 403-416.

and the General Assembly. Nevertheless, the protection of minorities or of individuals belonging to minorities has a long history in international law. Almost from the beginning of international law itself, at the time of the Treaty of Westphalia, texts were included in peace treaties securing the protection of religious minorities.[7] During the nineteenth century, minority rights provisions became a recurring feature of the international conventions that marked the declining fortunes of the Ottoman Empire.[8]

Then, in 1919, minority rights became one of the human rights themes of the post-war world order. There were a series of proposals, originating in the United States, for inclusion of minority rights provisions in the *Covenant* of the League of Nations.[9] However, these were dropped in the final version, due to hesitation by the United Kingdom, Australia and New Zealand, who were concerned about the consequences in their relations with aboriginal peoples.[10] A series of multilateral treaties, bilateral conventions and unilateral declarations ensured a panoply of rights to members of religious and ethnic minorities in Eastern Europe and the Middle East.[11] Moreover, a petition system was inaugurated that had, as its ultimate expression, the rich and enduring case-law of the Permanent Court of International Justice. But the treaties which provided safeguards for ethnic minorities fell short of their promise, and many believed they were exploited by fascists seeking to fan the flames of irredentism. By the end of the Second World War, as work began on the new law of human rights, the question of minority rights was controversial.

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7 For example: *Austro-Ottoman Treaty* (1615); *Peace of Westphalia* (1648); *Treaty of Ovila* (1660); *Treaty of Peace between France and Great Britain* (1713).

8 For example: *Convention of Constantinople* (1879); *Convention of 1881 for the Settlement of the Frontier between Greece and Turkey.*

9 F. CAPOTORTI, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, U.N. Doc. E/CN.4/Sub.2/384/Add.1-7, U.N. Sales No. E.78.XIV.I, §82-91. See also: David Hunter MILLER, *The Drafting of the Covenant*, Vol. II, New York: G.B. Putnam's Sons, 1928.

10 Nathan FEINBERG, *La question des minorités à la Conférence de la paix de 1919-1920 et l'action juive en faveur de la protection internationale des minorités*, Paris: Librairie Arthur Rousseau, 1929.

11 P. DE AZCARATE, *The League of Nations and National Minorities*, Washington: Carnegie Endowment, 1945; S. ROUCEK, *The Working of the Minorities System under the League of Nations*, Prague: Orbis, 1929.

1. From Secretariat Outline to Drafting Committee

The preliminary meetings for the organisation of the United Nations were held in late 1944 at Dumbarton Oaks. The Dumbarton Oaks Proposals only set out the goals of the United Nations Organisation and did not venture into the specific human rights that would be addressed. The phrase employed was: "promote respect for human rights and fundamental freedoms."[12] The following year at San Francisco the *Charter of the United Nations*[13] was adopted and the organisation inaugurated. The *Charter* declared that the promotion and encouragement of respect for human rights was an obligation upon Member States[14] and assigned the responsibility for human rights matters to the Economic and Social Council[15] and to commissions that were to be set up by the Council.[16] At San Francisco, there were unsuccessful efforts to adopt an "international bill of rights" as part of the *Charter* or as an adjunct to it, and with this in mind drafts were submitted by Panama and Cuba, neither of which addressed the issue of minority rights.[17] The San Francisco conference did not proceed with the bill of rights, leaving it as a matter of priority for the future Commission on Human Rights.[18]

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[12] *Dumbarton Oaks Proposals for a General International Organization*, Documents of the U.N. Conference on International Organization, San Francisco, 1945, Vol. III, at p. 19.

[13] *Charter of the United Nations*, (1945) 39 *A.J.I.L.* Supp. 190, [1945] C.T.S. 7, 145 B.F.S.P. 805.

[14] *Ibid.*, art. 55c); see Jean-Bernard MARIE, Nicole QUESTIAUX, "Article 55: alinéa c," in Jean-Pierre COT, Alain PELLET, *La Charte des Nations Unies*, Paris, Brussels: Economica, Bruylant, 1985, at pp. 863-883; E. SCHWELB, "The International Court of Justice and the Human Rights Clauses of the Charter," (1972) 68 *A.J.I.L.* 337.

[15] *Ibid.*, arts. 60, 62§2; see Dominique ROSENBERG, "Article 62§2," in Jean-Pierre COT, Alain PELLET, *ibid.*, at pp. 955-960.

[16] *Ibid.*, art. 68; see Raymond GOY, "Article 68," in Jean-Pierre COT, Alain PELLET, *ibid.*, at pp. 1010-1026.

[17] U.N.C.I.O. Doc. 2G/14(g); U.N.C.I.O. Doc. 2G/7/(2). Article 52 of the Cuban draft prohibited discrimination, but said nothing about minorities. Article 17 of the Panamanian draft provided for equal protection but was also silent on the subject of minorities.

[18] The First Committee did, on June 1, 1945, resolve that the General Assembly should examine the Panamanian text and give it an effective form (U.N.C.I.O. Doc. 944, I-I, 34). See also Lilly E. LANDERER, "Capital Punishment as a Human Rights Issue Before the United Nations," (1971) 4 *H.R.J.* 511, at p. 513.

In order to give detailed direction to the Economic and Social Council for the establishment of the Commission, a "nuclear commission on human rights" was convened in May, 1946, with Eleanor Roosevelt as its chair.[19] The Commission took the view that the actual drafting of the bill would be the task of the "Permanent Commission on Human Rights," following the creation of that body.[20] The report of the nuclear commission to the Economic and Social Council contained recommendations to this effect.[21] When the Commission on Human Rights was established by the Economic and Social Council, in June, 1946, its terms of reference consisted of five items, including the drafting of the international human rights declaration and the protection of minorities.[22]

The Commission on Human Rights met for the first time from January 27 to February 10, 1947.[23] At the first session of the Commission, there were occasional comments relevant to the issue of minority rights. Hansa Mehta of India said: "An effort must be made to define in practice, legal and practical language, as to what a minority is, as to what discrimination is. Additional to this, a definition must be made forthwith as to what specific safeguards must be incorporated in the proposed bill of human rights against the danger of assimilation where they exist."[24] Colonel Hodgson of Australia said: "What do we see when we speak of human rights? We refer to, or we have in mind minorities."[25] And General Romulo of the Philippines noted: "...the bill of rights, which we have been commissioned to draw up, should take into account... the rights of minority groups within the state..."[26]

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[19] U.N. Doc. A/125/Add.1, p. 7; U.N. Doc. E/HR/6, p. 3.

[20] U.N. Doc. E/HR/13, p. 1; U.N. Doc. E/HR/15, pp. 4-5, U.N. Doc. E/HR/19, p. 5.

[21] U.N. Doc. E/38/Rev.1.

[22] ECOSOC Res. 5 (I), §c; amended by ECOSOC Res. 9 (II); U.N. Doc. A/CONF.32/6, §79.

[23] U.N. Doc. E/CN.4/SR.1*. For a history of the work of the Commission on Human Rights in the drafting of the *Universal Declaration*, see Jean-Bernard MARIE, *La Commission des droits de l'homme de l'O.N.U.*, Paris: Pedone, 1975.

[24] U.N. Doc. E/CN.4/SR.2, p. 32.

[25] *Ibid.*, p. 42.

[26] U.N. Doc. E/CN.4/SR.9, pp. 13-20.

The Commission on Human Rights recognised that an *ad hoc* "Drafting Committee" would be best suited to prepare the draft bill.[27] This approach was endorsed by the Economic and Social Council, which requested the Secretariat to prepare a documented outline.[28] The outline was to be studied by the Drafting Committee and mailed to Commission members by June 25, 1947. It would then be considered at the Commission's second session at the end of the year, returned to the Drafting Committee if necessary for review, resubmitted to the Commission on Human Rights, and then sent on to the Economic and Social Council, with a view to adoption by the General Assembly at its 1948 session. The Drafting Committee was composed of representatives from Australia, Chile, China, France, Lebanon, the Soviet Union, the United Kingdom and the United States.

Accordingly, the secretary of the Commission, John P. Humphrey, was assigned to compile an initial draft. Humphrey essentially collated the human rights provisions found in the draft declarations submitted by governments and non-governmental organizations, together with the relevant constitutional human rights instruments of the United Nations Member States. His document, known as the "Secretariat Draft Outline," and which is the first real draft of the *Universal Declaration*, consisted of forty-eight articles.[29] Only one of the draft declarations available to the Commission had included a minority rights article, that prepared by Professor H. Lauterpacht in 1945.[30] But there were examples of minority rights provisions in the constitutions of Belgium, Byelorussia, China, Czechoslovakia, Ecuador, Iran, Lebanon, Luxembourg, Panama, Poland, South

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[27] *Ibid.*, p. 5; U.N. Doc. E/CN.4/SR.12, p. 5; U.N. Doc. E/259, §10(a).

[28] U.N. Doc. E/RES/46(IV), U.N. Doc. E/325.

[29] U.N. Doc. E/CN.4/AC.1/3.

[30] Hersh LAUTERPACHT, *An International Bill of the Rights of Man*, New York: Columbia University Press, 1945. See also: U.N. Doc. E/CN.4/AC.1/3/Add.1, pp. 380-381. Lauterpacht's text said: "In States inhabited by a substantial number of persons of a race, language or religion other than those of the majority of the population, persons belonging to such ethnic, linguistic or religious minorities shall have the right to establish and maintain, our of an equitable proportion of the available public funds, their schools and cultural and religious institutions and to use their own language before the courts and other authorities and organs of the State."

Africa, Syria, Ukraine, USSR and Yugoslavia.[31] Humphrey suggested the following text, which is article 46 of his draft: "In States inhabited by a substantial number of persons of a race, language or religion other than those of the majority of the population, persons belonging to such ethnic, linguistic or religious minorities shall have the right to establish and maintain, out of an equitable proportion of any public funds available for the purpose, their schools and cultural and religious institutions, and to use their own language before the courts and other authorities and organs of the State and in the press and in public assembly."[32] The Secretariat placed the provision under the heading "Equality," where it was accompanied by only one other article, dealing with the prohibition of discrimination.[33] The model for the Secretariat Draft article was the text drafted by H. Lauterpacht, with which it differed in only minor respects.

The Drafting Committee convened in June, 1947. Its session began with a first reading of the Secretariat Draft Outline, largely with a view to seeing if at least one member of the Committee considered that the provision should be retained. When it came to article 46, Charles Malik of Lebanon said that he agreed with the inclusion of the substance of the provision.[34] After this exercise was concluded, the Drafting Committee agreed to set up a Working Group, composed of the representatives of France, Lebanon, and the United Kingdom.[35] This Working Group in turn decided that it would be preferable for the draft declaration to be the work of a single individual and asked René Cassin to assume the responsibility. Cassin was to prepare a draft declaration based on those articles in the Secretariat Outline that he felt belonged in the Bill. A few days later, he produced a new text consisting of a preamble and forty-four articles.[36]

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[31] U.N. Doc. E/CN.4/AC.1/3/Add.1, pp. 381-386.

[32] U.N. Doc. E/CN.4/AC.1/3, p. 16; U.N. Doc. E/CN.4/AC.1/3/Add.1, pp. 380; also U.N. Doc. E/CN.4/AC.1/11, p. 51.

[33] U.N. Doc. E/CN.4/AC.1/3/Add.2, p. 6.

[34] U.N. Doc. E/CN.4/AC.1/SR.4, p. 10.

[35] U.N. Doc. E/CN.4/AC.1/SR.6, p. 8; U.N. Doc. E/CN.4/21, §13.

[36] U.N. Doc. E/CN.4/AC.1/SR.7, p. 2; U.N. Doc. E/CN.4/21, §14; the draft is U.N. Doc. E/CN.4/AC.1/W.2/Rev.2; also U.N. Doc. E/CN.4/AC.1/14.

Article 39 of the Cassin draft dealt was, with a few minor changes, the same as the text in the Secretariat Draft.[37] In presenting the provision, Cassin said it "was one of the most important Articles as the prevention of discrimination should be emphasised in the Declaration. However, the language in this Article should be appropriate for situations existing all over the world, and suggested that the word 'conglomeration' might be better than the word 'persons.'" Cassin recommended that the provision be referred to the Sub-Commission on Prevention of Discrimination and Protection of Minorities for further study.[38]

The Cassin draft provoked the first real debate on whether or not to include a minority rights provision in the draft declaration. Santa Cruz of Chile said that many countries of the American continent had been created by immigration of people from other countries and warned that the form and substance of the Article called for most careful consideration.[39] Malik of Lebanon perceptively observed that "the substance of this Article seemed to be what divided the New World from the Old. In the Old World, there were wide divisions of ethnic groups. In the New World, there was assimilation."[40] Malik did not oppose referral to the Sub-Commission, but insisted that the idea of minority rights be included in the Declaration.[41] Wilson of the United Kingdom said "that when the time was ripe, something along the lines of the draft Article should be included in the Declaration." But Wilson cautioned against referral to the Sub-Commission, as this would imply its endorsement by the Drafting Committee. Wilson said it should be the task of the Secretariat to bring the provision to the Sub-Commission's attention.[42]

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[37] *Ibid.* "In States inhabited by a substantial number of persons of a race, language or religion other than those of the majority of the population, persons belonging to such ethnic, linguistic or religious minorities shall have the right as far as compatible with public order to establish and maintain their schools and cultural and religious institutions, and to use their own language in the press, in public assembly and before the courts and other authorities of the State."

[38] U.N. Doc. E/CN.4/AC.1/SR.16, p. 6.

[39] *Ibid.*

[40] *Ibid.*

[41] *Ibid.*

[42] *Ibid.*

It was by now clear that sharp division existed on the subject. Eleanor Roosevelt, in the chair, thought that a footnote might be attached to the minority rights article saying that the text was based on the Secretariat Outline.[43] She thought the Drafting Committee might refer the substance of article 39 to the Commission on Human Rights, letting it decide whether to refer the matter to the Sub-Commission.[44] Malik preferred to state that the provision had been discussed in the Drafting Committee, which did not take any action, deciding to refer the matter to the Commission for possible reference to the Sub-Commission.[45] Eventually, the Drafting Committee agreed upon the following footnote: "In view of the supreme importance of this Article to many countries, the Drafting Committee felt that it could not prepare a draft article without thorough pre-examination by the Commission on Human Rights and suggested that it might if necessary be referred to the Sub-Commission on Prevention of Discrimination and Protection of Minorities for examination of the minority aspects."[46]

2. The Sub-Commission on Prevention of Discrimination and Protection of Minorities

The Sub-Commission met in November and December 1947.[47] The member from the United Kingdom, Elizabeth Monroe, noted an "inconsistency" in the draft declaration, in that it prohibited discrimination and at the same time sought to protect minorities, thus seeking equal treatment in one provision and differential treatment in another. She proposed that a "clarifying clause" be added to article

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[43] *Ibid.*

[44] *Ibid.*, p. 7.

[45] *Ibid.*

[46] *Ibid.*, p. 10.

[47] On the Sub-Commission, see: Asbjørn EIDE, "The Sub-Commission on Prevention of Discrimination and Protection of Minorities," in Philip ALSTON, ed., *The United Nations and Human Rights*, Oxford: Oxford University Press, 1992; John P. HUMPHREY, "The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities," (1968) 62 *A.J.I.L.* 869; Patrick THORNBERRY, *International Law and the Rights of Minorities*, Oxford: Clarendon Press, 1991, pp. 124-132.

36 (formerly article 39) reading: "Differential treatment of a Minority or of an individual belonging to a Minority is not discrimination when it is in the interests of contentment and the welfare of the community as a whole."[48] The Sub-Commission reworked the Drafting Committee's text and adopted its new version by six votes to four, with two abstentions: "In States inhabited by well defined ethnic, linguistic or religious groups which are clearly distinguished from the rest of the population and which want to be accorded differential treatment, persons belonging to such groups shall have the right as far as is compatible with public order and security to establish and maintain their schools and cultural or religious institutions, and to use their own language and script in the press, in public assembly and before the courts and other authorities of the State, if they so choose."[49] The Sub-Commission had made some important changes to the original proposal in the Secretariat Outline and the Cassin draft. It did not require that a "substantial number" of individuals make up the minority, but insisted that it be a "well defined group." The Sub-Commission clarified the distinction between objective and subjective criteria, originally contemplated in an advisory opinion of the Permanent Court of International Justice.[50] Minority groups needed to be "clearly distinguished from the rest of the population" (objective criterion) but additionally must "want to be accorded differential treatment" (subjective criterion).[51] The major source of discord in the Sub-Commission was whether the protection should be reserved to citizens or whether it would apply to all individuals. The latter solution prevailed, although the Belgian member, Nisot, said this was "excessive."[52]

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[48] U.N. Doc. E/CN.4/Sub.2/26. Perhaps the original "affirmative action" clause. See: *International Convention on the Elimination of All Forms of Racial Discrimination*, (1969) 660 U.N.T.S. 195, art. 1(4); *Convention on the Elimination of All Forms of Discrimination Against Women*, (1981) 1249 U.N.T.S. 13, art. 4(1).

[49] U.N. Doc. E/CN.4/Sub.2/38, p. 6; also U.N. Doc. E/CN.4/52, pp. 9-10; U.N. Doc. E/CN.4/77/Annex A.

[50] Advisory Opinion of July 31, 1930 on the *Greco-Bulgarian Community*, P.C.I.J., Ser. B, No. 17, at pp. 19, 21, 22 and 33.

[51] U.N. Doc. E/CN.4/Sub.2/38, p. 7.

[52] For the debates in the Sub-Commission, see: U.N. Doc. E/CN.4/Sub.2/SR.10, pp. 2–6, U.N. Doc. E/CN.4/Sub.2/SR.11, pp. 1-22. Also: U.N. Doc. E/CN.4/Sub.2/38, p. 7.

3. The Second and Third Sessions of the Commission on Human Rights

The Commission on Human Rights held its second session in December, 1947. In the Working Group on the draft declaration, the two minority rights provisions, that of the Drafting Committee and that of the Sub-Commission, were considered. Byelorussia expressed astonishment at the phrase "as far as is compatible with public order and security," which had been added by the Sub-Commission.[53] René Cassin said that France was prepared to support the Sub-Commission draft, but on the condition that the word "persons" was replaced by "citizens of the country."[54] Eleanor Roosevelt noted that there were no objections among the Group's members to this change.[55] Focussing on positive obligations to protect minorities, Byelorussia then proposed that an additional sentence be added to the draft provision: "The rights of minorities must be guaranteed by the State by means of establishing standards and procuring the necessary means from State source in order to give members of such groups rights of nation and nationality in the framework of national and territorial autonomy."[56] Eleanor Roosevelt was not pleased with the amendment, saying that implementation should be left to individual States.

The voting in the Working Group showed the continuing division on the subject of minority rights. Roosevelt, as chair, indicated that the Working Group first vote on whether or not to delete the provision entirely. The proposal to delete article 36 was defeated, by two votes to one, with two abstentions.[57] The Byelorussian amendment imposing a positive duty on States was defeated by three votes to two.[58] Then Cassin withdrew his proposed change dealing with

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[53] U.N. Doc. E/CN.4/AC.2/SR.9, p. 18.

[54] *Ibid.*, p. 19. Note that the Human Rights Committee considers that the protection of members of minorities ensured by article 27 of the *International Covenant on Civil and Political Rights*, *supra* note 4, extends to non-citizens: *General Comment no. 23(5) (art. 27)*, U.N. Doc. CCPR/C/21/Rev.1/Add.5, para. 5.1.

[55] U.N. Doc. E/CN.4/AC.2/SR.9, p. 19.

[56] *Ibid.*

[57] *Ibid.*, p. 20.

[58] *Ibid.*

citizens, saying that in any case the text of the article was not yet final and that it would be preferable for the Group not to vote on it at all. The Working Group agreed, then, by four votes to one, not to take a position on the minority rights provision and to send the matter back to the Commission.[59] Subsequently, the Commission also decided to set it aside with a note to this effect.[60] The Commission's report on the Second Session reproduced the texts of the Drafting Committee and the Sub-Commission, saying they were subject to "further consideration."[61]

Responding to an invitation from the Secretary-General seeking observations on the draft declaration, a few Member States submitted comments addressing the minority rights issue. Brazil said: "The Brazilian Government would prefer the text proposed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. It would seem advisable, however, to add that such provisions do not refer to groups formed by immigration, whether spontaneous or officially fostered, into independent States already in existence at the time of immigration."[62] Egypt's submission read: "With regard to Article 31 [formerly 39], which deals with the problem of minorities, and on which no decision was taken by the Commission, the Royal Government considers that such an article is out of place in a declaration on human rights, the object of such a declaration being to enumerate the rights of man and not those of minorities. Minority rights should be covered by a convention on minorities. It is to be hoped, moreover, that when the International Declaration on Human Rights is put into effect by States and men are given equal treatment everywhere the problem of minorities will disappear."[63]

The final version of the declaration adopted by the Commission on Human Rights at its third session, in June, 1948, contained no minority rights provision. The matter was considered only briefly and with the most perfunctory of debate before the Commission

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59 *Ibid.*, p. 21.
60 U.N. Doc. E/CN.4/SR.40, p. 16.
61 U.N. Doc. E/600, pp. 18-19.
62 U.N. Doc. E/CN.4/82/Add.2, p. 7.
63 U.N. Doc. E/CN.4/82/Add.3, p. 2.

decided to delete the provision, by ten votes to six.[64] Eleanor Roosevelt said that this also disposed of a Soviet draft to the same effect, but the Soviets argued that their text also dealt with the right to have schools in the mother tongue and that this dictated the need to put their amendment to a vote. Without further ado, it too was rejected, by ten votes to five.[65] The Soviet delegation made a statement, towards the end of the June, 1948 session of the Commission, noting "the omission from the Declaration of the provision regarding the right of every person to his own national culture, to be taught at school in his native language and to use that language in the press, at meetings, in courts and other public offices..."[66]

4. The General Assembly (Third Committee)

The Commission's draft, adopted at its Third Session in June, 1948, was transferred to the Economic and Social Council and from there to the General Assembly, where it was examined in minute detail from the beginning of October to early December, 1948. Although the minority rights provision had been deleted by the Commission, the Soviet Union, Yugoslavia and Denmark endeavoured to revive the matter during the article-by-article debate in the General Assembly's Third Committee.[67] Uruguay, Cuba and Greece all attempted to block the debate, arguing that the matter had been

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[64] U.N. Doc. E/CN.4/SR.74, p. 5.

[65] *Ibid.*, p. 6.

[66] "Report of the Third Session of the Commission on Human Rights," U.N. Doc. E/800, p. 38.

[67] U.N. Doc. A/C.3/307, p. 1 (Soviet Union): "Add to the text adopted a separate new paragraph... "All persons, irrespective of whether they belong to the racial, national or religious minority or majority of the population, have the right to their own ethnic or national culture, to establish their own schools and receive teaching in their native tongue, and to use that tongue in the press, at public meetings, in the courts and in other official premises." U.N. Doc. A/C.3/307/Rev.1/Add.1 (Yugoslavia): "A. Any person has the right to the recognition and protection of his nationality and to the free development of the nation to which he belongs. National communities which are in a state community with other nations are equal in national, political and social rights. B. Any national minority, as an ethnical community, as the right to the full development of its ethnical culture

resolved by the Commission at its third session.[68] But Charles Malik, who was chairing the session, ruled the amendments in order and opened the general debate on the three new texts.

Pavlov of the Soviet Union explained that the issue should concern all persons, whether members of a majority or a minority, because "the use of the native language and the right of a population to develop its own national music and culture were fundamental rights." Pavlov presented a lengthy portrait of Soviet practice, explaining that there were more than 100 nationalities living in harmony within his country, a state of affairs very different from that which had prevailed under Tsarist rule. Pavlov said that internationalism could be achieved in two ways, "firstly, by respecting the rights, the independence and the sovereignty of all peoples, which was the method followed by the Soviet Union; secondly, by assimilating the various peoples; that method the USSR rejected."[69]

Yugoslavia's delegate, Radevanovic, explained that the problem of national minorities was one of protecting small national groups, scattered like islets in the midst of the territory of a nation. Minorities were always in danger of losing their national character, he said. "The cultural and ethnical rights of all persons belonging to a national minority, the right to develop their own ethnical culture, to establish schools, to use their native language in public administration etc. all depended upon the recognition of the minority itself as an ethnic group." Radevanovic noted that the Yugoslav proposal was aimed at the protection of national minorities as such, and did not touch directly upon the individual rights of persons belonging to minorities.[70]

Denmark's proposal, dealing only with the right to education in the mother tongue for minorities, was more modest. Hvass of Denmark explained that the Soviet draft was too detailed, and that

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and to the free use of its language. It is entitled to have these rights protected by the State." U.N. Doc. A/C.3/307/Rev.1/Add.2 (Denmark): "All persons belonging to a racial, national, religious or linguistic minority have the right to establish their own schools and receive teaching in the language of their own choice."

[68] GAOR, Third Session, Part I, Summary Records of Meetings of the Third Committee, pp. 717-719; U.N. Doc. A/C.3/SR.161.

[69] *Ibid.*, pp. 719-720.

[70] *Ibid.*, p. 720.

"a declaration which was to be completed by a covenant demanded brevity and conciseness."[71]

The heart of the opposition to the proposals came from States of immigration, in South and North America, as well as Australia and New Zealand. Campos Ortiz of Mexico said that the situation of minorities on the American continent could not be equated with that in Europe. They were not, he said, affected by discriminatory measures and "had the advantage of a very generously conceived naturalisation, with the result that the various legislative bodies had not needed to consider the question of the protection of minorities."[72] Brazil said that national unity of States might be disrupted were the principle set out in the Soviet resolution to be applied. De Athayde of Brazil explained that all teaching in his country was carried out in the national language. "If foreigners were able to use their mother tongue in the schools, before the courts and in various other circumstances, immigrants would have no interest in learning Portuguese and in becoming assimilated as rapidly as possible into the Brazilian population." De Athayde said that an immigrant had agreed freely to come to the new country, and therefor should accept "the disadvantages of his situation as an immigrant, since he also had the advantages which went with it."[73] Santa Cruz of Chile said the principle would be "extremely dangerous" for countries such as his own, which had received large numbers of immigrants, many of them Europeans who had been persecuted by dictatorial regimes. Santa Cruz paid tribute to Brazil as "an unprecedented example of the fusion of races."[74] Uruguay's Jiménez de Aréchaga took a similar view, noting that there was no distinction in his country between the status of immigrants and that of its own nationals. However, he admitted that adequate measures might be necessary in States where minorities existed. Still, a minority rights provision had no place in a universal declaration.[75]

[71] *Ibid.*, p. 721.
[72] *Ibid.*
[73] *Ibid.*, pp. 721-722.
[74] *Ibid.*, pp. 723-724.
[75] *Ibid.*, p. 721.

Eleanor Roosevelt said that the Commission on Human Rights "had studied with close attention the possibility of including a provision concerning minorities" in the declaration, and had decided to delete it. She agreed with the Latin Americans that the problem was different in Europe ad in America. The American position favoured assimilation. The problem of minorities was only a European one, she said. [76]

Canada made one of its rare interventions in the debate on the draft declaration, questioning the definition of the term "minority." The Canadian delegate said "[i]t has been stated that the problem of minorities may arise as the result of the arrival in a country of new settlers from a foreign country, or it may arise from the unfavourable circumstances in which certain indigenous national groups may find themselves." He noted that Canada was made up of groups of English and French-speaking Canadians, neither of which met the definition of a "minority,"[77] and both of which have "complete amity one towards the other." [78] He did not expand upon the subject of indigenous peoples, although he did discuss the status of immigrants: "The Government's policy was one of voluntary assimilation, looking forward to the day when the immigrant would regard himself as a Canadian citizen."[79] He told the Committee that he would vote against the proposals, although he said he could support referring the matter to the ECOSOC for further study[80].

Australia, New Zealand, Turkey, Greece and the United Kingdom also spoke against the three proposed minority rights provisions. Australia said its situation was similar to that of the Latin American

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[76] *Ibid.*, pp. 726.

[77] In this regard, see: *Ballantyne and Davidson, and McIntyre* (Nos. 359/1989 and 385/1989), U.N. Doc. A/48/40, Vol. II, p. 91, 14 *H.R.L.J.* 171, 11 *Netherlands Q.H.R.* 469.

[78] "Final Report, Item 58, Universal Declaration of Human Rights, Supplementary to and continuing Interim Report submitted under cover of despatch No. 31 of 25th November from Chairman of the Canadian Delegation, by J.H. Thurrott, Second Secretary at the Canadian Embassy in Brussels, sent to George Ignatieff, December 21, 1948," NAC RG 25, Vol. 3700, File 5475-DM-1-40, Appendix H.

[79] U.N. Doc. A/C.3/SR.162, p. 729.

[80] NAC RG 25, Vol. 3699, File 5475-DG-2-40, No. 497, November 29, 1948. Also: "Final Report, Item 58, Universal Declaration of Human Rights...", *supra* note 78, p. 9.

countries. In general, Australia "desired the dispersal of groups rather than the formation of minorities; similarly it desired that one language should prevail." Australia could not accept the idea that any language other than the national language be used before the courts.[81] Contoumas of Greece said the question was already dealt with in the recognition of the right to equality in the Charter of the United Nations and in draft article 2 of the declaration. He said that recognition of equality met 85% of the concerns of minorities. As for the claim for differential treatment, this was delicate and minorities might abuse the right, becoming disloyal to the government and acting as a fifth column at the orders of a foreign government.[82]

Opponents of the minority rights provisions also raised the spectre of pre-war fascist agitation among immigrant communities, based on a pretext of protection of minorities in the New World. Chile's Santa Cruz noted that Nazi Germany had endeavoured to make use of the descendants of refugees of 1848.[83] Campos Ortiz of Mexico referred to attempts by Nazis and fascists to incite minorities in the Americas, and to suggest that they had some authority over them. However, such contentions had been rejected by all of the Latin-American countries. In this respect, Campos Ortiz cited a resolution of the eighth International Conference of American States, held in Lima, Peru in 1938, where a resolution had been adopted holding that foreigners enjoyed the same rights and privileges as the nationals of the countries where they resided, but that they were not entitled to any special protection as communities.[84] Australia, too, noted that its only experience with the minorities problem was when it had been raised by German propaganda.[85]

On the other hand, India said that as a country that had been under foreign domination for many years, it would naturally support the Soviet proposal. "India faced difficulties with regard to its own minorities, the most conspicuous example being the partition of the

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[81] *Supra* note 68, p. 725.
[82] *Ibid.*, p. 727; U.N. Doc. A/C.3/SR.162.
[83] *Ibid.*, U.N. Doc. A/C.3/SR.161, p. 722.
[84] *Ibid.*, p. 721.
[85] *Ibid.*, p. 725.

country on religious grounds," said Menon. "However, it hoped to solve those difficulties on the basis of the USSR policy of political integration with cultural independence."[86] Poland's Kalinowksi supported a minority rights provision, saying it represented the positive aspect of the principle of non-discrimination. Kalinowksi said that between the two World Wars, Poland had exercised a policy of discrimination with regard to minorities, but that its present government now recognised the rights of minorities which were being "encouraged" by the government. Poland also hoped that the cultural and linguistic rights of Poles living abroad would be assured to them.[87] In addition, other Soviet allies, Ukraine and Byelorussia, backed the proposal. Support for a minority rights text also came from Belgium, which noted that reference to Latin American conditions was not appropriate, because the situation of immigrants could not be equated with that of minorities. Immigrants had chosen to submit to the laws of the country, whereas minorities were historically constituted groups occupying more or less distinct territories. Dehousse of Belgium said it was unclear that the minority treaties were still in force, and that this was an additional reason for including the rights of minorities in the declaration.

There were only rare references to the issue of aboriginal peoples during the debate. Byelorussia, a supporter of the minorities rights provision, infuriated Australia by accusing it of "a policy of forceful elimination of its aboriginal group." Byelorussia also noted that "the North American Indian has almost ceased to exist in the United States," adding that in colonial territories there were no signs that indigenous culture was being developed and encouraged.[88] Syria, too, criticised the treatment of indigenous populations in Africa, where they were still prohibited from using their own languages in primary and secondary schools, and were not allowed to establish universities. But Syria cautioned that in the past, the protection of minorities had been used as an excuse to interfere in the domestic affairs of other nations.[89]

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[86] *Ibid.*, pp. 727-728; U.N. Doc. A/C.3/SR.162.
[87] *Ibid.*, p. 724; U.N. Doc. A/C.3/SR.161.
[88] *Ibid.*, pp. 724-725.
[89] *Ibid.*, p. 729; U.N. Doc. A/C.3/SR.162.

France's Cassin referred to the post-First World War minorities treaties system, but said it had been confined to Central Europe. Things had changed since then, he added, observing that the principle of equality of all persons everywhere had already been recognised. "The greater part of the rights of minorities was therefore covered by the terms already laid down," although there remained some matters to consider, particularly the question of languages. Cassin noted that the Soviet Union had a structure based on specific territories for linguistic minorities, whereas unified States, such as France or the young States of America, did not have the same circumstances. However, although France had no minorities, Cassin conceded that its colonial possessions included religious groups and various ethnic groups. "It was therefore exceedingly difficult to find a common denominator for the problems raised by such varied populations," said Cassin. He said he was aware of the great accomplishments of the Soviet Union and Yugoslavia with respect to minorities, but said their proposals were too general. Rather provocatively, he said "[s]uch measures might result in certain populations being unable to read any newspapers except those printed in their own tongue, and in their being excluded from taking part in competitive examination for official posts or in the active life of the nation."[90]

Saint-Lot of Haiti supported Cassin's argument as to the virtual impossibility of reaching any consensus on the subject due to the variety of experiences. He also agreed that the right to equality was already recognised in the draft declaration, and "the protection of minorities would amount to an increase in discrimination."[91] Haiti proposed that the matter be referred to the Economic and Social Council for further study.[92] René Cassin supported the Haitian proposal, as did Denmark. Greece wanted to modify the Haitian resolution, arguing for deletion of the second, third and fourth paragraphs, and ending the fifth paragraph with the words: "a thorough study *of those aspects of the problem* of minorities *which are not covered by the Declaration of Human Rights and particularly*

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[90] *Ibid.*, pp. 730-731; U.N. Doc. A/C.3/SR.162.
[91] *Ibid.*, p. 733.
[92] U.N. Doc. A/C.3/373.

by article 2." Contoumas said this was necessary in order to avoid giving the impression that the declaration did not deal with minorities at all. In fact, he said, it covered their protection, except it did not allow for differential treatment.[93]

Malik, who was in the chair, suggested that the last paragraph of the Haitian resolution should begin: "*Refers to the Economic and Social Council the texts submitted by the delegations of the USSR, Yugoslavia and Denmark on this subject, contained in document A/C.3/307/Rev.2* and requests the Council..." Haiti agreed to the amendment.[94] The effect of voting on the Haitian resolution first would be to table the three minority rights proposals. The Soviet Union challenged the Chair's decision to vote first on the Haitian resolution rather than on the Soviet resolution, but his appeal was rejected by twenty-six to one, with two abstentions. Then, Ukraine attempted to adjourn the session, but this was rejected by twenty-seven to ten, with one abstention. The Haitian resolution was voted in parts, paragraph by paragraph, and by roll call vote. After the various portions had been adopted, the entire resolution as amended was adopted by twenty-four votes, with sixteen abstentions.[95]

But this did not finish the matter, because Yugoslavia's additional article "A" was still to be debated. Yugoslavia explained that it was not, strictly speaking a minority rights provision, because it really dealt with "complete national groups forming part of the population of a State."[96] Critics of the Yugoslav proposal noted that it did not concern individual rights, but rather the rights of a group, and as such had no place in a declaration. Others said that the proposal raised an analogous problem to that of minorities, and should be settled in the same way. The Yugoslav proposal was voted in two

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[93] *Supra* note 68, p. 732.

[94] *Ibid.*, p. 733.

[95] *Ibid.*, p. 736. *In favour*: Haiti, Honduras, Mexico, Netherlands, New Zealand, Panama, Paraguay, Peru, Philippines, Sweden, Syria, Turkey, United Kingdom, United States of America, Uruguay, Australia, Canada, Chile, China, Dominican Republic, Ethiopia, France, Greece, Guatemala. *Abstaining*: India, Lebanon, Poland, Siam, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Yemen, Yugoslavia, Argentina, Belgium, Brazil, Byelorussian Soviet Socialist Republic, Cuba, Czechoslovakia, Denmark, Ecuador.

[96] *Ibid.*, pp. 736-737; U.N. Doc. A/C.3/SR.163.

parts; the first paragraph was rejected, by twenty votes to eight with eight abstentions, the second, by twenty-two votes to eight with eight abstentions.[97]

The Haitian resolution referring the question of minorities to the Sub-Commission was subsequently adopted by the General Assembly.[98] Prior to the vote, the Soviet delegate Vyshinsky lamented what he called a fundamental defect in the *Declaration*, namely a provision concerning minority rights.[99] The Soviet Union again sought to rectify the situation with an amendment,[100] but it was defeated, by thirty-four to eight, with fourteen abstentions.[101]

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Malcolm Shaw has written that minorities lie "upon the fault line of international personality." He has described them as occupying an "indeterminate space along the uneasy and volatile spectrum that ranges from the State at one end to the individual at the other."[102] This partially explains the difficulties of the drafters of the *Declaration* with the unsuccessful minority rights provision. We know that subsequent efforts, and notably article 27 of the *International Covenant on Civil and Political Rights*, have failed to dispel this equivocation, recognising rights of "persons belonging to such minorities" but adding that these rights are exercise "in community with the other members of their group."[103]

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[97] *Ibid.*, p. 740.

[98] "Resolution relating to the Fate of Minorities," G.A. Res. 217 C (III).

[99] GAOR, Third Session, Part I, Plenary Meetings of the General Assembly, pp. 856-857. See also the comments of Ukraine, at p. 871; Yugoslavia, p. 917

[100] U.N. Doc. A/784.

[101] *Supra* note 68, at p. 930. *In favour* Ukraine, U.S.S.R., Yugoslavia, Byelorussia, Colombia, Czechoslovakia, Pakistan, Poland. *Against*: United Kingdom, United States of America, Uruguay, Venezuela, Australia, Belgium, Bolivia, Brazil, Canada, Chile, China, Costa Rica, Denmark, Dominican Republic, France, Greece, Iceland, India, Iran, Lebanon, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Siam, Sweden, Syria, Turkey. *Abstaining*: South Africa, Afghanistan, Argentina, Burma, Cuba, Ecuador, Egypt, El Salvador, Ethiopia, Guatemala, Haiti, Iraq, Liberia, Saudi Arabia.

[102] Malcolm N. SHAW, "The Definition of Minorities in International Law," (1991) 20 *Israel Y.B. Human Rights* 13, at p. 14.

[103] *International Covenant on Civil and Political Rights*, *supra* note 4, art. 27.

According to Asbjorn Eide, there are four basic categories of minority rights claims: claims for equality or non-discriminatory treatment; claims for conditions necessary to preserve their identity (language, religion, culture); claims for autonomy or local self-government; claims for secession and statehood.[104] The first is the least controversial, and also the most clearly "individual" of the four. It was on this point alone that the drafters of the *Universal Declaration* were able to agree. The second, which recognises positive rights for minorities, or for individuals belonging to them, was more controversial, as the debates in 1947 and 1948 reveal. Many countries, particularly those of the "New World," were extremely uncomfortable with the notion, arguing that it was incompatible with the nature of immigration. Although little was said on the subject, they may also have had an eye to their real problem in this respect, that of indigenous peoples. On a more theoretical level, there was the difficulty of formulating a right to an individual that necessarily involved his or her presence in a group.

This review of the drafting history of the *Universal Declaration* indicates that opposition to a minority rights provision was most certainly not based on the so-called failure of the inter-war minorities treaties, as has often been suggested.[105] Within Eastern Europe, where the treaties had their real impact, delegates to the Commission on Human Rights and the General Assembly were by and large quite favourable to including a minority rights provision in the *Declaration*. Indeed, Poland and Yugoslavia were two of the keenest proponents of such a text. Denmark and Belgium were also very positive on this count. Of the Western European States, the United Kingdom and, to a lesser extent, France, were unenthusiastic, but this appeared to be more out of concern for their colonial empires than a reaction to the minorities treaties regime in inter-war Europe. And significantly, countries that had historically been on the receiving end of Western European civilisation, such as Lebanon and India, were also anxious to see the provision included in the *Declaration*. Finally, Greece and Turkey were opposed to the measure, reflecting

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[104] U.N. Doc. E/CN.4/Sub.2/1993/34, §45-48.

[105] Marc AGI, *René Cassin, Prix Nobel de la Paix (1887-1976)*, Paris: Perrin, 1998, pp. 265-266.

a discomfort with the protection of minority rights that continues to this day.

The absence of a dedicated minority rights provision in the *Universal Declaration of Human Rights* does not mean that minorities have no special protection under the instrument. Several articles of the *Declaration* may be invoked by ethnic minorities, including the right to equality (art. 1), to non-discrimination (art. 2), to equality before the law and to equal protection against discrimination including incitement to discrimination (art. 7), to freedom of religion (art. 18) and expression (art. 19), and to cultural rights (art. 27(1)). The Commission on Human Rights soon returned to the issue of minority rights as it prepared its draft of the *International Covenant on Civil and Political Rights*, the result being article 27 which provides that "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." In recent years, specialised instruments have been developed to address the rights of minorities[106] and of indigenous peoples,[107] although their reach is modest and their universality disputed. In the case of indigenous peoples, no final document has yet been agreed to. The drafters of the *Declaration*, foremost among them Eleanor Roosevelt and René Cassin, were perceptive and far-seeing on many accounts, and this explains the enduring importance of the instrument they prepared. On the issue of minority rights, however, as history has shown, they overlooked an important and ultimately unavoidable issue. Fifty years later their oversight has only been partially corrected.

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[106] *Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities*, U.N. Doc. E/CN.4/1992/48 + Corr.1, U.N. Doc. A/RES/48/138, G.A. Res. 48/138. Also: *Framework Convention for the Protection of National Minorities*, C. of E. Doc. H(94) 10, [1995] *I.C.J. Review* 105; *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/24, 14 *H.R.L.J.* 352, Part II, paras. 25-27.

[107] *Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1993/29. Also: *I.L.O. Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, I.L.O., *Official Bulletin*, vol. LXXII, 1989, Ser. A., no. 2, p. 63; Vienna *Declaration...*, *ibid.*, Part. II, paras. 28-32.

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WEU AND THE EUROPEAN SECURITY AND DEFENCE DIMENSION: AN OVERVIEW

PAOLO FORESTI

This article retraces, from a historical and political perspective, the attempts made during these last decades to create a solid and effective collective framework for European security and defence; starting from the Brussels Treaty down to the Amsterdam Treaty. In particular it focuses on the WEU (Western European Union) as a first attempt to achieve some sort of co-operation in defence matters between European states, and it gives an insight into the institutional format and stated objectives of this organisation. The restructuring of the WEU following the development of European Political Co-operation (EPC) and the more recent Common Foreign and Security Policy (CFSP) within the framework of the European Union are also considered. Under the Maastricht Treaty, in fact, the WEU is recognised as integral to the development of the Union. However, there still seems to be no consensus amongst member states concerning the WEU's complete integration into the Union as the Union's defence arm. Therefore the WEU still retains its institutional autonomy. Nevertheless, recent statements regarding the need for the EU to play a full role on the international level and the need to establish a cohesive defence policy supported by credible military forces, seem to indicate that the way ahead could be to progressively merge the military structure of the WEU into the framework of the European Union.

1. A brief history of the WEU

The Brussels Treaty signed in 1948 by the Benelux countries, France and the UK was the first endeavour to create a collective framework for co-operation and security in Europe. It still maintained the somewhat old fashioned appearance of a defence pact against Germany, but in fact it already targeted the Soviet threat in the emerging cold war landscape. In 1949, the North Atlantic Treaty was to be the next fundamental step towards a collective defence system for western democracies sharing the same fundamental

values through the establishment of a solid transatlantic link. Europeans were than left to decide how to translate into reality the various proposals for cultural, economic and political co-operation in the Continent, which were floated at that time by a number of prominent personalities and encouraged by the USA.

While economic supranational integration did eventually start with the European Coal and Steel Community (ECSC, 1951), the initiative for common defence (CED) was to remain on paper. France, led by the socialist leader Mendes France, realised that it was not prepared to give away portions of its national sovereignty in defence matters (August 1954). As a reaction to this failure, in October 1954 in Paris, the Brussels Treaty was amended to give birth to WEU, the Western European Union. The mutual defence agreement against external aggression was integrated into a treaty with economic and cultural components. Italy and West Germany joined the original five member states. At that time Italy was already a NATO member, but for Germany this marked a major turning point, restoring her to the fold of western democracies and out of the pariah status of a vanquished power.

The core of the Brussels treaty is Art. V: "If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Art. 51 of the Charter of the UN, afford the Party so attacked all the military and other aid and assistance in their power." It should be read in parallel with Art.5 of the North Atlantic Treaty as a mutual defence guarantee for Europe.

The creation of the European Economic Community with the Treaty of Rome (in 1957) –and of sister organisations such as the Council of Europe (1949)– made the economic and cultural provisions of the Brussels treaty irrelevant. WEU therefore faded away into quiet semi-retirement. West Germany's entry into NATO was a further blow. Between 1954 and 1973 the only significant role played by WEU in world affairs was to provide a forum for discussion between the six European founder members of the EEC and the UK. After 1973, with the UK's reluctant accession to the EEC, WEU's fate appeared to be doomed as the European Political Co-operation (EPC) seemed to be the natural framework for debating any possible development in European security matters. The Colombo-Genscher (the Italian and German Foreign Ministers of the time) initiative in 1981 made an attempt precisely at that: to have EPC covering defence

affairs. However, once again no political consensus could be reached among partners (the British being unsurprisingly cold).

In 1954, WEU was the only choice left in the field of European defence and thus managed to survive. Faced with this stalemate, a group of like-minded countries (including Italy) set themselves the unenviable task of revitalising WEU. In 1984 – at the initiative of the Italian Minister for Defence, Mr Spadolini - the Rome Declaration re-shaped WEU's institutional format and stated the objective: "to make better use of the WEU framework in order to increase co-operation between the member states in the field of security policy". This attempt was not entirely successful; nor could it be otherwise considering the historical setting.

Under dramatically changed circumstances, WEU found some unexpected room for action from 1989 onwards; the collapse of the Soviet Union required a rapid response from the victors of the Cold War to embrace the new democracies of central and Eastern Europe. The absence of democracy and the neglect of human rights would have destabilised the whole continent. Of course other European organisations (CSCE-OSCE, Council of Europe, European Union, NATO, etc.) had specific competence to deal with the problem and co-operated to reaffirm fundamental European values and principles. But WEU showed at least one notable ability: a successful enlargement policy. It counts to-date (1999) 10 full members (Spain, Greece and Portugal having joined the founding members), 3 associate members, NATO but not EU members (Iceland, Norway and Turkey), 5 observers, who are EU members (Austria, Denmark, Finland, Ireland and Sweden) and 10 associate partners (Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia).

WEU could act as a bridge between NATO and the EU. If it did not play "a pivotal role", as WEU likes to boast, it was still performing some useful homework, providing a forum for discussion to new partners from the former Soviet block. Besides this "participatory approach", it would be unfair not to mention a few recent cases where WEU has been actually involved in the field. Since the beginning of the 90's, WEU contributed to the de-mining and control of shipping in the Gulf and in 1992 it provided a flag and a framework for naval forces in the Adriatic, monitoring the embargo against former Yugoslavia. In 1993, WEU assisted Bulgaria, Hungary and Romania in enforcing sanctions in the Danube. WEU contributed a

police contingent to the EU Administration of Mostar (1994-1996). Finally, WEU has been engaged since 1997 in MAPE, a mission of assistance to the Albanian police, providing training and advice.

2. After Maastricht and Amsterdam

Preceded and prepared by the Single European Act (1986), in 1991 the Maastricht Treaty developed the Common Foreign and Security Policy (CFSP) for the EU, as a successor to the EPC. The debate over a common European defence policy was reopened. The end of the east-west divide required some rethinking, but positions still remained far apart, with the UK strongly opposing any autonomous European initiative considered as a possible threat to the cohesion of the Atlantic Alliance.

The Maastricht treaty reflects a compromise. It states that: "The common foreign and security policy shall include all questions related to the security of the Union, including the eventual framing of a common defence policy, which might in time lead to a common defence." WEU is recognised as: "an integral part of the development of the Union," opening up the possibility for the EU to ask the WEU: "to elaborate and implement decisions and actions of the Union which have defence implications". At the initiative of the Italian and Austrian presidencies of WEU and EU, art.J.4 of the Maastricht Treaty was implemented for the first time in the international police mission in Albania and in two specific actions of the Union: mine clearance operations in Croatia and satellite monitoring of the situation in Kosovo through the WEU Centre in Torrejon (Madrid).

The WEU ministerial declaration at Petersberg (1992) shed further light on the kind of tasks that WEU could be given by the EU; the so-called Petersberg missions: "humanitarian and rescue tasks, peacekeeping, crisis management and peacemaking." The fall of the Berlin wall had transformed the threat in a variety of diffused risks demanding a different strategic concept and a new co-operative security framework. In a new strategic environment, the meaning of security issues has changed to include different dimensions and to bring about a more multidisciplinary approach. The end of the cold war has dramatically increased the number of conflicts arising in the world in the form of a proliferation of small scale regional fighting leading to large displacements of people, mass famine, violation of human rights and basic democratic rules. The

globalisation of world economies, financial systems and the growing interdependence resulting therefrom aggravate the threat to European security and enlarge the geographical area that may affect Europe's prosperity and stability. International terrorism, racism, religious and ethnic tensions, drug trafficking and illegal immigration, organised crime, the public order and stability of rising democracies, the proliferation and illegal commerce of weapons, are all regarded, *inter alia*, as a challenge to the Common European Foreign and Security Policy (CFSP) and particularly to WEU as the core organ of European defence and security. Co-operation with NATO, which remains an important premise for the development of the European Security and Defence Identity (ESDI), has been reinforced in the perspective of the establishment of some kind of functional relationship with the EU. European interests are no longer identified with the traditional basic need to defend territorial integrity. Military and non-military actions have to be strictly combined in all aspects of crisis management. The ideal model to deal with security issues in this changing environment may well be represented by the combination of EU and WEU resources, providing political guidance and interaction in both classic use of force and other instruments.

At that time however WEU still lacked the military structure and capability to accomplish such tasks. An embryonic military staff has been created since then; consultations with NATO have been started, to define how WEU could make use of NATO assets and capabilities for WEU-led operations. The NATO summit in Berlin (1996) clearly affirmed NATO's support to the development of WEU's operational capabilities, including planning and implementation of operations.

The Amsterdam Treaty (signed in 1997) does accomplish some additional progress in the definition of CFSP, "including the progressive framing of a common defence policy." It still fails to achieve in concrete terms WEU's integration in the EU. During the negotiations of the Amsterdam Treaty a number of states (including Italy) proposed to set a clear calendar for this integration, but the UK was adamant in refusing any such provision. In the end, both parties could claim victory, since the text leaves room for manoeuvre. It reiterates that WEU: "is an integral part of the development of the Union"; it goes on to add that WEU provides the Union: "with access to an operational capability notably in the context of paragraph

2" (the Petersberg missions). Finally, the future merger is evoked: the Union is to "foster closer institutional relations with the WEU with a view to the possibility of the integration of the WEU into the Union, should the European Council so decide."

The Amsterdam Treaty takes a further step in the recognition of the need for CFSP to have an operational arm, especially for the Petersberg tasks. The logical consequence would have been the establishment of such a defence arm within the Union itself. But the political outcome was different: WEU managed once again to preserve its autonomous life, for lack of a better alternative.

3. The Italian WEU presidency (July-December 1998)

The process of European integration received a new boost with the creation of the EURO. From January 1999, a single currency is available for Europe: one of the bastions of state sovereignty has fallen. After half a century of unrelenting psychological propaganda about its national power, it was almost impossible for any government to submit to British public opinion the disappearance of the pound in a common European currency. The UK had probably no other alternative than to decide not to join, thus being again left out of the European mainstream.

The Labour Government does not appear to relish splendid isolation from the continent. Blair belongs to a new generation of politicians, clearly less hostile to European co-operation and more aware of the fact that it is more effective to defend an interest from within, than from a position of sterile opposition from without. Its self-exclusion from the European Monetary Union has put the UK on the side-lines, weakening its possible leading role. This might explain why Prime Minister Blair in the summer of 1998 offered some fresh ideas on the future of European defence. In striking contrast to the British position in the past, openness was shown with regard to the need for a common European approach in view of a: "stronger, more influential voice, articulated with greater speed and coherence through the CFSP." The contrast with the past can be seen against the backdrop of the tough British position on the relationship between the EU and WEU during the Intergovernmental Conference that led to the Amsterdam Treaty.

Preparations for the NATO Washington summit (April 1999) and for the imminent entry into force of the Amsterdam treaty have

added momentum to the discussion. The Austrian EU Presidency convened before the end of 1998 an unprecedented informal meeting of EU defence Ministers that set the stage for real progress ahead. The Italian WEU Presidency (July-December 1998) did not fail to exploit this positive development. A number of initiatives were taken to foster EU/WEU relations and prepare for the entry into force of the Amsterdam treaty. An inter-parliamentary Forum was convened in Rome on the eve of the Rome Ministerial Meeting, in November 1998. Members of the WEU Assembly and the European Parliament gathered to discuss the future of European defence. This was the first experience of its kind and it managed to focus the attention of European MPs on defence issues.

In the wake of the Rome meeting, a seminar was organised on the restructuring of the European defence industry: Ministers for Defence and Industry, European Commissioner Bangemann and prominent representatives of the sector were invited. This was the first occasion for key-players to meet and exchange views on how to consolidate European industry, increase efficiency and face the US competitive challenge. The Rome Ministerial Declaration also highlights the momentum of the search for a European defence: "Ministers recalled the proposals made during the negotiations of the Amsterdam treaty and noted with interest the lines of thought put forward by some Heads of State and Government and the new impetus given to the debate in Portschach with a view to a fresh consideration of the issues of common European security and defence. In this connection, Ministers expressed the wish that a process of informal reflection be initiated at WEU on the question of Europe's security and defence from the perspective of the entry into force of the Amsterdam Treaty and of the Washington Summit. This reflection should serve the interest of all WEU nations."

The drafting of this text was at times painful; the Presidency had to steer a middle course, to include elements of innovation without hurting national sensitivities. The result provides WEU with an instrument to continue its work on future perspectives for European defence – through "informal reflection" – without raising at this stage the delicate issue of institutional mechanisms. WEU will focus its attention on technical aspects, such as the: "identification of further steps to enhance European military capabilities to deal with crises, notably Petersberg tasks, including greater transparency and interoperability among multinational forces".

The Presidency's position was proved right by two significant developments shortly after the Rome Ministerial Meeting: the Franco-British Saint-Malo Declaration and the Conclusions of the Vienna European Council in December 1998. The Saint-Malo Declaration does indeed mark a turning point. The UK formally retracts its traditional critical stance, and supports the framing of a common European defence policy in the framework of CFSP: "in order that Europe can make its voice heard in world affairs". The Declaration states that this must be done: "within the institutional framework of the European Union" and that: "...the Union must be given appropriate structures...without unnecessary duplication, taking account of the existing assets of the WEU and the evolution of its relations with the EU." While in Saint-Malo no definite indication was given, most commentators inferred – some with alarm, others less than tearfully – that it sounded the death knell for WEU as it is today. The European Council, meeting in Vienna on 11 and 12 December, welcomed the new impetus given to the debate on a common European policy on security and defence, as well as the Franco British Saint-Malo Declaration. It also welcomed: "the intention of WEU to conduct an audit of the assets available for European operations", as a first step in the "informal reflection." The issue will be back on the agenda at the European Council in Cologne, in June 1999.

Reactions from the US side have been cautiously positive. Ms Albright, the US Secretary of State, voiced her confident feelings, while defining conditions for American support. European efforts towards a common defence were asked to meet the "three D" test: no duplication with NATO; no decoupling of Europe from the Alliance's framework; no discrimination of non-EU Allies. The ground might be ready for direct EU-NATO contacts to be developed in the near future.

4. The end of WEU - the beginning of a European defence?

A remarkable consensus seems to be emerging on a number of points concerning the future of European defence. First, the need for the EU to play its full role on the international stage is now recognised by everyone. This also implies the progressive framing of a common defence policy in the framework of CFSP and capacity for autonomous action, backed up by credible military forces. It is

also clear that NATO remains the pillar of European defence and that a solid transatlantic link is a pre-condition for world security. It is generally felt that any European endeavour would have to be complementary to the Alliance and established in full co-operation with NATO. The implication is twofold: Europeans are to reform their armed forces, step up co-operation in defence matters, including the restructuring of defence industries; and an institutional setting is to be devised, within the EU structure, to realise this capacity for autonomous European action.

At this stage, attention is mostly focused on the first of these two aspects, for reasons both of substance and of convenience: the reform of European armed forces, in order to make them more effective, mobile and deployable, passing from the old territorial defence concept to the updated rapid reaction forces type able to operate also at great distances. Europeans appear oriented to abandon conscription and develop professional forces, notably for Petersberg-type operations abroad. This will have considerable implications in diverse fields such as intelligence, air transport, and logistics. Budgetary consequences are not negligible, considering that Europe stands at about 60% of the American defence spending. Moreover Europe has not yet made a shift from quantitative to qualitative expenditure.

Transparency and interoperability among existing multinational forces also need to be enhanced. In addition, the consolidation of European defence industries is only starting now. All these elements provide the substantial background to the debate on European defence. Institutional aspects, however, will also need to be dealt with at some stage. It certainly is advisable not to force the course to avoid a backlash. But the Amsterdam treaty does already give indications as to the way ahead. The corollary of its provisions is the merger of WEU into the EU and the transfer of political decision-making to the Union. The embryonic military structure of WEU would be preserved and would have the task of implementing decisions taken in the CFSP context. The vital "acquis" of WEU in terms of membership would also remain, through specific mechanisms designed for the participation of non-EU members. Article V would be somehow integrated in the EU framework. Direct relations would be established between NATO and the EU, to ensure full co-operation and complementarity, avoiding useless duplication.

Institutional architecture can easily help to define the possible framework, provided the political will is there. Several options are available, be it a merger or any other. The present situation appears favourable. It is generally recognised that Europeans have to take a larger share of the burden in security matters. The United States have been demanding that European Allies do so and seem willing to accept the perspective of a common European initiative, with the obvious proviso that it shall not be detrimental to the Alliance's cohesion. This proviso is shared in principle by all and should not pose any insurmountable problem. The time is ripe for shaping a European defence, even though this will not happen overnight.

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ROMOTING MUTUAL COMPREHENSION ETWEEN PEOPLES TO THE NORTH AND OUTH OF THE MEDITERRANEAN

AAD EDDIN IMBRAHIM

Social well-being in the second half of the twentieth century and beyond can only be achieved through respect for human dignity and recognition of individual sovereignty and all human rights. These rights are best practised and protected under a democratic system of government. Otherwise, individuals and societies are bound to feel insecure and hence their respective states will never be peaceful. Kantian logic places democracy at the heart of peaceful conflict resolution. According to this reasoning, neighbouring democracies should be the safest group of nations. Despite this, to the south of the Mediterranean there are ten countries which have, in the last fifty years, somehow been involved in 20% of the world's armed conflicts. The Barcelona Mediterranean Partnership Declaration of 1994 was meant to bridge the gap which exists between the South and North of the Mediterranean. However, tolerance is a necessary condition for co-operation and partnership within the Mediterranean. Since new Europeans of Arab-Muslim origin constitute the largest cultural/ religious minority group of Western Europe, Europeans have to practice "multiculturalism" on both regional and national levels. Migration should also be regulated through multilateral arrangements. Ultimately, however, migration can only really be controlled by eradicating its root causes through sustainable comprehensive development. Both sides of the Mediterranean want prosperity and peace and they equally want to assist one another. To pursue these objectives, they must respect each others' cultural traditions.

1. On the expanding meaning of security

The fact that a military superpower, the Soviet Union (and its satellites), collapsed without a single shot having been fired, must have sent a very clear message about the true meaning of "security." It is not so much the number, size, or lethal quality of

nuclear warheads, missiles, planes, and tanks. These may be an extremely significant part of the physical security of a nation or a group of countries. However, the dramatic and rapid disintegration of entire systems from within has made many observers realise that societies cannot survive, much less thrive, on the basis of physical security alone. At best physical security may be a necessary, but not a sufficient, condition for social wellbeing. Nor is social wellbeing guaranteed by bread and other material goods, important as these may be.

Social well-being in the second half of the twentieth century and beyond, can only be achieved through respect for human dignity and recognition of individual sovereignty and all human rights; as stipulated in the Universal Declaration of Human Rights, of which we have recently celebrated the fiftieth anniversary (10 December, 1998). These rights are best practised and protected under a democratic system of government. Once this is secured, a society would have fulfilled all essential dimensions of "security." Without democracy and respect for human rights, individuals and societies are bound to feel insecure and live in fear. Thus no meaningful sense can be given to the expression: "security for the state and insecurity for society." In other words, if the individuals and groups which compose a given human society are insecure, their respective states will never be secure.

Thus the concept of "security" has become multidimensional, with the human dimension at its centre. The fulfilment of human security means the assertion of individual sovereignty, ensuring basic human rights, the values of civil society, and the rule of law. A pluralist democratic system is the political implementation of societal security. Since Immanuel Kant enunciated his famous proposition that: "no true democracies go to war with one another" in the eighteenth century, there has not been any empirical evidence to the contrary. The Kantian thesis puts "democracy" at the heart of peaceful conflict resolution. As it is the optimal modality for inter-group peaceful management of disputes over contradictory interests, democracy enshrines the rule of law. Being the mode of governance in a country, democracy should make it extremely difficult, if not impossible, for that country to act as an aggressor against another country in which the rule of law and democracy are also the mode of governance. Neighbouring democracies, according to this Kantian reasoning, would be the safest community of nations.

2. Regional neighbourhoods

In brief, it has taken mankind in modern states over two centuries to firmly recognise the validity of the Kantian proposition, which ultimately puts: "democracy and the rule of law" at the heart of "security." Needless to say, "secure neighbourhoods" in the world today have also become "prosperous neighbourhoods."

According to recent UNDP reports, the five countries which make up: "the North Mediterranean neighbourhood" (France, Greece, Italy, Portugal, and Spain) have a combined population of about 180 million, with less than 0.7% annual population growth rate and an adjusted real per capita GDP of $16,000. These five countries have not gone to war with one another for more than 50 years. They are all democracies, and are part of a larger regional neighbourhood further north known as the European Union (EU), which is equally democratic, secure, and prosperous.

By contrast, across the Mediterranean to the south, there are ten countries (Algeria, Egypt, Jordan, Israel, Lebanon, Libya, Morocco, Syria, Tunisia, and Turkey) that make up roughly a neighbourhood of about 250 million, with an annual population growth at the high rate of 2.0% and an adjusted real per capita GDP of $4000. (see Table 1). Not only is this neighbourhood less prosperous, but it is also less democratic, and most alarmingly less secure. With less than 5% of the world population the ten countries have had a notoriously disproportionate share of 20% of the world's armed conflicts in the last 50 years (see Table 2).

Without being mechanically simplistic, the correlation of regional security, democracy, and prosperity over time (e.g. 50 years) is abundantly clear. Of course, there are long-ranging historical and deep socio-economic processes underlying the formation of both neighbourhoods to the north and south of the Mediterranean. Yet the end result is what we see. The question is: could this gap in democracy, security, and prosperity be bridged?

3. A quest to bridge Mediterranean shores.

The Barcelona Mediterranean Partnership Declaration in 1994 was meant to bridge this gap. Its third Chapter spells out what amounts to a human dimension of security, as mentioned in Section II, above. Thus, respect and promotion of human rights, the rule of

Table 1

Mediterranean Countries: Basic Economic and Demographi Indicators

Countries of the Mediterranean	Population in millions (1995)	%Population Growth Rate (1980-92)	Life Expectancy at birth	Population Growth Rate (1992-2000)	UNDP adjuste real per capita GDP %(1995)
Algeria	28.1	2.8	68.1	2.2	5,618
Egypt	62.1	2.4	64.8	1.7	3,829
Jordan	5.4	4.9	68.9	3.4	4,187
Israel	5.1	2.3	77.5	2.2	6,195
Lebanon	3.0	2.0	69.3	n/a	4,977
Libya	5.4	3.7	64.3	n/a	6,026
Mauritania	2.3	2.4	52.5	2.8	1,622
Morocco	26.5	2.5	65.7	1.8	3,477
Syria	14.2	3.3	68.1	3.3	5,374
Tunisia	9.0	2.3	68.7	2.2	5,261
Turkey	60.8	2.3	68.5	1.9	5,516
Total or Average	**219.62**	**2.8**	**67**	**2.38**	**4,600**
France	57.4	0.5	78.7	0.4	16,229
Greece	10.3	0.5	77.9	0.5	16,140
Italy	57.8	0.2	78.0	0	16,227
Portugal	9.8	0.1	74.8	0	16,171
Spain	39.1	0.4	77.7	0	16,187
Total or Average	**174.4**	**0.66**	**77.4**	**0.26**	**16,190**

Sources. Calculated from tables of the:
UNDP's Human Development Report 1998, and 1993
World Bank, World Development Report 1994
World Bank, Social Indicators of Development, 1991-1992

Table 2

The Cost of Armed Conflicts in the Arab Middle-East and North Africa (AMENA) Region: 1948 - 1996

Type of Conflict	Period	No. of Casualties	Estimated Cost in Billions of US$ (1991 value)	Estimated Population Displacement
A) *Inter-State Conflicts:*				
Arab-Israeli conflict	1948-1990	200,000	300.0	3,000,000
Iraq-Iran	1980-1988	600,000	300.0	1,000,000
Gulf War	1990-1991	120,000	650.0	1,000,000
Other Inter-State conflicts	1945-1991	20,000	50.0	1,000,000
Sub-Total		**940,000**	**1,300.0**	**6,000,000**
B)	*Intra-State Conflicts:*			
Sudan	1956-1995	800,000	50.0	4,500,000
Iraq	1960-1995	500,000	50.0	2,000,000
Lebanon	1958-1995	180,000	50.0	1,250,000
Yemen	1962-1972	100,000	10.0	500,000
Algeria	1992-1996	60,000	10.0	300,000
Somalia	1989-1995	50,000	3.0	250,000
Syria	1975-1985	30,000	0.5	150,000
Turkey	1980-1996	20,000	2.0	200,000
Morocco (Sahara)	1976-1991	20,000	3.0	100,000
S. Yemen	1986-1987	10,000	0.2	50,000
Other Intra-State conflicts	1945-1991	100,000	10.0	400,000
Sub-Total		**1,870,000**	**188.7**	**9,700,000**
Grand Total (All Armed Conflicts)		**2,810,000**	**1,488.7**	**15,700,000**

Source: Compiled from the files of the Arab Data Unit (ADU), Ibn Khaldoun Center for Development Studies, 1997.

law, civil society, and democracy are not to be pursued just for their own sake as worthwhile ends, but also instrumentally to reduce dangers to the more stable and prosperous neighbourhood to the north. In this respect, the Barcelona Declaration is the epitome of the principle of: "enlightened self-interest." It was the principle which brought the EU, including the north Mediterranean countries, together in the first place.

3.1. Promoting multiculturalism

Tolerance and acceptance of the "other," or more precisely *each* other across the Mediterranean, is a necessary condition for co-operation and partnership. This calls for equal respect for each other's culture –i.e. without an explicit or implicit demand on the other to abdicate his cultural sovereignty or authenticity to be accepted as equal. This is what is now termed "cultural relativity."

But there is more to accepting the other, without demanding or expecting cultural abdication or capitulation. There are some 15 million Arabs and/or Muslims now residing in the Euro-Mediterranean countries –some as naturalised citizens, second generation children of migrants, permanent residents, legal migrants, and illegal migrants. The older among those had come to the North as badly needed guest workers in the two decades following the Second World War. Whatever their mode of arrival, these new Europeans of Arab-Muslim origin represent at present the second largest religious/cultural group in Western Europe.

Any talking or pontificating about understanding, co-operation, dialogues of cultures or civilisations across the Mediterranean will continue to lack credibility, let alone sincerity, as long as these Euro-Arabs feel estranged, segregated, or discriminated against. As the saying goes: "charity begins at home." So even if we consider accepting others as charity, Europeans have to start practising "multiculturalism" at home first.

Of course educated, sophisticated and well-intentioned Europeans, encountered in Euro-Arab dialogues or OSCE meetings are not the problem. It is the average European in the street or in the market place that may wittingly or unwittingly be the victimiser of expatriate Arabs and Muslims. Subtle stereotyping may start in school textbooks or the media. But that in turn makes it easy for ugly and explicit scape-goating by demagogues.

Expatriate Euro-Arabs are a challenge as well as a litmus test for the human dimension of security across the Mediterranean. Institutional adjustments and arrangements in European education and the media are a must, not only to create a more equitable and humane environment for Euro-Arabs, but also to strengthen overall liberal egalitarian values for all. Such adjustments would also preclude the often apt charge of Western double standards in dealing with non-Westerners. Ultimately, Euro-Arabs could be the cultural brokers and roving entrepreneurs of the Mediterranean –as the Greeks and the Phoenicians once were in earlier times.

3.2. *A quest for better comprehension of Islam and Islamism*

An equally important component of multiculturalism is a better understanding of "Islam," setting it at a healthy distance apart from "Islamism." The former is a great monolithic religion, similar in spirit and moral commandments to Judaism and Christianity. Islamism, on the other hand, is a worldly ideology of some Muslims with a moral claim to purity and the political ambition to take over power to reshape society and state in accordance with this "puritan" reading and interpretation of "Islam."

In so doing "Islamists," (invariably also called Activists, militants, fundamentalists), come into conflict with the majority of their fellow Muslims. Thus the ferments and violence perpetrated by radical Islamists is not mainly directed at non-Muslims, but against other Muslims who refuse to go along with them. The Taliban of Afghanistan, Groupe Armee Islamique (GIA) of Algeria, and the Jamaa Islamiya in Egypt have killed a thousand times more Muslims than non-Muslims. The Islamists' hostility toward the "West" is a mirror image of the attitude of some Westerners towards Islam or Muslims –a sort of a la Huntington 'Clash of Civilisations'. Equally, some of the Islamists' wrath towards the West is due to its long humiliation and exploitation of the Muslim world; without realising that Western imperialism did not target Muslims alone, but swept along just as many Hindus, Buddhists, and other Christians as well. The reason why Islamism has flourished in recent decades is the same reason behind the development of other "fundamentalist movements" which have grown during the same period – such as Jewish, Christian and Hindu fundamentalists. Often it is in response to powerlessness, relative

deprivation, alienation, or exclusion in periods of rapid and profound transitions.

Understanding the difference between "Islamism" and "Islam," or "Islamists" and "Muslims," also means understanding the rules and conditions for potential partnership across the Mediterranean. It is the like-minded forces of progress and enlightenment on both shores who hold the promise of nurturing the partnership. These like-minded forces exist as government representatives, businessmen, youth, and civil society organisations (CSO's) across the sea.

3.3. A coalition against racism, Fascism, extremism, and terrorism

Having made the distinction between Islam and Islamism and having made the point that extremism is not the monopoly of any single religion or nation, it behoves the like-minded to stand together to fight off all the forces of "hate," whether in the name of religion, nationalism, or any ideological "ism."

Egyptian President Hosni Mubarak has been for several years, the last of which was as recently as on October 1, 1998, calling for an international effort to combat terrorism; "Egypt was the first country which alerted the world about the international nature of terrorism, and the need for an international response to combat it... Cards should not be mixed by invoking human rights or the right to political asylum... terrorism has nothing to do with Islam, Christianity, or Judaism as religions, nor is it confined to poor countries. Recent events have shown that terrorism can take place in rich countries which have nothing to do with Islam...." (Interview, Egypt's Armed Forces magazine, Oct. 1, 1998, pp. 10-11).

In order for a collective Mediterranean effort to combat terrorism not to turn into a "witch hunt," a sustainable multidisciplinary effort must be initiated to ensure careful conceptualisation, meticulous planning, and cautious but daring implementation. By the same token, anti-Arab and anti-Muslim fascist tendencies in Europe must be forcefully combated through the law, the media, and education. The recent survey in France, which indicated that as many as 25% of adult French public opinion harbours racist attitudes is truly alarming (A CNN report on France 2000, Oct. 5, 1998).

3.4. *A quest to regulate migration*

The Southern Mediterranean countries were net receivers of European migrants during the 19th and first third of the 20th centuries. The north-south population movement was motivated by the "push-pull" factors underlying all migrations in history. Now the migratory stream may have been reversed across the Mediterranean, but the underlying factors are the same –shrinking opportunities for a decent living in the south and perceived better opportunities in the North. The difference in opportunities, as testified to by Table (1), is real.

Even if another "Iron Curtain" is drawn or another "Berlin Wall" is built, so long as a 4:1 difference in opportunities persists or increases, there will be migration –legal, illegal, and extra-legal. In December 1994, France attempted to seal its borders when faced with North African new comers in the aftermath of the hijacking of an Air France plane in Algiers airport; and the subsequent killing of a score of innocent passengers and other Europeans living in Algeria at the time (Newsweek, January 9, 1995, p. 14). Within 72 hours, France re-opened its borders, albeit with more restrictions on travellers from the countries of the Maghreb.

Thus the optimum way of handling the issue of the human flow across the sea is to regulate, not to prevent, migration, through multilateral arrangements –in much the same manner as when combating terrorism. We have to be cognisant all the time, however, that if both processes and phenomena are to be stemmed or controlled, their respective root causes have to be eradicated or ameliorated.

3.5. *A quest for sustainable development assistance*

Ultimately, the eradication or amelioration of the root causes of both terrorism and undesirable migration is contingent on sustainable comprehensive development –economic, social, and political. While much of the responsibility for such sustainable development rests on Southern Mediterranean countries themselves, it behoves their richer counterparts in the North to extend far more generous development aid than the modest rate of recent years. The need is for a "Mediterranean Marshal" type plan.

Part of the proposed Mediterranean-Marshal-Plan (MMP) should entail a Mediterranean free trade (MFT) zone. It is often said by students of development issues that in the long run: "trade is better

than aid." This being the case, the Barcelona Declaration took notice of it by emphasising the free trade idea as the first of three measures for: "creating An Area of Shared Prosperity" (pp. 4-5 of the Declaration). But despite these lofty proclamations, President Mubarak of Egypt expressed dismay at the EU's quibbling over the entry into its market of less than $100 million worth of Egyptian agricultural produce; saying: "what surprises us is that the countries most adamant in this regard are more than $1.0 billion annual net exporters to Egypt." (Al-Ahram, Oct. 2, 1998). Again, this kind of EU behaviour immediately invokes Arab accusations of Western double standards.

The fact remains, however, that free trade and direct development aid across the Mediterranean are necessary conditions for sustainable economic growth. To make the process both comprehensive and sustainable, other measures provide the sufficient conditions, to which we turn in section IV.

4. Promotion of cultural understanding

"Democracy" and the "rule of law" make up two pillars of the broader concept of good "governance." The other two pillars are: "transparency" and "accountability." As such, good governance can neither be superimposed nor can it be expected to strike root overnight. Recent cross-cultural experiences have shown that any superimposition of a social practice by external powers, even if well intentioned, usually backfires. Western powers, including many of our Euro-Mediterranean partners, often overlook this simple human principle of collective learning. They invariably even forget their own long arduous march toward good governance –such as several centuries full of inter-state, intra-state conflict and two world wars. Without invoking a litany of sad memories, we must observe that we in the South were often victims of that Western march towards its own progress and prosperity. We were victimised by Western colonialism and racism –even when this was cloaked in self-virtuous slogans like the: "White Man's Burden" or its "Manifest Destiny" to "civilise" the rest of the world.

The point to be made and one lesson to be learned here is that we in the South can "learn" from the experiences of the West. We do not need to take so many centuries. We do not have to shed as much blood, nor victimise numerous others in the process. We can "learn;"

but at our own pace, according to our needs, and in the light of our own accumulated culture. The: "admiration-resentment" syndrome that many Southern partners have vis-à-vis their Northern counterparts is itself a psycho-cultural complex worth pondering upon. I submit that one underlying factor in that syndrome is the 'positive demonstration' effect as opposed to the 'arrogance imposition' effect. It is one thing to "learn" voluntarily by emulating. It is another to be forcefully "pontificated" at, or worse to be dictated to.

Northern understanding of these and other Southern sensitivities and sensibilities is essential for promoting cultural understanding across the Mediterranean or across any other barrier. We do not only have visible problems which we are all aware of, such as limited resources, burgeoning populations, rising expectations and protracted internal and external conflicts. But we also have invisible dilemmas, of which you may only sense some of their outcomes. Among these dilemmas, is the search for a healthy equilibrium between the polarities of the "sacred" and the "secular," "modernity" and "authenticity," individual "human rights" and collective "social rights" and, more recently, between the "global" and the "primordial." The dynamics of these dilemmas are mostly invisible, in so far as their conflicting polarities are not so much or solely between contending societal forces, but more agonisingly within individual souls. What makes these dilemmas even more wrenching is the absence of institutional structures to tease them out or allow their open interplay without "losing face," or worse "losing life."

Here again, the plea is for empathetic understanding, dialogue over the visible problems and respect for our collective privacy in coming to grips with our inner invisible dilemmas; i.e. finding our healthy equilibrium at our own pace according to our needs, within the context of our own culture.

Let me conclude with a few recent lessons from Egypt's own experience –the quest for an honourable peace in the conflict with Israel and the quest for economic reform. In the Arab-Israeli conflict, Egypt has been profoundly committed to restoring the "just rights" of the Palestinian people. In the process of fulfilling those legitimate commitments, Egypt was dragged into four successive wars between 1948 and 1973. But having restored its dignity in the 1973 October war and having made the point that no country in the region is invincible, Egypt began its forceful march towards peace. The Arab-

Israeli conflict is exactly half-century old this year (1998). The first quarter of it (1948-1973) witnessed four conventional regional wars (1948, 1956, 1967, and 1973). But the second quarter (1973-1998) witnessed not a single such conventional regional war. This is due to Egypt's cultural leadership; which was to be followed in time by the Palestinians themselves (the Oslo Agreement) and the Jordanians (1994). Egypt would not have taken that bold step toward peace, without having first restored its honour and collective self-respect in the October war of 1973 –i.e. washing off the humiliation of the 1967 defeat. By the same token, the Palestinians would probably not have signed a peace agreement without having first had their collective "Intifada" (uprising), 1987-1990, which was like the October War for Egypt –a necessary restoration of collective self-respect. In both cases, Egyptians and Palestinians had to do things at their own pace, according to their needs, and within the cultural context of "collective honour." By Western, "rational," calculation, much time and bloodshed was spent unnecessarily to reach such peace agreements. But, culturally speaking, it could not have been done any other way without appearing to "surrender."

The second lesson is that of Egypt's experience with economic reform. In the mid 1970's, Egypt was pontificated at by the IMF and the World Bank to put into effect certain specific measures to get its economy in order. The pressure reached its maximum intensity in late 1976; and the Egyptian government reacted by reducing food subsidies in January 1977. The instant popular response to these measures were the worst riots in modern Egyptian history, which forced the government to call in the army to restore law and order. However, it also felt compelled to retract on those IMF-World Bank "suggested" measures. The 1977 food riots were not just a mass protest against the anticipated financial burdens, but they were also a form of deeply felt resentment against external Western pressure. When the Egyptian government re-introduced similar measures several years later, at its own pace and according to its own assessment of collective needs, and with a collective perception that it is out of Egypt's own "free will," the Egyptian people responded positively. Egypt's economic reform program is on a moderate speed track, but it is considered as a regional success story.

The ultimate lesson from all this should be clear. Peoples on both sides of the Mediterranean may desire the same objectives of peace and prosperity. They may equally want to help one another. But in

pursuing the former and practising the latter, they must better observe and respect each other's cultural requirements. With mutual good intentions and enlightened self-interest this could, must and will be done.

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ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE PRESENT INTERNATIONAL ECONOMIC CONTEXT

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This article analyses globalisation processes in the international economic context and the manner in which these processes are conditioning the lives and rights of millions of people. It argues that the idea that the dismantling of social security systems can be justified in the name of economic liberty has served to multiply the cases where economic, social and cultural rights are being trampled upon. In this context reference is made to the Universal Declaration of Human Rights, which is based on the principle of the indivisibility of human rights since it caters both for civil and political rights, as well as economic, social and cultural rights; without imposing any hierarchical order between these two categories of rights. Reference is also made to the International Treaty of Economic, Social and Cultural Rights, which requires progressive compliance to ensure continual improvement in living conditions. The author then examines whether this requirement is being put into effect against the backdrop of past and present trends in world economic structures; especially of what has been termed the: "neo-liberal globalisation" of world economies. He argues that whilst economic globalisation is promoted as modern and necessary, it is in reality a step backwards which is negatively affecting the enforcement of economic, social and cultural rights.

Introduction

The odyssey of this century is the diffusion of a universal conscience about human rights. It is the propagation of a concept which tries to overcome all kinds of discrimination among human beings; and which considers that the value of human dignity has a character of ethical supremacy which places it above all other interests or ideological, political or economical values.

Nevertheless, today, we are troubled by the imposition of neo-liberalism which emarginates, excludes and maintains a large portion

of the human race in poverty. We are concerned that globalisation processes do not respect environmental or citizens' rights, particularly the rights of those most in need. We sadly realize that decisions concerning international economic coordination decide the destiny of people and have a greater weight than issues of national and international politics. We notice that the equality of rights affirmed in the Universal Declaration is either conditioned or ignored in practice according to the directives of world economic power. It would seem that in the name of the economic liberty of the great trans-national capitals, it would be legitimate today to completely dismantle the social security systems which in various countries granted some social benefits to the population. We are anguished to notice that poverty is present within the most vulnerable sectors: women, old people and children.

Nobody can remain indifferent when confronted with this reality. We all have the responsibility to refuse to accept impunity for crimes of violation of human rights against life or physical integrity, or the trampling of any fundamental liberty or right, *obviously including the economic, social and cultural rights*. Human rights are indivisible. The violation of any one of them puts all the rest in doubt. When we fight against violating a single right, we are fighting in favour of all rights.

1. Economic, social and cultural rights: an integral and indivisible part of human rights

The Universal Declaration of Human Rights contemplates both civil and political rights, as well as economic, social and cultural rights: articles 3 to 21 refer to the former, while articles 22 to 27 refer to the latter. It is for this reason, that one speaks of the equilibrium that exists between the two categories of rights in the Declaration, as well as the absence of any hierarchy between them.[1] This is manifested in the second paragraph of the preamble to the Declaration, where it is stated that the most elevated aspiration of

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[1] Cf. René Cassin - former President of the Human Rights Commission : The genesis of the Human Rights Charter in El Correo de la UNESCO, year XXI, January 1968.

the human being is the obtaining of both the first and the second type of rights: "the arrival of a world in which human beings, freed of fear and misery, may enjoy freedom of expression and freedom of beliefs."

The Declaration also affirms the so-called principle of the indivisibility of human rights. This means that all rights, civil and political as well as economic, social and cultural, are indispensable for the respect of human dignity. Indeed, Article 22 states that each person has a right to obtain: "...the satisfaction of economic, social and cultural rights, indispensable for his dignity and for the free development of his personality." It is superfluous to recall all the reasons which confirm this indivisibility; we only wish to point out that recently in 1993 – 45 years after the approval of the Universal Declaration – it was once again endorsed during the Vienna Conference organised by the United Nations. At this conference, it was emphasised that: "all human rights are universal and interdependent and related among themselves." In short, the Universal Declaration includes both categories of rights without establishing any subordination or hierarchy amongst them and considers their validity as a whole a necessary and indispensable condition for the dignity and free development of all persons.

2. The Treaty of Economic, Social and Cultural Rights

The two treaties, complementary to the Universal Declaration – the "International Treaty of Civil and Political Rights" and the "International Treaty of Economic, Social and Cultural Rights" – are international instruments of an obligatory nature for all signatory states. There is, however, an important difference between them. The Treaty of Civil and Political Rights must be complied with *immediately* by all states, without allowing for any delay concerning the agreements involved. The Treaty of Economic, Social and Cultural Rights, on the other hand, only requires compliance in a *progressive manner*, because of the nature of some of its dispositions which are related to economic and social conditions not possessed at the present moment by all countries.

In this latter Treaty, according to Article 2, every state must adopt measures: "...up to the maximum resources available to obtain progressively, with all suitable means, including the adoption of legislative measures, the full effectiveness of the rights herein

recognized." This obligation to obtain the full effectiveness of these rights progressively does not excuse a state from not obtaining them because of lack of resources. It rather imposes the obligation to advance systematically for their effective realization, as is very clearly stated in Article 11 which establishes the right of every person to an adequate standard of living: "and a continual improvement of living conditions".

3. The present international economic situation: the "globalisation" of neo- liberalism

At this stage, it is necessary to ask oneself whether the continual improvement of living conditions as established in the just-quoted article of the Treaty of Economic, Social and Cultural Rights exists; and what is the state of the economic, social and cultural rights in the present international economic context. Still, before tackling these questions, it is necessary to consider the present economic reality. The past two decades have witnessed long-term fundamental modifications in the structure of the world economy. These changes correspond to an attempt to escape from the crisis that capitalism undergoes every now and then. Ever since capitalism emerged from the roots of the industrial revolution and world markets, the whole system has been pervaded periodically with economic and social contradictions.

Towards the end of the 60's, there were several indications showing the beginning of a new structural crisis of capitalism at world level. Income levels were declining in the USA as a consequence, among other reasons, of the exhaustion of the technological model and of the growing pressures on salary structures. Some of the occurrences that were an expression of this crisis included the international monetary crisis around 1971 when the USA announced the end of the gold-dollar model; the oil crisis in 1973; and the foreign debt crisis in 1982. As from then onwards, there is a phase of adjustment and re-structuring of the international capitalist system during which period the technological, economic and political bases are created to surmount the crisis and to start a new cycle. Many countries had to suffer because of this and many are still suffering today from the so-called programmes of Structural Adjustment.

At the present moment in the economic plan, the objective bases for accumulation of capital on a world-wide scale have been

established. This is the essential background of what has been termed: "globalisation" or: "trans-nationalism," the stage of development of capitalism in which the most dynamic sphere of accumulation becomes the world market. This is already the case at the level of financial capital, particularly in the speculative field. The world economy is no longer an aggregate of national economies. These are connected by commercial or investment flows, to be progressively converted into a unique network of markets and products. The globalisation process could be defined as a system of production in which an ever-growing fraction of profits and assets is generated and distributed world-wide by a complex of interrelated private networks managed by the large trans-national companies, gaining the full advantages of financial globalisation - the central nucleus of the process.

In order to ideologically justify these changes and to present them not only as convenient but also as unavoidable, the concept of Neo-Liberalism has been developed, a concept that has become widespread during the last 15 years. As a publicity stunt, the notions of novelty and modernisation are used to obtain the approval of the people to these policies. An attempt is made to present anyone critical of neo-liberalism as being against modernisation, as a traditionalist, a conservative and a retrograde.

If facts are examined, however, it is neo-liberalism that means a step backwards, a return to past eras of lower protection of the rights of persons. This is expressed in some of the central notions of liberal ideology, such as Privatisation, the Minimalist and subsidiary state and the De-regulation and commercialisation of work relations and of the labour market. All this has an enormous effect on the enforcement of Economic, Social and Cultural Rights.

4. Neo-liberal "globalisation" and its impact on Economic, Social and Cultural Rights

The effects on the enforcement of these rights have been very serious. The Economic Commission for Latin America, CEPAL, has pointed out in no uncertain terms that: "...the technological advances - which should allow men and women to have better jobs and to receive higher salaries with machines doing the routine, unpleasant and dangerous jobs - are reflected in elevated long-term unemployment figures, a sustained reduction of work opportunities

and the creation of new badly-remunerated jobs, a concentration of earnings and of riches, an accentuation of heterogeneity in salaries, the elimination of social benefits for workers and an increase in the burden of work for those who are lucky enough not to have been discharged from their job as a result of the process of reduction of expenses for companies."[2]

The balance is disastrous. The concentration of earnings has increased dramatically over the past years. In 1960, the richest 20% of the world population registered earnings that were 30% higher than those earned by the poorest 20%. In the beginning of the 90's, the richest 20% were earning 60% more. This comparison is based on the distribution among rich and poor countries. Should we take into account the uneven distribution within the various countries, the richest 20% of the world population earn at least 150% more than the poorest 20%.[3] The difference during the past years tends to increase if one considers that inequalities in technology and in information systems have also increased. If material riches are concentrated in this world, still more is scientific knowledge.

The disciples of the neo-liberal perspective argue that through the: "process of internationalization and of modernization," many countries have achieved growth. In my country, for example, there is talk of around a dozen years of sustained growth, with low levels of unemployment, low and decreasing inflation rates, lower levels of poverty and an increase in the material well-being of the population. This is the pretty side of the model that is given publicity all over the country and internationally on all occasions, in order to serve as an example to follow by other poor and dependent countries. There is, however, another side of this coin, another aspect to this story, which is that suffered by the workers and the majority of Chilean men and women who aspire to justice, liberty, solidarity and democracy; to a harmonious life with nature and with other human beings.

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[2] Panorama de la Insersión Internacional de América Latina y el Caribe, CEPAL, December 1996.

[3] Cf. Informe sobre el Desarrollo Humano (Report on Human Development), United Nations Development Programme, UNDP, 1992

What is not said is that as a consequence of this model, our people lose completely their ability to govern their economic and social structure; they lose their liberty and their sovereignty. Countries become slaves of investment decisions of trans-national capital that controls the major sources of economic power. Increasingly, the concentration of earnings grows, encouraging social disintegration and the generation, in many cases, of "two worlds" within one and the same country. Growth in many countries is being achieved to the detriment of the environment and of the standard of living of the whole population. Violence in the cities, corruption in business and in politics is a rampant and growing reality with which we unfortunately have to live. Moreover, there is the trampling of rights of indigenous people; the lessening of rights for workers with suitable salaries, of rights for social security: they are all evident consequences that are suffered daily by the population.

Life is definitely becoming more and more commercialized, without even sparing health and education, which are basic rights proclaimed in the Universal Declaration and in the Treaty of Economic, Social and Cultural Rights. Those who do not have money cannot study and literally die if they are unlucky enough to get seriously ill. As things stand today, the enforcement of a person's rights depends on the amount of money one has.

5. The role of politics in the violation of Human Rights

Nowadays, there is an attempt to spread the belief that it is normal that the exercise of rights depends on the resources available to each person; one is made to believe that it is not possible to expect better or that the fruits of this model may be spread among the poor. We know that what this model really does is to spread poverty and inequality.

What is happening today is that there is an attempt to suppress the anxieties connected to the enforcement of human rights for all. We should not allow it. It is not acceptable to deny the exercise of the most basic rights to millions and millions of human beings on this planet under the pretext of the lack of the right economic conditions. This is the paradox of a world that has never created so much wealth and lived in such dire poverty at the very same time. The truth is that in trampling on the rights of the poorer people, what is being risked is the introduction of an unacceptable concept

of the human being. When the rights of all are not respected, this means fundamentally that we are not really accepting for some – the majority who make up the poor in this world – the condition of human beings. What is being risked, therefore, is the breaking up of the human race in different categories, some superior to others, some dominating and other dominated. The trampling on the rights of the poorer people has, therefore, not only an economic dimension of exploitation but also a political dimension: getting used to injustice, promoting submission and depression. Indeed, this is its political function: maintaining the domination of some over others.

6. Proposals for facing today's challenges

In the face of this reality, then, what is it that we can do regarding the defense and promotion of human rights? We propose three strategies of action:

a) The introduction of a **Social Clause** in commercial agreements, modelled on international agreements concerning vested rights, which will place an unassailable limit on states, in their search to facilitate foreign investment at the cost of such rights.
b) **The search for a relation between populations** to face the effects of liberalisation, to build networks and links of solidarity and to search for forms of integration among peoples and not only among multi-national companies. This is a job for today. At the same time, the refusal of commercial agreements and of summits that have these aims in mind, will serve to prevent the legitimising of such fora as places for political decision and action.
c) **Promoting the creation of an international UN instrument,** which will censure and specifically control Commercial Agreements and contracts of multi-national companies and corporations. We obviously know that we must try to construct a political consensus on this matter. An agreement for the protection of economic, social, cultural and environmental rights, within "globalised" economic regimes is a contemporary necessity. In this context, it is necessary to strengthen and support the work of the rapporteurs of the UN who monitor the situation, including violations of economic, social and cultural rights.

Now is the time to propose the above suggestions. It is time to start the process of construction of an international system for the protection of workers' rights and of the rights of the poor in any part of the world. Faced with this historic moment, we proclaim that we are against the globalisation of the trans-national companies, against this integration of all the peoples of the humanity. We are against the model that destroys nature and the search for a sustainable development. We are against dictatorship and the manipulation of persons; we are for the urgent construction of a participative democracy.

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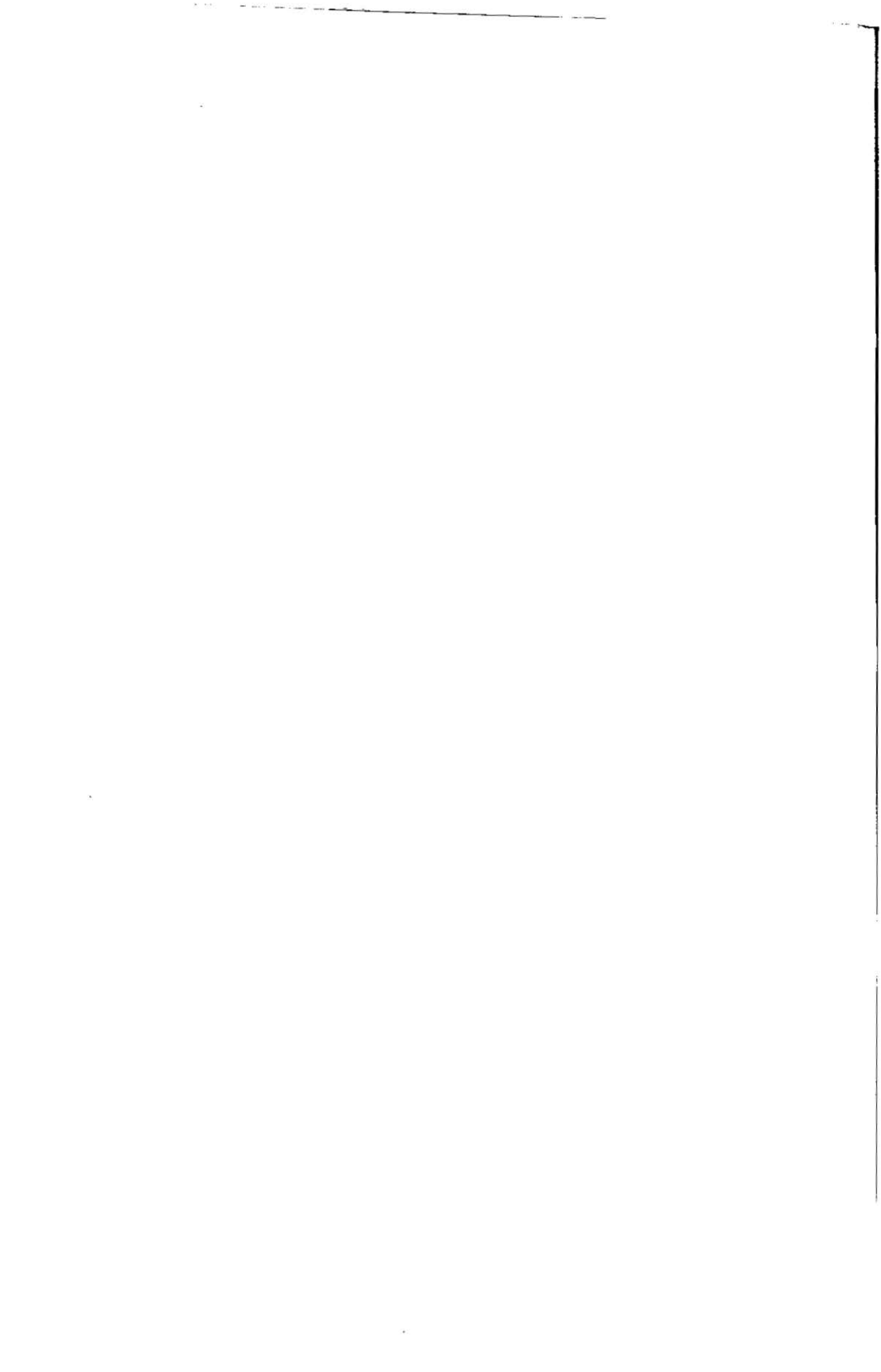

CRIMINALITY AND ECONOMIC DEVELOPMENT: AN EMPIRICAL VERIFICATION IN ITALIAN REGIONS (1980-95)

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This research tries to assess the existence of a correlation (positive or negative) between the level of economic development and particular criminal variables (homicide and theft) in the Centre-North and Southern Italian regions during the period 1980-95. The results obtained confirm the hypothesis that there exists an inversely proportionate relationship between the level of economic development and the number of homicides in five regions out of eight in Southern Italy. When the rate of theft is considered instead, this relationship can only be established for three regions out of eight in Southern Italy. The first part of this article examines the theories that analyse the relationship between economic development and crime, whilst the second part of the article describes the index factors used to develop this econometric analysis. The research-data obtained is discussed in the concluding part of the article.

1. Introduction

Much research has been carried out to explore the relationship between economic development and crime rates. This research has focused on the number of thefts and homicides in particular territorial regions. When comparative analysis between regions with different income per capita[1] is carried out, it is evident that there is a higher crime rate in the poorer regions. The most direct correlation observed is in the case of homicides and offences against the person; while the results for theft and offences against property are less clear. The cause of the negative correlation between crime and income per capita is the existence of social inequality in the poorer areas.

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[1] See: Brantingham (1984), La Free e Kick (1986) e Neuman e Berger (1988).

This creates a sense of deprivation and injustice in a substantial part of the population, which promotes illegality. With respect to the more ambiguous correlation between income per capita and crimes against property (like theft), it seems that the proliferation of these crimes is encouraged by an increase in the standard of living enjoyed by a fraction of the population. This intensifies the feelings of relative injustice experienced by those belonging to the disadvantaged classes, weakens the systems of social control and multiplies the occasions for making illegitimate earnings.

This paper tries to verify the existence of a correlation (positive or negative) between the level of economic development and certain criminal variables (homicides and theft) in the Italian regions of the Centre-North and in the Southern Italian regions during the years 1980-95. The results obtained confirm the hypothesis of the existence of a negative correlation between the indicator of economic development and the number of homicides for five regions out of eight in Southern Italy. This article is structured as follows. The second section contains a discussion of the theories that analyse the relationship between economic development and crime; while the third section lists the index factors used to develop the econometric analysis. In the fourth section, the results obtained are listed and the final section summarises the results obtained through this research.

2. The relationship between economic development and crime

Before going any further, it is expedient to consider the principal theories that explain the causes of the existence of crime.[2] For this purpose, one should consider the two current opposing schools of thought in the field of criminology. The first is the "Classical" or "Utilitarian" school, the main exponents of which are Casare Beccaria and Jeremy Bentham. Its main propositions are that:

a) the criminal is as capable of ideas and feelings as any other man[3];
b) the principal aim of punishment is that of preventing the increase in crime;

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[2] For a review, you see Rey (1993, pp. 18-28).
[3] See Birkbeck and Lafree (1993).

c) man is endowed with free will and moral liberty and for that reason he is morally guilty and legally responsible for his crimes.

On the contrary the second, "Positivist," school of thought holds the view that:

a) the criminal is not a normal man because of organic and psychic, hereditary and acquired abnormality. He is, therefore, a deviant human being;
b) the increase or decrease in the crime-rate is not dependent on the punishments meted out by the positive law;
c) free will is a pure subjective illusion.

Evidently, the positivist school focuses on the criminal rather than on his crimes. On the other hand, the classical and the post-classical school focus on the crime itself. Becker's economic model of crime (1968, p.176) is inspired by the "Post-Classical" school. He has observed that: "people turn into criminals not because their dominant motivations differ from those of others, but because they derive an overall benefit from choosing that specific (criminal) sequence of actions." In substance, Becker hypothesises that the individual will decide to commit an illegitimate action if the benefits derived from this choice are greater than the relative costs. This economic model of crime has been recently utilised by Marselli and Vannini (1996a and 1996b). These economists base their econometric analysis on the hypothesis that a person turns to a criminal life when the remuneration from the crime is better than what he would gain from a legitimate job, after taking into account the probability of being caught and the severity of the punishment. In particular, the econometric results of Marselli and Vannini emphasise a positive and significant correlation between the variable: "probability of being convicted" and that of the crimes of theft, homicide and fraud for the period 1980-1989. According to these scholars, the: "certainty of conviction" is the best deterrent of crime.

The results of this research broadly confirm the hypothesis outlined in Bandini *et al* (1991), according to which an individual decides whether to perpetrate a crime or not by taking into account its consequences, both public and private. The public consequences arise from the legal sanctions meted out by the State and from the negative consequences that these have on one's reputation. The

private consequences arise from the negative feelings experienced by the transgressor and stemming from a guilty conscience, including feelings of guilt, shame and depression.[4]

3. The choice of variable

The basis of this analysis is the idea that the classic economic model of crime contains two weak points. Firstly, in regard to those persons who are morally capable of committing a crime, this model places the choice of pursuing a criminal career and that of pursuing any other occupation on the same plane. The second weak point is that of attributing the ability to deter the individual from illegal behaviour solely to the formal legal sanctions meted out by the State (in the form of pecuniary punishments, arrest and imprisonment). At this point, it is important to state that there exists evidence in support of the claim that the decisions of the individual are strongly dependent on his/her environment of origin, circumstances of life, values and beliefs about what is right or wrong. Often enough, whoever commits a crime does so in conformity with expectations inculcated in him by his environment. To this effect, Barbagli (1995, pp.24-5) writes that: "the motivations of his behaviour are no different from those of a law-abiding person. It is the group to which he belongs which makes a person deviant. The individual never violates the norms of his own group but only those of society in general." In this analysis we tried to verify, by means of econometric analysis, whether limited economic development is related to criminal activity. As was already pointed out above, the results attempt to reveal the relationship between a variable indicating the level of economic wellbeing and figures for two criminal variables, namely theft (RP) and homicide (OM), for the regions of the Centre-North and Southern Italy, during the period 1980-95.

As is well known, theft is a crime against property and homicide a crime against the person. The indicator of economic wellbeing used is the index of per capita income (PK), calculated on the basis of Prometeia's analysis of the "Istat" data. We expect an increase in the variable of economic wellbeing to result in a negative sign for

[4] See: Barbagli (1995, p. 18)

the criminal variable. In the literature, the level of income per capita seems the most useful indicator. Pomfret (1995) and more strongly, Lewis (1955, p. 421) also support the view that income growth gives more freedom to people through better control of their environment. Moreover, Lewis affirmed in his 1984 address to the American Economic Association, that: "per capita income remains the best instrument for measuring income development" and defines the economics of development as the: "structures and behaviors of economies when their income per capita is below $2,000." With regard to theft and homicides, for the period 1980-1989, we have been using the values obtained by Marselli and Vannini (1996a and 1996b) and for the subsequent years we have used the Svimez elaboration (1993, 1995, 1996). These indexes are found in Tables 1, 2, 3, and 4 on the following pages. The values are all expressed in pure numbers, which were obtained from the ratio between the value per year of each index of each macro-region to the corresponding national value, which then results in an average value.

When analysing the period under review, from Tables 2, 3 and 4, it emerges again that the mean per region of the rate:

a) of homicides is: Calabria (3,74), Sicily (2,83), Campania (2,87), Puglia (1,63), Sardinia (1,26), Basilicata (0,70), Abruzzo (0,48) and Molise (0,38);
b) of theft is: Campania (3,76), Sicily (2,86), Puglia (1,17), Calabria (0,78), Sardinia (0,50), Abruzzo (0,32) Basilicata (0,28) and Molise (0,18);
c) of income per capita is: Abruzzo (0,86), Sardinia (0,74), Puglia (0,72), Molise (0,71), Sicily (0,69), Campania (0,68), Basilicata (0,62) and Calabria (0,59).

Generally speaking, the regions with the lower rate of income per capita have the higher crime rates.

Particularly in relation to the higher crime rate of the Southern regions, various explanations have been brought forward in recent years. According to Barbagli, as far as homicides and theft are concerned, the higher crime rate of the Southern Italy regions may be explained by numerous factors going back to the beginning of this century; namely: an intense sense of personal honour and shame of the inhabitants, their tendency to be revengeful, the lack of trust in others, the absence of an effective guardianship of the public order on the part of the State and of a solid middle class. Many of

these explanations have been re-proposed recently, giving however better weight to the role of the Mafia phenomenon.

4. The procedures used to derive estimates and analyse the results

The procedures used to obtain estimates are based on a calculus of the coefficients of relationship and their sign between the OM, PK and RP indicators. Tables 1–4 below illustrate the results obtained:

Table 1
Estimated correlation of OM and RP on PK

PK Regions	OM	RP
Abruzzo	0,2870	0,3854
Molise	–0,9686	0,1513
Campania	–0,0423	0,7973
Puglia	0,8383	0,5862
Basilicata	–0,0639	–0,6170
Calabria	–0,0423	0,2116
Sicily	–0,2537	–0,1553
Sardinia	0,3799	–0,0264
Center-North	–06349	–03900
Southern	–0,8255	–0,5949

Table 2

Number of homicides per 100,000 inhabitants (numbers index, Italy = 1,00) for the years 1980-95

	1980	1981	1982	1983	1984	1985	1986	1986	1988	1989	1990	1991	1992	1993	1994	1995
Abr.	0,52	0,45	0,39	0,62	0,58	0,67	0.63	0,56	0,45	0,30	0,17	0,23	0,35	0,75	0,55	0,41
Mol.	0,48	0,53	0,48	0,77	0,59	0,39	0,49	0,09	0,36	0,21	0,07	0,10	0,23	0,67	0,35	0,35
Cam	2,08	1,79	2,41	2,28	1,69	2,04	1,51	1,79	1,43	1,38	1,90	1,88	1,96	1,89	1,67	2,27
Pug.	1,74	1,32	1,57	1,72	1,72	1,97	2,15	1,99	2,07	2,16	1,28	1,55	1,27	1,39	0,98	1,19
Bas.	0,38	0,26	0,18	0,24	0,55	0,70	0,44	0,81	0,89	0,79	1,24	1,45	0,69	1,11	0,80	0,66
Cal.	4,25	3,95	4,70	3,56	3,28	3,00	3,65	3,10	3,89	4,37	5,07	3,97	3,91	3,28	3,19	2,62
Sic.	1,94	2,43	2,35	3,15	2,91	2,54	2,89	2,92	2,86	3,24	3,14	3,41	3,08	3,00	2,93	2,53
Sar.	1,36	1,55	1,41	0,81	1,10	1,47	1,51	1,20	1,30	1,58	0,72	1,13	1,00	1,50	1,38	1,14
C.N.	0,57	0,61	0,50	0,53	0,60	0,57	0,52	0,59	0,52	0,45	0,38	0,42	0,42	0,50	0,55	0,50
S.	1,59	1,54	1,69	1,64	1,55	1,60	1,66	1,56	1,66	1,75	2,10	2,06	1,96	2,00	2,21	1,88

Table 3

Number of robberies per 100,000 inhabitants (numbers index, Italy= 1,00), for the years 1980-95

	1980	1981	1982	1983	1984	1985	1986	1986	1988	1989	1990	1991	1992	1993	1994	1995
Abr.	0,34	0,30	0,44	0,42	0,33	0,27	0,33	0,34	0,34	0,44	0,23	0,22	0,19	0,28	0,33	0,32
Mol.	0,19	0,29	0,10	0,30	0,24	0,20	0,25	0,26	0,32	0,13	0,02	0,04	0,03	0,15	0,22	0,18
Cam	3,51	4,16	5,19	6,14	6,00	3,72	5,00	5,06	4,97	4,96	1,47	1,65	2,32	1,66	2,05	2,37
Pug.	1,09	1,19	1,19	1,06	1,06	1,06	1,14	1,31	1,53	1,38	1,19	1,22	1,04	1,20	1,11	0,89
Bas.	0,17	0,22	0,26	0,28	0,21	0,30	0,37	0,28	0,27	0,44	0,42	0,34	0,31	0,23	0,22	0,16
Cal.	1,16	1,23	0,86	0,61	0,66	0,60	0,60	0,50	0,66	0,82	0,78	0,92	0,52	1,04	0,68	0,77
Sic.	2,09	2,35	2,38	2,20	2,26	3,24	3,59	3,38	2,72	3,04	4,51	4,58	3,01	2,52	1,20	1,97
Sar.	0,39	0,33	0,35	0,35	0,37	0,48	0,38	0,49	0,43	0,57	0,62	0,56	0,70	0,68	0,65	0,63
C.N.	0,91	0,81	0,75	0,69	0,71	0,83	0,67	0,67	0,71	0,66	0,47	0,47	0,57	0,75	0,75	0,74
S.	1,12	1,26	1,35	1,42	1,39	1,23	1,46	1,45	1,41	1,47	1,91	1,92	1,75	1,44	1,56	1,46

Table 4

Per capita income per 100,000 inhabitants (numbers index, Italy= 1,00) for the years 1980-95

	1980	1981	1982	1983	1984	1985	1986	1986	1988	1989	1990	1991	1992	1993	1994	1995
Abr.	0,86	0,85	0,86	0,86	0,88	0,88	0,87	0,88	0,87	0,90	0,84	0,83	0,87	0,86	0,85	0,87
Mol.	0,73	0,70	0,68	0,68	0,72	0,73	0,72	0,72	0,74	0,74	0,69	0,68	0,74	0,73	0,74	0,74
Cam	0,68	0,68	0,71	0,70	0,71	0,72	0,69	0,69	0,71	0,73	0,66	0,65	0,67	0,67	0,65	0,64
Pug.	0,74	0,71	0,70	0,73	0,73	0,72	0,73	0,74	0,75	0,76	0,71	0,72	0,71	0,71	0,71	0,70
Bas.	0,67	0,62	0,60	0,60	0,68	0,63	0,60	0,60	0,60	0,60	0,60	0,63	0,63	0,64	0,64	0,63
Cal.	0,60	0,63	0,61	0,62	0,60	0,62	0,60	0,59	0,57	0,60	0,53	0,60	0,56	0,57	0,55	0,56
Sic.	0,70	0,71	0,70	0,71	0,72	0,69	0,71	0,72	0,70	0,68	0,65	0,66	0,67	0,66	0,65	0,64
Sar.	0,74	0,72	0,73	0,75	0,78	0,76	0,76	0,75	0,74	0,75	0,66	0,69	0,78	0,77	0,77	0,74
C.N.	1,16	1,15	1,14	1,14	1,14	1,14	1,14	1,14	1,14	1,16	1,19	1,19	1,18	1,18	1,19	1,20
S.	0,71	0,70	0,70	0,71	0,72	0,71	0,71	0,71	0,71	0,72	0,67	0,67	0,69	0,68	0,67	0,66

The results obtained in Table 1 indicate:

a) That for almost all the regions considered, the hypothesis of the existence of a negative correlation between the index of the per capita income and index of homicides, is confirmed. However there are some exceptions; namely in Abruzzo, Puglia and Sardinia.
b) That the correlation between the indicator of robberies and that of per capita income does not possess the same sign in all the regions; and the value of the coefficients is inferior and therefore less significant than in the case of homicides.
c) That the coefficients of correlation that relate to the Center-North and Southern Italy are significant and confirm the hypothesis put forward in literature on the subject, of the existence of a negative correlation between the index of per capita income and the indicator of homicides.
d) Finally, in the regions in which there exists the highest rate of organized crime, (Calabria, Campania, Puglia and Sicily) the coefficients of correlation are less significant in the case of crimes against the person, in particular that of homicide.
e) The non-significant frequency of the results obtained as concerns the index of the crimes against property for the above-mentioned regions, makes one question the reliability of this data. After all it is well-known that in Southern Italy the failure on the part of victims to report crimes against property to the judicial authorities is prevalent (and according to my personal knowledge of the environment, this could be due to a rational expectation of seeing one's stolen property being returned, rather than because of a fear of retaliation). In support of this view, Barbagli writes as follows (1996, p. 37): "the decision of whether or not to denounce a crime depends above all on an inward analysis of the costs and benefits that each victim makes." Basing himself on these premises, Barbagli continues, p.34-7: "The official statistics of crime gathered by the police and magistracy, represent only a part of those which have actually occurred. There are also those crimes which are committed but which are never even recorded. These last constitute the so-called "obscure number" of crimes. Whereas there are hardly any homicides that are not reported to the police and judicial authorities, there is a

considerable number of thefts which remain unreported. This same problem was emphasized in the last century, by Messadaglia (1866, p. 54): "they do not reflect the total number of crimes in this country. There are undoubtedly many cases of crimes which are never denounced (and which are therefore never prosecuted)."

5. Conclusions

The results of this study, which covers a period running from 1980 to 1995, confirm as regards Italian regions, the hypothesis of the existence of a negative correlation between the indicators of economic development and that of homicide. The reason behind this correlation could be found (by reference to literature), in the fact that the greater social inequality present in the poorer regions leads to an environment of injustice and relative deprivation, which in turn makes certain parts of the population more prone and willing to infringe the law. This is so even if the correlation does not seem to be significant in the regions where there is organised crime. Most probably, in these cases, the reduction of the level of income is due to the presence of organized crime - and this therefore introduces new elements into the relationship between economic development and criminal factors.

The minor significance, of the results obtained for different regions as concerns the index of crimes against property, mainly thefts, leads one to consider again the reliability of the data. As has been stated above, in certain regions, particularly in the south of Italy crimes against property are not reported to the judicial authorities, but instead recourse is had to personal acquaintances within their same environment, with the hope that this tactic offers greater probability of having the stolen goods returned. This practice leads one to conclude that in reality there exist an "obscure number" of crimes, that is crimes which are not reported. Such a phenomenon makes it impossible to determine with certainty the real existing relationship between the number of crimes against property and the indicator of economic comfort.

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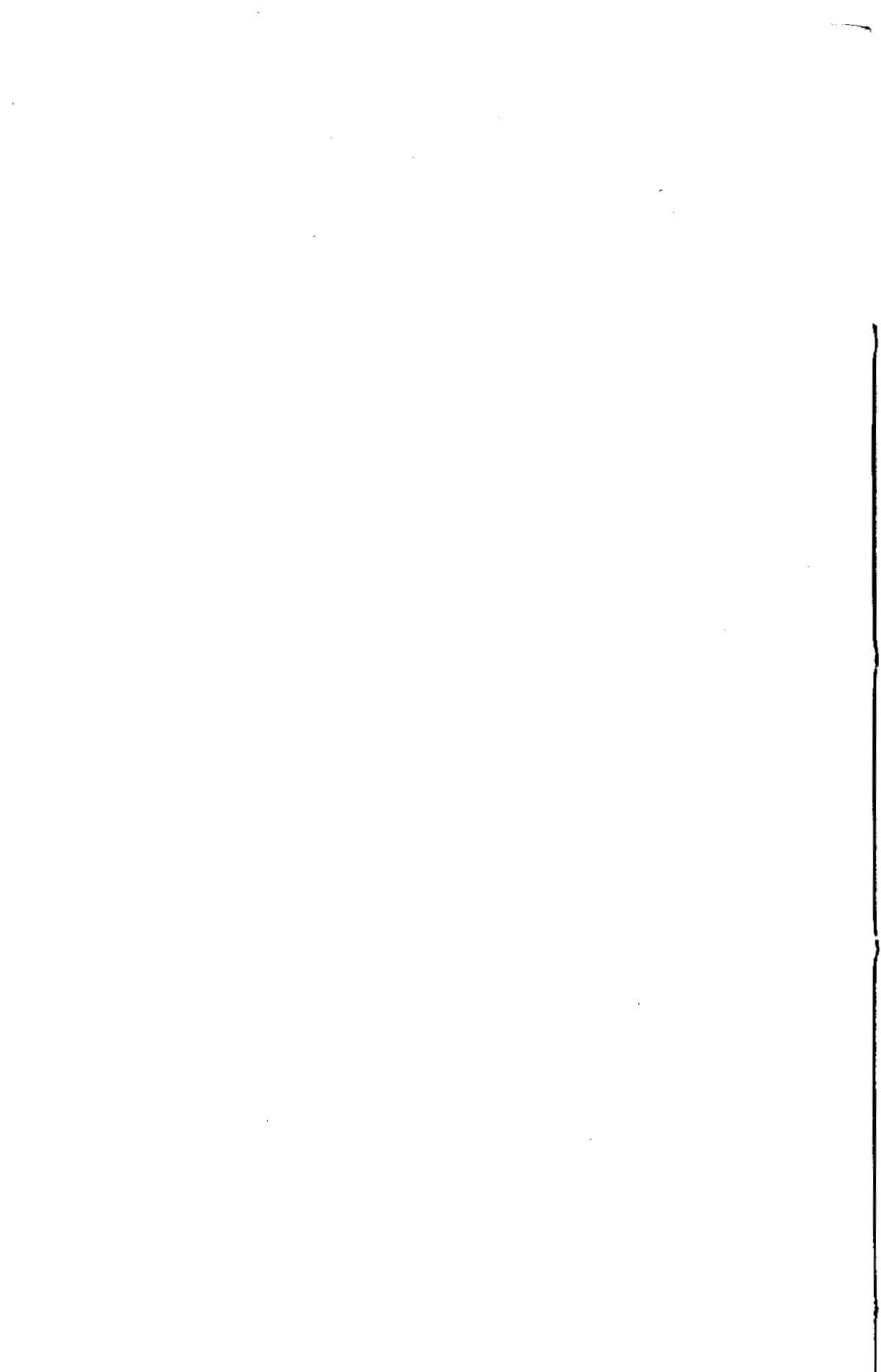

HANS KELSEN: RIGHTS CRUSADER OR NAZI SYMPATHISER?

MARIO PATRONO

Kelsen's *Reine Rechstlehre*, or: 'Pure Theory of Law', has been accused of being a "path-breaker" for Nazism and Fascism before it. Since the *Reine Rechstlehre* separates law from morals, it was accused of dulling the conscience of the German people, leading them to ignore the claims of justice. However it would be fallacious to claim that Kelsen was a Nazi or Fascist sympathiser. In fact it is not true that the 'Pure Theory', by maintaining an attitude of neutrality with regards to values, promoted blind obedience to the Weimar Constitution. It is also false to argue that the formalism of the *Reine Rechstlehre* contributed to the founding of the Fascist regimes. It is implausible to accuse Kelsen of legitimising the totalitarian system of National Socialism, which he abhorred. Indeed the pure theory of law does not necessarily compel one to obey the law, but obliges the individual to take a solitary decision as to which values he will follow. Law is only one of these values. So these accusations were false and completely unfounded. To Kelsen these accusations were not painful; but they weighed heavily on his disciple Merkl, who believed in God. In regard to both of them, these accusations were lies. May they be spared further lies in death.

1. Introduction

Hans Kelsen was the scholar who with the greatest intellectual passion outlined the reasons justifying the primacy of international law, which he saw as an over-arching legal order not solely based on inter-state relations. The supremacy of the constitution as the supreme norm for the guarantee of rights and the primacy of International Law over internal law has given a formidable theoretical basis to the protection of human rights. Despite this, Kelsen and the Viennese School have been suspected of complicity or at least of excessive tolerance in regard to Nazism. How is it possible that the scholar who described war as "mass

assassination" and claimed that: "there is no possibility of substantial social progress until an international organisation has been created which is effectively capable of preventing war," could have sympathised, together with his school and especially his student Merkl, with Nazism? Some have held that the man who re-launched the Kantian project of de-politicisation of international relations to promote of their legalisation implicitly supported ferocious dictators who have humiliated human dignity. Clearly Kelsen has been misunderstood and above all his legal formalism has been misinterpreted. In the pages which follow we attempt to demonstrate what has not been understood in regard to the thought of Kelsen and Merkl.

2. The Accusation

When, on the 20th January 1950, Adolf Merkl[1] publishes the article entitled: Tragedy of Obedience in the German newspaper "Stuttgarter Zeitung", everything has already been definitively accomplished. With Nazism buried under the ruins of military defeat (and the spectral image of Berlin razed to the ground by bombing remains as an effigy, an emblem of that catastrophe); the fascism

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[1] Adolf J. Merkl: a Viennese jurist. In 1911, when very young, he happens to attend, together with only two other students, the first lesson held by Kelsen at the university. Afterwards he would become the greatest of his 'disciples', so that years later Kelsen himself would declare him a 'genius'. He owes his fame to the theory by which law is not a still and immobile element in the hands of one authority alone, but a dynamic fact "shared" between various centres of power; which flows along an uninterrupted chain of commands reaching from the constitution and the laws of parliament, all the way down to government regulations, bureaucratic decrees and judgements until it dips its last chain into the sea of life (of the life, for example, of the prisoner who hears the door of his prison cell close behind him in the enforcement of a conviction of imprisonment issued at his expense on the basis of laws in accordance with the constitution - and the chain of law now tightens around his ankle). In 1924 he inspired first Austrian statute - perhaps the first in the world - in protection of the environment. He is a Catholic. In March 1938, only a few days after the *Anschluss*, when he goes to the university as he does every morning to hold his lessons, he finds the door barred and, posted, the list of professors barred from teaching. His is the first name. He will return to the University of Vienna in 1950. He dies in his eighties in 1970.

of Mussolini defeated; the exile of Hans Kelsen[2] in the United States by now definitive ("from my house, beyond the green of the garden, I see the foamy blue of the ocean....", he used to respond to whoever asked him why he had not returned to Vienna); Merkl himself one step away from taking up teaching again in "his" University of Vienna. Everything, thus, was accomplished. Finished. Concluded.

Apart from the calumny that reappeared, as though flowering from the mists of the past, and began to spread ever more rapidly, that atrocious calumny which was made to circulate with reference to the *Reine Rechtslehre*[3], with reference to the School of Vienna:[4] that the *Reine Rechtslehre* had acted as a "pathfinder" for Nazism - and, already before that, for Italian fascism; that it had helped in holding the reins of power firmly in hand, legitimising its authority; and that Kelsen, in particular, the first and principal author of the pure theory of law, thus shared the "moral" responsibility for Nazism and had performed the functions and role of "supporter", of "objective" ally in regard to Hitler. In other words, the accusation that many scholars (jurists mostly, but also political theorists and even historians ... of which history is not clear) made and still make with regard to pure theory, can be summarised in a kind of syllogism: dictatorship finds it hard to impose itself when the sentiment of justice is strong in the heart of the people. Kelsen's theory has released law from the bonds of justice. Kelsen has therefore favoured

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[2] Hans Kelsen, born in Prague but Viennese by adoption. He is usually considered, not wrongly, the greatest jurist of the century and, perhaps, of all time. Jewish. When Hitler comes to power, Kelsen immediately understands the way the wind is blowing and leaves Austria; after some travelling around Europe, he arrives definitively in Berkeley, California, where he dies at almost a hundred years old in 1973.

[3] Pure theory of law (in German: *Reine Rechtslehre*). This is the theory to which Kelsen dedicated his entire scholarly life. Saying that one thing is the law and another justice, Kelsen warns that the law can also be unjust, that in fact it often is, but that it does not for this reason cease to be "law"' and that therefore no-one can ever deceive himself into believing that by observing the law, justice will be served.

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the birth both of fascism and Nazism, i.e. of the dictatorships which arose in those countries where Kelsen, as a scholar, had in that moment most influence.

In effect, amongst the elements which used to be (and still are) put forward to support the thesis that the German people should not be considered responsible for Nazism (and let us not talk about the atrocities perpetrated by Nazism: for these, all crammed into the bundle of the "greatest criminals of war" indicated in the indictment read on 20th November 1945 in the International Tribunal of Nuremberg, were destined to fall with them into the tomb, at dawn on 16th October 1946) - amongst these elements there is the following: that by separating law from morals, the *Reine Rechtslehre* had anaesthetised, had ended up by dulling the conscience of the German people, soothing any claim for justice which otherwise would have led them - one must deduce - to the refusal of dictatorship, precisely because of that claim; in other words, Kelsen affirmed (or confirmed) that cult of purely formal legality which was at the base - so they say - of the blind obedience proffered by all: judges, officials, soldiers, common people, to the totality of the rules established by Nazism, and even to those more clearly, more terribly, unjust.

It is difficult when dealing with calumny, to go back and find the author, the authors - and don Basilio, with unmatchable poetry, knows how to express this difficulty in giving name and surname to calumny when, in the Barber of Seville by Gioacchino Rossini, he sings that "calumny is a breath of wind / which insensitive and subtle / lightly, gently / begins, begins to whisper."

However, two scholars more that any others have contributed - because of the fame, aura of prestige and scientific authority which they enjoyed while alive and which, in part, still accompanies them today - to feeding and spreading the terrible accusation raised against the *Reine Rechtslehre*, of having "gone along with" the most ruthless of the 20th century's totalitarian States. The two are: Hermann Heller[5], who died when Nazism had barely taken off from its starting

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[5] Hermann Heller, German jurist with a few, confused ideas, who often misunderstands Kelsen's way of thinking and thus says he is wrong, whereas when he understands him correctly, he invariably says he is right. It is he, anyway, who launches the accusation that Kelsen favoured the enemies of the Weimar Republic, and who demands his political and cultural isolation.

line; who blamed Kelsen of all people for the fall of Weimar and the affirmation of the fascist regime; and Gustav Radbruch[6] ,the "repentant" Radbruch ("repentant", I mean, with regard to juridical positivism of which he had been one of the major exponents between the two wars and as such earned a mention by Max Weber, which Kelsen was denied), who individuated in positivism one of the main supports for Nazism (even if Radbruch would never arrive at the extremes of sustaining - as, however, already in 1945, does Emil Brunner - that "the totalitarian State is simply and solely juridical positivism in the form of political praxis").

3. The Defence

In the accusation, there is an affirmation which would be comforting - for the class of jurists, I mean - if it were not completely unfounded: that in Germany, or in Italy, a student of law - even if he were called Hans Kelsen - could have the authority, with his scientific work, of triggering a wide and solid consensus around any political system whatsoever, to the point of facilitating its rise and stability: or, on the other hand, of depriving it of that consensus, contributing in a decisive manner to its fall. Nothing could be further from the truth: and he who, furthermore, believes that the Kelsenian doctrine went along with totalitarianism, ends up by giving it that very significance, that very influence which it had never had, which no doctrine of law can or could ever have.

But there is, in that accusation which we are discussing, also a paradoxical element which it is worth noting. And it is this; that the attack on Kelsen is usually made (if one thinks of Radbruch, of Von Hayek, of Passerin d'Entreves) under the banner of an ideal "law" - whether it is called "natural law" or by another name is not

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[6] Gustav Radbruch, one of the most authoritative exponents of legal positivism between the two wars. In 1945 he makes a self-criticism, affirming that "positivism has disarmed Germany before the horror and abuse" of Nazism and, therefore, without losing time, he makes a clean break from positivism, disassociating from it and finding refuge under the protection of natural law: that is, in that current of thought which, by making law coincide with justice ends up - quite beyond all intention - by actually consecrating the law in that relationship, strengthening obedience to it in all regimes, and especially in the worst ones.

important - defined as superior to positive law (Law behind the Law) and presented as the antidote to all dictatorships. With the consequences, beyond all intention, of holding firm to the category of law, always and anyway linked to the name and concept of the law: thus strengthening precisely that legalistic culture which is blamed for favouring the inclination of the people to a supine respect for law, which however one would like - in theory - to hinder.

Then there is a second, perhaps more important paradox in the accusation (by now common) moved against Kelsen. Power does not fool itself, it knows itself and it knows; and yet the National Socialist power, as soon as it establishes itself in Austria, takes the initiative of banning the School of Vienna, i.e. of attracting into the net of purification precisely those who would so efficiently (as well as involuntarily) have done their best - so the accusation maintains - to actually create the environment favourable to the affirmation of a totalitarian State. A paradox, in fact: an oddity. A trick of fate.

In reality, at the base of the discredit liberally thrown at the School of Vienna from the most varied sectors of the world of law, there are - I believe - essentially psychological reasons, in part connected to a phenomenon of transfer of guilt and all anyway directly related to the person of Kelsen. First and foremost, Kelsen as a jurist is "unpleasant", so to say: he has the fault in the eyes of his critics, of having known how to build the *Reine Rechtslehre* as a theory without errors, scientific, methodologically correct, indomitable from the doctrinal point of view; a theory which leaves no room for crevices, cracks which bring down the building, destroy the body. Thus, one understands the anger of the Lilliputians who, like an army, attempt to attack Gulliver time and time again, and each time withdraw defeated. And then, it is said that Kelsen is capable of fascinating, of convincing: but only through art, artifice, deception of logic, quite another and different thing is the "effectual truth" and, that is, the experience of law, which Kelsen would not be able to grasp. And then, Kelsenian "formalism" is brought into play and it is said - with pretentious words - that this "begins where the law ends". And then, too, one understands the calumny, and how it managed to gain acceptance, and how much it was spread "from one shore to the other".

Besides, is not Kelsen after all a foreigner, and a Jew to boot? And what could be better than to transfer the responsibility for

Nazism from the German people, innocent by definition, onto a foreign doctrine - Austrian, the *Reine Rechtslehre* - elaborated, perhaps, by a Jew: Kelsen, in fact (and Carl Schmitt maliciously, resentfully, defined him as a "Jew" and of being, as such, "an enemy of the pure values of the Germanic race"); thus arriving at the most perfidious deceitful unloading of conscience, that which spills everything into the saying "he who causes his own downfall, cries by himself."

To say however, that Kelsen collaborated with Nazism and that he had previously done so with fascism, is a gratuitous and stupid slander. In point of fact, it is not true:

(i) That the pure theory, by maintaining an attitude of "neutrality with regard to values", obtained the end effect of de-motivating obedience to the Weimar constitution, which also collapsed for this reason. Instead of which, we know, that the Weimar Republic, lacerated by irreversible class battles from the start, was finally swept away by the weight of the "great depression" of 1929 and by the terrible lock-out of the Ruhr. In the field of confrontation between political ideologies, theories of law and of the State, and institutional trends, it might perhaps be asserted that the Weimar constitution – attacked boldly and precisely on the plane of values, both by right and left– had to undergo a sort of process of fragmentation due to the urging of the "free" interpretation of procedures and in general of de-formalising theories. To denounce what was called (and is called) with contempt "Normativism" (prescription) –and which is then an appeal for rules, for law, for the constitution– as a weakening element in the battle for the defence of Weimar, was an error: and Otto Kirchheimer realised this very well in 1932, when *in articulo mortis* (of the Republic, I mean) he calls for a "return to legality" (and, thus, to Kelsen) as a last trench for the defence of Weimar: but it was too late!

(ii) It was completely false, then, that the *Reine Rechtslehre* had contributed with its formalism to legitimating the bases of the fascist regime, which started in Italy in 1922. On the contrary, it is a common assertion that precisely the formalism of the jurists - which was dominant in Italy at that time, if one thinks of the lessons on V.E. Orlando's method - had, at least in the initial period, kept the fascists' policy from prevailing over law statutes: and it is enough to consider, with regard to this, that the regime had to set up special

tribunals in order to obtain, to some degree, a politicised management of the justice system, which the ordinary magistracy tenaciously refused to concede. Besides, many of the "great" statutes turned out in the fascist era and still in force today almost in their entirety, were irreproachable on the technical plane: statute number 100 of 1926, which amongst other things establishes the principle by which enacted laws are converted into law: the "twin" codes of criminal justice of 1930; the statute concerning public water; the banking statute of 1936; the civil code of 1942. The fact is that fascism was not a revolution, but a continuation of the preceding political system, except for the elimination of all opposition and, stemming from that, the subsequent reflection on the plane of the "form of the State". The special influence of jurists in the first years of the twenty-year period of fascism is explained in this way: the legitimacy of fascist power was based on the legality of its exertion: in other words, fascism prided itself on its legitimacy stemming uniquely from the fact of being legal. Legality attracts jurists just as honey attracts bees: and in Italy, the jurists - and I repeat this - functioned as an element of dissension to the regime.

(iii) The accusation is totally implausible even when it is claimed that Kelsen's whole argument ended up by legitimating, through the equation between State and law and the distinction between law and justice, precisely that totalitarian system which National Socialism was, and which Kelsen himself in his heart abhorred; and, as though to surprise him in the evident crime of aiding and abetting, sentences like this are quoted: "from the juridical science point of view, even during Nazi rule, law was law. We can be pained by it, but we cannot deny it." Or else: "Judges, who under the Nazis obeyed their orders considering them a juridical obligation, may merit our commiseration, but it only creates confusion to claim that their actions were not governed by the law." However, precisely that equation established between State and law by the pure theory (the State for Kelsen was nothing other than a body of procedure, offices, jurisdictions) caused the attempt by Nazism (and, previously, by fascism) to set up the totalitarian State under the commendatory label of "State subject to the rule of law" to be completely sterile, "Because," as Kelsen explains, "every State is necessarily a State subject to the law, inasmuch as any State whatsoever, i.e. the state-controlled judicial system, is defined as a State subject to the law" -

democracy is quite another thing from the State subject to the law, which represents a particular form of state completely different from the form of the totalitarian State.

As for the distinction between law and morals, it was precisely this – as far as I know – that was the primary cause of that wave of purges which, after clashing with almost the whole School of Vienna, forced Kelsen into exile and Merkl into an early retirement: since they were tenaciously unmoving in refusing to redeem the wrongdoing of a detestable law with the adjective "just".

And then, let us be truthful: what could the totalitarian National Socialist State, a glorification of the "ethical" State (of which ethics is not clear), dominated by the *Fuehrerprinzip*, ruled by a single party, highly concentrated in the management of power, war-mongering, versed in all sorts of abuse, have had in common with the doctrine of Hans Kelsen, the theorist of democracy founded on liberty and the principles of tolerance, compromise, pluralism and the widest possible decentralisation; the man who knew how to fuse the State and Law? (When I was at university, among the text books there was one elegant book with a blue cover, entitled General theory of law and the State, by Kelsen in fact, which was exam material. From that book stems my aversion to the mystically, metaphysically conceived State and my awareness of what happens when one speaks of State and not of constitution, not of law, when the State begins to appear not as a whole and a co-ordination of offices, but as an entity beyond the physical, beyond needs, necessity). What did it have in common with Hans Kelsen, advocate of the *bellum iustum* and of the constitution understood as legality imposed on power: author of the Constitutional Court set up to protect that legality? Nothing.

A shadow of suspicion remains: that the pure law theory, by practising neutrality on the plane of values, anaesthetised the conscience of the German people, preparing them for a "corpse-like" obedience to legally issued orders, whatever their content might be. But the charge is such as to mystify the complex reality of Nazism, to which the entire German society, more or less consciously, gave its consent not through coercion, fear or a simple tendency to obey; but because –one must have the courage to admit it– it recognised itself in the principles, in the values (negative values), in the laws which the dictatorship wanted to impose, in the interests which it

wanted to protect. Adhesion, therefore, of a "strong" type, practica as such can find no basis in Kelsen's way of thinking. This is wha counts from the point of view of fact.

From the conceptual point of view, the argument to be mad regards the positivism of the "Viennese school", on which point ther is often misunderstanding. There is an essential difference betwee Kelsen's "positivism" and that, let us say, of Wittgenstein. On must, in fact, distinguish between "ontological" positivism and "methodological" positivism. To give an example, macabre indeed but perhaps effective, let us imagine a pathologist who bent over a body, dissects, opens, searches, looks into, rummages, and does so for a long time, for hours scrupulously. In the end, tired, disconsolate, he sews it up again quickly. He surrenders. The soul, which he was looking so hard for in that body, was not to be found. At this point, there are two possible conclusions: the first, that the soul therefore does not exist("ontological" positivism: nothing exists that is not visible, traceable, ascertainable on the plane of empirical research: Wittgenstein); the second, that the soul may, perhaps, exist but simply should not be searched for with a scientific method, in itself unsuitable for finding it ("methodological" positivism: Kelsen). In other words, "ontological" positivism eliminates the "ultimate" truth and the research around it (i.e. the world of "values") from its own subject, affirming the non-existence of everything that cannot be positively or scientifically verified: whereas Kelsen founds "methodological" positivism, which does not exclude the existence of the "truth" beyond and underneath what can be scientifically verified, but he claims to be able to know the "ultimate" truth with a different method from the scientific one. The reason for which, claims Kelsen, that the world of positive procedures, the only scientifically verifiable one, belongs to jurisprudence; and the world of "values", moral rules and justice to the conscience.

What is the consequence of all this in the field of obedience to laws? Simple: the pure theory of law does not necessarily oblige one to observe the law, but each time puts the individual - alone - face to face with his conscience i.e. facing the scale of values which he believes in. Law is only one of the values in the list, certainly important, but not the only one. Nor did Kelsen ever claim that obedience to the law was the pre-eminent of all values, i.e. that it was "right" to obey laws.

4. Conclusion

The truth is that the assertion according to which Kelsen went along with Nazism, as he did previously with fascism, and that he deserted in the battle for the defence of Weimar, expresses a cultural position with little strength; which takes for granted the fact that jurisprudence cannot be anything other than ideology of law: that is, in order to fulfil its task, it must not so much devote itself to the pursuit of truth, as know how to turn itself into an instrument of power, if possible at the service of an ill-defined "militant" democracy (Lowenstein). Consequently, Kelsen is blamed for having abandoned the use of jurisprudence as a "blunt instrument", as a weapon; and, substantially he is reproved.... for being Kelsen. The quality of the accusation which we have been discussing is right there. But the accusations, whether they correspond to the facts or not, are still serious in themselves: and this one, particularly, is terrible and completely unfounded.

The reaction to this accusation, however, varies. In order to understand it, one must keep in mind that Kelsen was always at the centre of criticism, of the most various and often ferocious attacks. It was as though he were used to it, by then it had become a condition of life for him, through habit barely painful: resigned, accepted. In a certain sense he even enjoyed it, because it is not a rare skill in, let us say speculative, men to extract a certain happiness, a subtle joy, from an unhappy situation. For this reason, Kelsen in his exile continues imperturbably along his path, completing, perfecting, clarifying the pure theory of law without a moment of respite, without ever stopping; only now and again letting fall the occasional sentence about that accusation, and then he faces up to it; but rarely, almost fleetingly. He will always go on with his research, with the prospect and from the point of view of law: his, will always be the science of law. He will always maintain firmly, in particular, the distinction between law and morals, between law and justice, between law and politics: his will always be the ethics of law.

Not so with Merkl. For him there was a small problem: that he believed in God. He believed in the God of truth, the God of justice. And so that accusation weighed on him like a mill-stone, provoked his contempt, his revolt. He could not resign himself, accept it, live with it. Merkl was an extremely pure man, with a limpid intellectual honesty, without a shadow of boastfulness, but he was also a resolute

man with a gentle determination. Thus in 1950, he wrote the Tragedy of Obedience, an article which, in his autobiography two years later, he will define as, "the document which on its own is worth more than all the rest of my work". An extremely hard article, of delusion, of reproof, perhaps with a touch of involuntary scorn. And you can hear the anger flow, beneath the profoundly cultured language, like water boiling beneath a layer of ice. Obedience, Merkl asserts, even if it is always a duty from a juridical point of view with regard to the orders of authority, does not always represent an obligation in the moral sphere, is not always a virtue; and neither is it always in the military service, where, however obedience corresponds to particular disciplinary requirements. In fact, it may happen in certain cases that one must, morally speaking, disobey the laws: that disobedience itself may become a virtue. Merkl lets it be understood that there are acts of disobedience which are not pure acts of free will; that are imposed by the conscience, that are acts of obedience to other values, other principles, other needs: to obey a positive order is a duty that the conscience feels, but the conscience also feels the duty to obey different values, which may even be predominant. When these predominant values exist and enter into conflict with the laws, obedience must go to them and the transgression of the laws (Merkl cites the vicissitudes of many soldiers/heroes of disobedience, and in moved tones also tells the story of Cesare Battisti: and on a symbolic plane, we like to remember Sophocles' Antigone, who in order to fulfil the dictates of reason, the will of the gods, the "never written" moral rules which "have a mysteriously eternal life", arrives at the point of challenging Creon, the "power which admits no openings", the iniquitous law which denies burial to Polynices, and for this the "devout outlaw" stakes her own life and finally loses it). Law, in other words, is a value like others; not the only one, therefore, and not even the greatest of all. To consider it as such, however, may depend only on a flaw in one's upbringing or a sickness of the soul, and lead to the horror of Nazism.

On the political plane, it seems that, in the wake of Meineck, Merkl too professed this untenable theory: that Nazism was child of the supine obedience of the German people and army to the orders of constituted power, inclined to any order whatsoever from authority. Instead of which, Field Marshall Wilhelm Keitel, the war criminal Keitel, had confessed, with dignity, the truth for the reasons behind the Third Reich when speaking about himself in his last deposition

before the Nuremberg Tribunal before he was hanged. "I believed, and so I did not know how to prevent what I should have prevented. And now I understand that I was mistaken. This was my main error." And only afterwards, subordinately, does Keitel acknowledge, "another error of mine: that among the duties of a soldier, next to obedience and fidelity, there must also exist the awareness of the limits that are called for in the exertion of such duties."

But, to return to the theme which interests us, one can see that here Merkl abandons the strictly juridical perspective, the visual angle of law, and proposes the point of view of the person who must (should) obey it, and, that is, the point of view of the man. His is not only, no longer, the science of law (jurisprudence) which for Kelsen is also the morality of the law. His is morality opposed to law, which means the mirror image of *Reine Rechtslehre.*

Pirandello called the dead "pensioners of the memory": but, adds Sciascia, we must always send them into retirement with truth, not with lies. A lie is an offence to the dead as much as to the living, and when they were alive both Hans Kelsen and Adolf Merkl were fated to submit heavily to lies. May they be spared further lies in death. And may they rest in peace.

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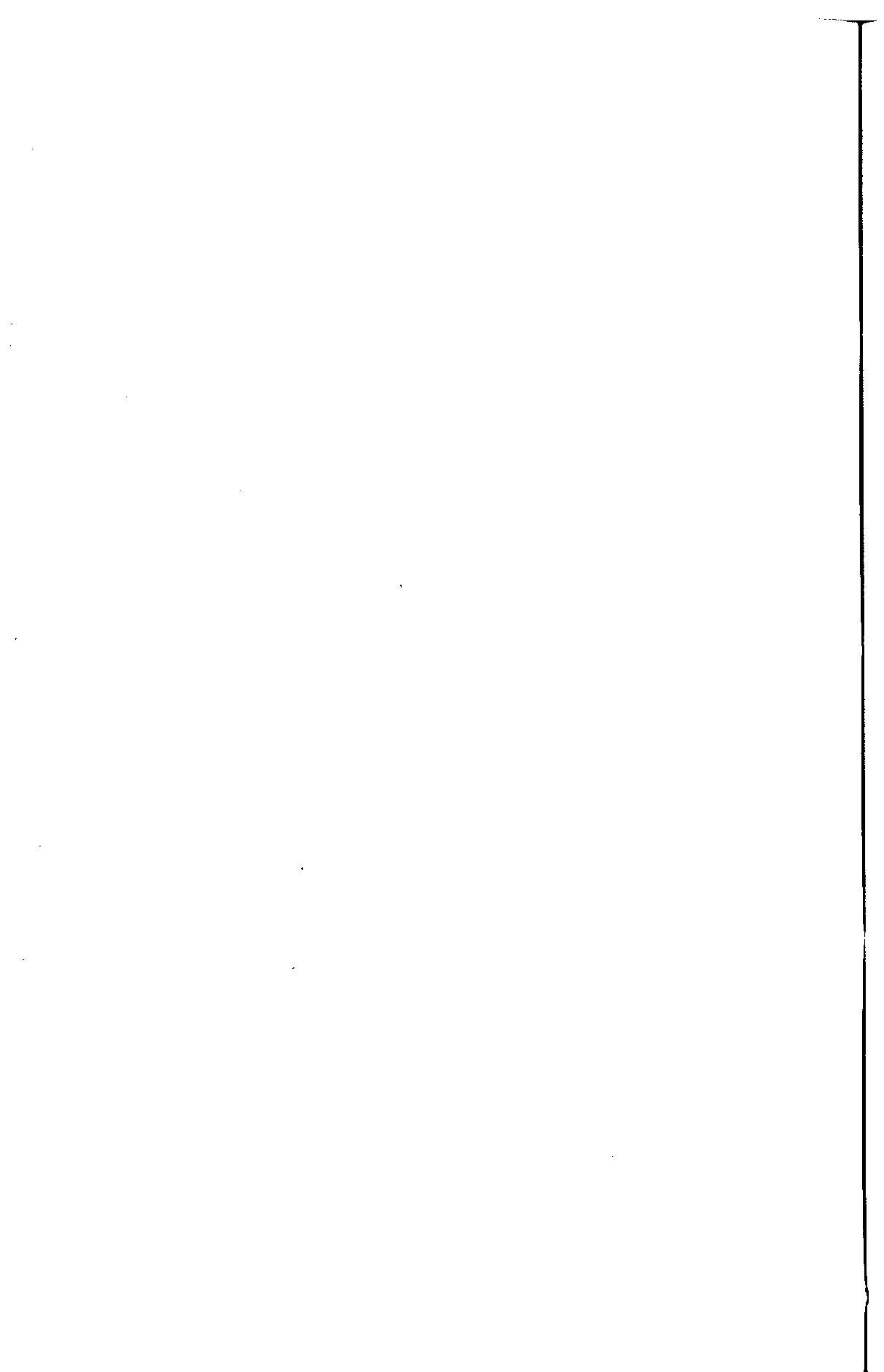

REVIEW ARTICLE

LES DROITS CONTRE LES POUVOIRS – RÉPARATION AU GARANTISME

CARLO GRASSI

In the context of the legal and political theory of democracy, sociologist Eligio Resta's book: "Powers and rights" attributes new significance to the concept of a legal guarantee. He adopts a definite position regarding this issue, proceeding to define democracy in terms of the relationship between powers and rights. His explanation of democracy in complex societies pivots upon the necessary subordination of the exercise of power to the respect for basic rights; highlighting the inevitable restrictions which the attempt to guarantee basic rights places on political action. Resta writes about a pattern of complex, dynamic equilibrium. He also elaborates a highly original theory of "brotherly right;" which tries to establish a theoretical foundation for the construction of rights which is not based on violence.

1. Une responsabilité sans fin et surtout un manque de buts certains

Au temps présent nous vivons "dans un âge sans Dieu et sans prophètes" (Max Weber, 1919, p. 38). Cela signifie qu'observer les lois n'apparaît plus comme quelque chose que les différents acteurs sociaux perçoivent immédiatement comme juste. En effet, puisqu'ils ne peuvent plus respecter des normes émises ou, au moins, garanties par un Dieu, ces derniers se retrouvent à obéir à des règles écrites par eux-mêmes, par d'autres hommes. Alors, d'une part, la relation de l'homme avec la sphère éthique vient d'être

nécessairement sublimée dans la légalité élémentaire d'éléments isolés de l'être et de l'agir; et, d'autre part, l'activité légale perd ce qui lui reste du relief moral pour devenir une convention pure et simple: "le manque de fondement du *Selbstgerecht* - comme l'écrit le sociologue du droit Eligio Resta (1992, pp. 94-95) - n'a plus besoin d'être masqué; il confie uniquement dans ses chances de victoire, dévoilant dans le droit rien d'autre qu'un *Gesetz* imposé par les hommes à d'autres hommes".

Conscient d'un tel manque de fondement, le droit moderne renverse le rapport entre validité et légitimité: il défait l'illusion que les droits soient un destin rationnel et naturel de l'histoire, renonce à fonder sa propre effectivité sur les bases solides d'une autorité qui le transcende et apprend à se justifier avec sa propre simple positivité, avec sa propre capacité de rendre valable et efficace la généralisation d'un système d'attentes. Comme l'a écrit Hans Kelsen (1957, pp. 173-174), "à la demande, pourquoi faut-il obéir à ses dispositions, une science du droit positif doit répondre seulement ça: pour pouvoir distinguer ce qui est juridiquement licite et ce qui est juridiquement illicite, et surtout l'usage légitime et l'usage illégitime de la force".

Le fait que la loi n'ait plus de source divine et transcendante comporte une modification radicale de sa perspective car "le rapport d'obéissance, dans son principe interne et dans tout le sens de la vie du sujet qui obéit, apparaît divers selon qu'il procède d'une Loi ou d'une personne" (Simmel 1908, p. 171). Respecter la volonté divine tire l'homme de la forêt obscure où il demeure et l'élève en haut, vers le beau, le juste: vers l'absolu. L'occurrence d'observer des règles humaines qui, en principe, ne valent plus que d'autres règles instituées par d'autres hommes, introduit, par contre, une forte dévalorisation du fait de se subordonner aux normes et d'accepter une limitation à son propre comportement. La loi apparaît ainsi comme indéfiniment perfectible et les représentants de la loi tels à être légitimement déposés, révoqués, destitués. Une lutte sans fin vient ainsi engagée entre les hommes qui découvrent de ne pas avoir d'autre origine qu'en eux-mêmes et ceux qui s'érigent en représentants de la loi sans s'y soumettre. "En jeu il y a l'artifice du contrat social: le ressort c'est la *Selbst-behauptung*, le fait de se découvrir plongés dans une ontologie du 'présent' dans laquelle on est à la fois acteurs et spectateurs, étrangers et impliqués, ce qui pose

l'homme moderne dans la condition paradoxale de dépendre de soi-même. Et le fait de dépendre de soi-même n'indique pas seulement une conquête d'autonomie, mais implique aussi une responsabilité sans fin et surtout un manque de buts certains" (Resta 1995, p. 550).

2. Les droits fondementaux

C'est dans ce contexte que nous devons situer la théorie juridique et la théorie politique de la démocratie: un thème sur lequel c'est très important d'examiner la précieuse réflexion contenue dans le volume d'Eligio Resta "Pouvoirs et droits", Turin, Giappichelli, décembre 1996.

Resta fonde sa réflexion sur un aigu réexamen du garantisme: un thème qui pour la gauche a constitué un point d'impact très important dans le passé, mais qu'aujourd'hui n'apparaît qu'en partie oublié. C'est juste une position décidément garantiste qui, en effet, lui consent de définir la théorie et l'histoire de la démocratie, plutôt qu'à partir des contenus specifiques du pouvoir, sur la base des conditions qui à ce même pouvoir sont posées par la lutte pour les droits. En fait, "on sait très bien que soit les droits sont contre les pouvoirs soit ils n'ont aucune raison d'être sanctionnés: le pari de la légalité construite sur les droits demeure toute dans cette différence. Différence qui avait caracterisé tout l'effort de la culture moderne, à partir d'Hobbes en avant, pour établir un seuil qui limitait l'arbitraire du pouvoir, de tous les types" (Resta 1996, p. 109; cfr. aussi Racinaro 1995).

Dans ce texte le nœud gordien de la démocratie est identifié dans la subordination nécessaire de l'exercice du pouvoir aux droits fondementaux et dans la limitation que la garantie de ces droits fixe à l'intervention politique. "Les choix de la Constitution" - écrit Resta (1996, pp. 166-167) - "non seulement décident et adjugent comme tout autre *nomos*, mais ils le font à l'intérieur d'un rôle de 'légitimation par la légalité' qui n'est pas un détail quelconque. Ils le font par des règles qui assurent des droits fondementaux par lesquels la forme-état vient d'être justifiée, ce qui signifie division des pouvoirs, limitations de la politique, obligations de la majorité. Il ne s'agit pas de prendre fait et cause pour la légalité procédurière contre la légalité substancielle: il s'agit de relire dans la Constitution un dessin des règles de la démocratie dont à la base il y ait toujours et

uniquement le pivot des droits fondementaux. Et fondementaux signifie qu'ils mettent en commun, incluent, ne peuvent pas être à quelcu'un ou à peu de gens, mais à 'chacun'. Tout cela est oublié par ceux qui, politiques des nos jours, pensent à la Constitution comme à un texte qui vieillit rapidement et qui doit être réécrit à coups de majorité."

3. Le garantisme

Reprenant un écrit crucial de 1872 de Rudolf von Jhering et un essai plus récent de Ferrajoli sur "Droit et raison", Resta reconstruit comment les droits que les Costitutions modernes ont considerés universaux soient le fruit d'une lutte acharnée conduite par les mouvements sociaux contre les institutions afin d'affirmer la souveraineté de chacun contre la souveraineté consignée à la Nation: pour ainsi dire, afin d'assurer à la vie humaine une souveraineté indépendante du lieu de naissance et de proclamer comme droits inaliénables le *jus migrandi*, le droit de voyager, et l'*habeas corpus*, la *self-preservation*. "Une lutte pour les droits qui est foncièrement une lutte contre les pouvoirs: sa manifestation extrême est l'exercice du droit de résistance avec son paradoxe apparent d'être négation du droit en vigueur et garantie externe d'effectivité du droit valable" (Resta, 1996, pp. 43-44).

Dans ce contexte, les notions de culpabilité et de responsabilité apparaissent totalement transformées. C'est pourquoi les bornes qui décrivent les systèmes normatifs et qui marquent les limites juridiques des règlements et de leur horizon de légalité commencent avoir comme *terminus* non plus les auteurs des crimes mais uniquement les actions criminelles. Non plus le jugement sur histoire, idées, race, religion ou sexe des acteurs sociaux, mais seule l'évaluation de leurs actions: non plus ce que les acteurs sont, mais exclusivement ce qu'ils font. En effet, parlant du droit de résistence, Resta (1996, pp. 320, 321) remonte au *perseverare in esse suum* et à la philosophie politique de Baruch Spinoza au droit "d'être même méchants, comme la pensée libérale nous a enseigné; droit d'être juifs, fascistes, libanais ou palestiniens, mais demeurer soi-même, refuser même un possible salut, comme l'affirmait Locke." Ce qui "ne signifie pas du tout qu'il faut se comporter de facon contraire aux règles. D'où les raisons du garantisme: le droit à ne pas être jugé ou préjugé pour ce qu'on est, mais seulement pour ce qu'on fait".

Le garantisme est, en ce sens, le véritable pivot d'une théorie de la démocratie adéquate aux sociétés complexes. C'est pourquoi, face à la circonstance que dans le même espace géographique se trouvent cohabiter des gens qui ne possèdent pas des systèmes de codification socio-symbolique partagés, des acteurs dont l'interaction traverse plusieurs niveaux de conventions communes, mais qui mantiennent des degrés d'indifférence, de non-contact, de méfiance et de conflit ouvert; bref, face à l'existence d'une pluralité de positions raisonnables même si incompatibles, seule le garantisme arrive à tenir compte de l'impossibilité de l'assujettissement à une règle commune partagée. C'est à dire qu'il est le seul qui peut consentir de parier sur l'adoption de l'*overlapping consensus*, le consensus par superposition ou par intersection (cf. Rawls, 1994): le choix politique d'un universalisme dépassant les différences blindées et les chauvinismes déraìsonnables. "C'est de cela qu'on parle lorsq'on parle d'état de droit à fondement constitutionnel. Au contraire de l'état éthique qui non seulement suppose, mais requiert impérativement le consensus, l'état de droit n'impose aucun consensus et au contraire légitime la dissension" (Resta, 1996, p. 36).

4. Le droit fraternel

En réfléchissant sur l'idée d'*overlapping consensus*, Resta nous parle d'un modèle d'égalité complexe, dynamique, où des égalités données peuvent reproduire des espaces d'inégalité, et élabore une théorie très originale qu'il définit du "droit fraternel": théorie avec laquelle il essaie de construire la présupposition théorétique d'un droit non violent. Une proposition qui prévoit les "peuples" se présentant sur la scène historique confier leur chances de liberté à la grammaire des droits, et qui lance l'invitation pressante à "1) rendre à une politique internationale les droits inviolables, 2) désincorporer ces droits de la citoyenneté étatique, 3) mettre en œuvre ces droits contre les souverainetés singulières des états, 4) convertir contractuellement les ressources économiques internationales (désarmement, non prolifération nucléaire, démilitarisation) en plans d'intégration et de solidarité" (Resta, 1996, p. 117).

Les droits universaux proclamés à l'âge de la révolution françaìse fondaient leur légitimité sur l'état et sur les souverainetés centralisées. "Entre ce temps-là et le nôtre il y a continuité mais aussi rupture, ce qui doit être analysé jusqu'au bout afin

qu'aujourd'hui nous puissions avoir un regard désenchanté sur le problème des droits humains". En ce sens, le cosmopolitisme des droits à faire valoir contre les états nationaux revient comme le problème véritable et urgent: "ce n'est pas la puissance politique des états, soit forts soit vainqueurs, qui peut régler les conflits qui sont, à leur tour, toujours des conflits sur les droits, mais c'est une 'loi', la moins fondée, la plus artificielle, la plus conventionelle, mais, jamais comme dans ce cas, nécessaire. Contre les 'loups artificiels', c'est à dire les états modernes, le seul pari jouable n'est pas celui de la 'puissance', mais celui-là de la loi qui limite une telle 'puissance'. Une guerre, avec son immanquable et tragique corollaire d'injustices et de violations des droits humains, peut être réglementée par improbables conseils de sûreté qui devront réprimer la force par la force; mais elle peut être empêchée et arrêtée par une loi qui substitue les instruments d'intervention avec des tribunaux et des cours de justice acceptés par tous. Et avec moins de possibilités que les vengeances et les ressentiments trouvent leur espace" (Resta, 1996, pp. 19-24).

Suivant ce parcours, Resta argumente de facon très valable le projet non encore entièrement realisé de l'institutionnalisation d'une Cour Pénale Internationale permanente qui indique une transformation drastique des modalités d'auto-règlement des systèmes sociaux. Un événement qui met à l'ordre du jour le problème d'une nouvelle approche politique, juridique et culturelle aux relations internationales. La substitution progressive du critère qui prévoit pour ces tribunaux une condition occasionnelle et exceptionnelle avec celui-là qui soutient la nécessité de leur présence stable nous ramène, en effet, au principe kelsenien selon lequel invoquer la primauté des droits se résout en une déstructuration radicale de l'autorité des états. Principe qui affirme la souveraineté de chacun contre la souveraineté consignée à la Nation et pose les droits humains *against States, against majority, against rules*. Ce qui signifie choisir le cosmopolitisme contre l'internationalisme et promouvoir un modèle de résolution des conflits du genre de celui-là mis en lumière par le "droit fraternel": un modèle sur la base duquel, plutôt que *jurer sur une loi* dictée par un père, par un souverain, par un tyran, il faut *jurer une loi* à partir de laquelle il n'y ait plus de tyrans. Une perspective qui, différemment de l'agir communicatif ou agir orienté à l'entente à l'Habermas, ne prétend pas de constituer une explication ou un fondement, mais qui sait d'être un choix, un défi, un pari non nécessaire ni obligé à l'intérieur d'un monde de possibilité, et qui

donc se charge pleinement de son caractère volontaire et contingent: "il s'agit juste d'un pari sur lequel investir collectivement, 'en risquant' comme un pari quelconque à respecter. Il n'y a pas de coercition qui soit capable d'obliger au respect d'une règle; Giacomo Leopardi évoquait ça mieux que d'autres lorsqu'il écrivait que l'abus et la désobéissance à la loi ne peuvent être empêchés par aucune loi. Il s'agit, par contre, d'un investissement collectif, faible, non fondé, gratuit, risqué, 'désarmant' (Resta 1996, p. 109).

5. Contre la dérogation

Limiter l'arbitraire des pouvoirs signifie que les représentants de la loi ne sont en aucun cas plus égaux des autres, mais qu'ils appartiennent à la même société des transgresseurs et donc qu'ils ont leurs mêmes droits et devoirs: leur violence est identique et non diverse de la violence des citoyens. Considérer que les deux positions soient identiques comporte une drastique réduction des possibilités des pouvoirs de s'appeler à l'état d'émergence: pour ainsi dire, cela implique un frein décisif à la faculté de dérogation aux lois que ces derniers s'arrogent sans cesse. Il s'agit, donc, de réclamer "une radicalisation des lois telle qu'elle amène l'état à obéir aux mêmes lois que, par l'état, les hommes se sont imposés" (Fornari 1964, p. 86).

Dans l'horizon de légalité inauguré par l'âge du désenchantement du monde (*Entzauberung der Welt*) et par des sociétés sécularisées et fonctionellement différenciées telles que les actuelles, un nouveau paradigme de culpabilité et de responsabilité vient ainsi s'affirmer qui, au lieu de viser à l'identification de sujets définissables comme malfaiteurs, se pose comme objet la réglementation d'actions définies comme délits. Avec son œuvre de soustraction de la juridiction au jeu de la vengeance, à la justice sommaire et à l'arbitraire des souverains, ce paradigme conduit au présupposé formel, extrêmement important, par lequel celui qui gouverne est lui-même subordonné à la loi qu'il a promulgué. Adopter cette perspective, alors, permet de concevoir la société comme l'ensemble des pratiques qui resistent à la violence et non comme le système disciplinaire de contrôle du corps social. En effet, si l'exercice du pouvoir comme force relationnelle positive s'applique au corps social par la discipline, la sauvegarde des droits met en place l'indisponibilité de ce même corps à une manipulation absolue et désigne le lieu où les pratiques du pouvoir trouvent leur limite décisive.

6. Etat éthique et état de droit

La différence principale entre l'état éthique et l'état de droit consiste dans le fait que dans le second les représentants du pouvoir politique sont élus sur la base d'un mandat leur conféré par le peuple souverain et ils sont sujets en tout et par tout à la loi. Ce qui garantit la souveraineté populaire c'est la certitude du droit qui empêche aux représentants politiques légitimement élus d'utiliser leur propre charge pour intérêt privé. Parce qu'il soit en vigueur la certitude du droit, la loi doit être générale, abstraite et non sujette à dérogation. Lorsque les règles certes deviennent discrétionnaires, l'état de droit tombe et à sa place s'instaure la condition de l'arbitraire: l'état de droit représente la liberté de tous, la condition de l'arbitraire seulement la liberté de certains qui tyrannisent tous les autres.

Le pouvoir légal-rationnel ne connaît pas de condition définitive: il est par sa nature provisoire et donc il doit chaque fois être légitimé à nouveau. Ses représentants tirent toute leur force et leur légitimité entière du fait d'être limités par des bornes inhérentes à la sphère de la légalité. Comme l'écrit Hegel (1820, § 295, p. 237), "dans le comportement et dans la culture des fonctionnaires se situe le point où les lois et les décisions du gouvernement touchent l'individualité et elles sont faites valoir dans la réalité": c'est, donc, de ce comportement et de cette culture que "la satisfaction et la confiance des citoyens dépend".

La certitude du droit est la seule et véritable défense des faibles. Cette tutelle, comme l'a écrit Georg Simmel (1908, p. 180), "a son symbole dans l'objectivité juridique" qui fait de la règle une "norme objective au-dessus des parties". Donc, différemment de l'état éthique, l'état de droit confie sa légalité au choix des moyens et non à celui des fins: pour ainsi dire, l'état de droit conçoit comme légitimes tous les buts posés par les acteurs sociaux et déclare sujettes à limitation uniquement les modalités pour les atteindre. En effet, écrit Resta (1996, p. 265), "l'état de droit n'impose pas le consensus par rapport à ses contenus mais il exige exclusivement le respect pour ses règles procédurières en laissant libres les citoyens de se conformer ou pas aux prévisions normatives et d'en risquer les sanctions".

L'interdiction de déroger aux normes est le moyen par lequel les faibles, les perdants, les minorités, réussissent à se sauvegarder des puissants, de ceux qui voudraient se passer des lois: de ceux pour lesquels le système normatif est un obstacle. On comprend ainsi

comment l'alternative pauvre et terrible à tout système complètement démocratique demeure dans l'invocation de l'état de nécessité, dans la promulgation de directives d'émergence et, avec eux, dans l'appel au super-policier avec pouvoirs spéciaux, au préfet de fer, au bras armé de la loi. Il devrait donc être évident comment, en définitive, l'effective différence à droit et justice (*jus et æqitas*) ne demeure pas dans la présence de ceux qui transgressent les lois, mais plutôt dans la présence d'un pouvoir qui, au nom de fins qu'il juge supérieurs, décrète l'état d'exception.

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الحقوق ضد السلطات

كارلو كراسّـي

في اطار النظرية القانونية والسياسية للديمقراطية يُسند عالم الاجتماع ايليجيو ريستا في كتابه "السلطات والحقوق" معنى جديدا الى مبدأ الضمان القانوني. ويتخذ ريستا موقفا محددا في هذا الشأن ويصف الديمقراطية من ناحية العلاقة بين السلطات والحقوق. ويدور وصفه للديمقراطية في مجتمعات مركّبة على المحور التالي: ضرورة خضوع ممارسة السلطة لاحترام الحقوق الاساسية، مع التركيز على حتمية تقييد العمل السياسي نتيجة محاولة ضمان تلك الحقوق الاساسية. ويشير الكاتب الى نموذج من التوازن المعقّد والفعّال، كما يقدم نظرية مُبدعة جدا حول "الحق الأخوي"، أي محاولة خلق اساس نظري لعملية بناء الحقوق بعيدا عن العنف.

هانس كيلسين: مناضل من أجل الحقوق أو متعاطف نازي؟

ماريو باترونو

أُتّهم كتاب كيلسين راينه ريشتسليهره أو "النظرية القانونية الصافية" بأنه قد شقّ الطريق للنازية وللفاشية. ونظرا لأن هذا الكتاب يفصل القانون عن السلوك والأخلاق فأُتهم بأنه ثلم ضمير الشعب الألماني، الأمر الذي أدى بهم الى تجاهل طلبات العدل. ومع ذلك فمن الخطأ أن يُدّعى أن كيلسين كان متعاطفا نازيا أو فاشيا. كما انه ليس صحيحا أن "النظرية الصافية"، التى احتفظت بموقف محايد تجاه القيم، بشّرت بالطاعة العمياء لدستور فايمار. بل انه من الخطأ أن يُدّعى أن أصول "النظرية الصافية" قد ساهمت في تأسيس الأنظمة الفاشية. هذا و ليس جائزا أن يُتّهم كيلسين باضفاء الشرعية على نظام الاشتراكية الوطنية الدكتاتورية، ذلك النظام الذى كان كيلسين يكرهه كثيرا. فالنظرية القانونية الصافية لا تُجبر بالضرورة أحدا على أن يطيع القانون، ولكن تجعل الفرد يأخذ قراره المنعزل فيما يخص القيم التى يتبعها. والقانون ما هو الا احدى تلك القيم. ولذا فالاتهامات الموجهة ضد كيلسين كانت خاطئة ولم يكن لها أي اساس. أما كيلسين، فانه لم يتألم من هذه الاتهامات. ولكن طالبه ميركل كان متأثرا كثيرا من تلك الاتهامات وذلك لأنه كان مؤمنا باله العدل والحقيقة. فالاتهامات الموجهة الى هاتين الشخصيتين كانت كاذبة. والاكذوبة اساءة ضد الموتى. وليبرأ كيلسين وميركل من المزيد من الاكاذيب!

الاجرام والتنمية الاقتصادية: تحقّق علمي في المناطق الايطالية (١٩٨٠-١٩٩٥)

فيرديناندو أوفريا

يحاول هذا البحث تقييم العلاقة (ايجابية كانت أم سلبية) بين مستوى التنمية الاقتصادية والاجرام (القتل والسرقة) في المناطق الايطالية الوسطى - الشمالية من ناحية والمناطق الجنوبية من ناحية أخرى في الفترة ما بين ١٩٨٠ و١٩٩٥. وتؤكد نتائج البحث الاعتقاد بأن هناك علاقة تناسب عكسي بين مستوى التنمية الاقتصادية وعدد حالات القتل في خمس مناطق من المناطق الجنوبية الايطالية الثمان. ويفحص الجزء الأول من البحث النظريات الخاصة بالعلاقة بين التنمية الاقتصادية والاجرام، بينما يصف الجزء الثاني المعايير المستخدمة في تنمية مثل هذا التحليل الاحصائي - الاقتصادي. ويناقش الجزء الختامي الحقائق العلمية الناتجة عن هذه الدراسة.

والثقافية. كما يزعم الباحث انه بالرغم من حصول زيادة في التنمية الاقتصادية، غير أن ذلك قد أدى الى استعباد الدول بسبب اعتبارات اقتصادية. ذلك أن القرارات تُتخذ بناء على اعتبارات اقتصادية بحتة دون الانتباه الى انعكاساتها في حياة وحقوق عامة الناس.

الحقوق الاقتصادية والاجتماعية والثقافية في الوضع الاقتصادي الدولي الراهن - فابيولا ليتيليار

يحلل هذا البحث عمليات العولمة الاقاصادية الدولية وكيف تؤثر هذه العمليات حياة وحقوق ملايين من الناس. ان فكرة امكانية التخلي عن أنظمة الأمن الاجتماعي باسم الحرية الاقتصادية قد أدّت الى زيادة حالات اختراق ودوس الحقوق الاقتصادية والاجتماعية والثقافية تحت الاقدام. وفي هذا الصدد تتم الاشارة الى الاعلان العالمي لحقوق الانسان الذي يتناول الحقوق المدنية والسياسية بل حتى الحقوق الاقتصادية والاجتماعية والثقافية، مع أنه لا يحدّد أي نظام تسلسلي بين مجموعتي الحقوق هذه. فالاعلان العالمي لحقوق الانسان مؤسس على مبدأ عدم تجزئة حقوق الانسان، أي أن كافة حقوق الانسان ضرورية جدا احتراما لكرامة الانسان وللتطور الحرّ للجميع. كما يشير البحث الى المعاهدة الدولية حول الحقوق الاقتصادية والاجتماعية والثقافية والتى تشترط أن يكون هناك امتثال منتظم لحقوق الانسان ضمانا لتحسّن مستمر في ظروف المعيشة.

كما يفحص الباحث ما اذا كان هذا الشرط الاساسي منفّذا حقيقيا وذلك على سعيد الانظمة الاقاصادية العالمية في الماضي والحاضر وخاصة في اطار ما يُسمّى بـ "العولمة النيو - ليبرالية" لاقتصادات العالم. ويزعم الباحث أن رغم وصف هذا الاتجاه بأنه حديث وضروري، غير أنه في الواقع يمثّل خطوة نحو الخلف التى تؤثر سلبيا في تنفيذ الحقوق الاقتصادية والاجتماعية

الهجرة عبر محو جذورها بواسطة التنمية الشاملة المستمرة. ان كلتي منطقي المتوسط ترغبان في الرفاهية والسلام، بل ترغبان في أن تساعدا بعضهما البعض. وتحقيقا لهذه الأهداف، يجب لهذه المناطق أن تحترم ثقافاتها.

تشجيع التفاهم الثقافي بين شعوب شمال وجنوب البحر الابيض المتوسط

سعد الدين ابراهيم

ان الرفاهية الاجتماعية في النصف الثاني من القرن العشرين وبعده يمكن تحقيقها فقط عبر احترام الكرامة الانسانية واعتراف السيادة الفردية وكافة حقوق الانسان. ولا توضع هذه الحقوق موضع التنفيذ ولا يتم حمايتها الا في ظل نظام حكومي ديمقراطي. ذلك لأنه في غياب الديمقراطية واحترام حقوق الانسان لا بد للأفراد أن يشعروا بعدم الاطمئنان ويؤدي ذلك الى عدم استقرار بلدانهم. أما منطق "كانت" فيضع الديمقراطية في صميم الحل السلمي للنزاعات. وحسب اعتقاد "كانت"، تكون الديمقراطيات المجاورة آمن مجموعة دول. ورغم ذلك الاعتقاد، ففي جنوب البحر المتوسط هناك عشر دول التى تورطت في ٢٠٪ من النزاعات المسلحة التى شهدها العالم في السنوات الخمسين الماضية. وكان من المفترض أن يُقيم اعلان بارشيلونا حول الشراكة المتوسطية جسرا بين جنوبي وشمالي البحر المتوسط. هذا والتسامح هو شرط ضروري للتعاون والشراكة في منطقة البحر المتوسط. ونظرا لأن اوروبيين جدد من أصل عربي - مسلم يشكلون أكبر أقلية ثقافية ودينية في أوروبا الغربية، فيتحتم على الأوروبيين أن يمارسوا "التعددية الثقافية"، وذلك ليس على السعيد الاقليمي فقط ولكن على السعيد الوطني أيضا. أما بالنسبة للهجرة فيجب تنظيمها وفقا لاتفاقات متعددة الاطراف. هذا وفي النهاية، يمكن التحكم في

الاتحاد الاوروبي الغربي والبُعد الأمني والدفاعي الاوروبي: نظرة عامة.

بـاولو فوريستـي

يسرد هذا البحث من الناحية التاريخية والسياسية المحاولات في العقود الماضية في القارة الاوروبية لخلق اطار جماعي متين وفعّال للأمن والدفاع الاوروبي، ابتداء من معاهدة بروكسيل حتى معاهدة امستردام. ويركز البحث بشكل خاص على الاتحاد الاوروبي الغربي كمحاولة أولى للحصول على نوع من التعاون الدفاعي بين الدول الاوروبية. ويتطرق البحث الى التركيبة التأسيسية والاهداف المعلنة لهذه المنظمة. كما يعالج عملية اعادة النظر في هذه المنظمة عقب تطور التعاون السياسي الاوربي والسياسة الخارجية والامنية المشتركة في اطار الاتحاد الاوروبي. وطبقا لمعاهدة ماستريخت فالاتحاد الاوروبي الغربي يعتبر " ... جزءا لا يتجزأ من تلمية الاتحاد الاوروبي." ومع ذلك فيبدو أنه لا يوجد اتفاق بين الدول الاعضاء فيما يخص الاندماج التام للاتحاد الاوروبي الغربي ضمن الاتحاد الاوروبي بصفته جناحه الدفاعي. ولذا، فرغم الفرص الجيدة للتعاون بين الاتحاد الاوروبي والاتحاد الاوروبي الغربي، فهذا الاخير لا يزال يحتفظ بالحكم الذاتي التأسيسي. ومع ذلك فالتصريحات الاخيرة حول ضرورة لعب الاتحاد الاوروبي دوره الكامل على السعيد الدولي وضرورة ضمان سياسة دفاعية متماسكة تدعمها قوات عسكرية يوثق بها، كل ذلك قد يدلّ على أن الاتجاه المستقبلي سيتجسد في دمج الهيكل العسكري للاتحاد الاوروبي الغربي تدريجيا ضمن اطار الاتحاد الاوروبي.

الاقليات: البند الناقص في الاعلان العالمي لحقوق الانسان

وليام ا. شاباس

ان الاعلان العالمي حول حقوق الانسان لا يشمل حق الانتماء الى أقلية عرقية أو لغوية أو دينية. ومنذ عهد قديم في تاريخ حقوق الانسان، كانت قضية حماية الاقليات أمرا مهما ولا سيما في المعاهدات والاعلانات التى جاءت عقب الحرب العالمية الأولى. ان المسودّة الأولى للاعلان العالمي حول حقوق الانسان كانت تتضمن بندا يتعلق بحقوق الأقليات وذلك بناء على نص قدّمه العالم الانكليزي هيرش لاوتيرباخت. غير أن لجنة الصياغة لم تكن متحمسة لهذه الفكرة وأحالت الأمر الى لجنتها الفرعية حيث تمت صياغة جديدة للبند. ولكن في النهاية صوتت لجنة الصياغة ضد ادخال النص في الاعلان النهائي. هذا وحاول كل من الاتحاد السوفياتى ويوغسلافيا والدانمارك لن يطرحوا الفكرة من جديد في اللجنة الثالثة للجمعية العمومية للأمم المتحدة في اكتوبر - ديسمبر ١٩٤٨ ولكن دون أي نجاح. وفي نهاية المطاف، قررت الجمعية العمومية أن تحيل الامر الى اللجنة الفرعية للمزيد من البحث. هذا وكانت الدول الاوروبية، وخاصة دول اوروبا الشرقية حيث كان نظام الاقليات ساري المفعول في الفترة ما بين الحروب العالمية، كانت هذه الدول مهتمة بادخال بند يتعلق بحقوق الاقليات. وجاءت المعارضة للفكرة من دول الهجرة مثل دول امريكا اللاتينية والشمالية واستراليا ونيو زيلاندا خوفا منها بأن مثل هذا البند حول الاقليات يؤدي الى تشجيع اندماجها واستيعابها في تلك الدول. اما بقية القوى المستعمرة، كالمملكة المتحدة وفرنسا، فعارضة هي الأخرى فكرة ادخال البند حول حقوق الاقليات. هذا ونجح مقترحو حقوق الاقليات ادخال البند ٢٧ في المعاهدة الدولية حول الحقوق المدنية والسياسية. غير أن التجاهل المؤسف لهذه الحقوق في الاعلان العالمي لحقوق الانسان كان له عواقب طويلة الأمد وقد يكون السبب وراء الحماية غير الكافية التى يمنحها القانون الدولي حول حقوق الانسان للأقليات العرقية وللشعوب الأصلية.

تحريات اللجنة ضد التعذيب التابعة للأمم المتحدة حول اللجوء المنتظم الى التعذيب في تركيا ومصر.

ديديار روجـي

ان معاهدة الأمم المتحدة ضد التعذيب وسائر المعاملات والمعاقبات القاسية وغير الانسانية أوالمذلّـة التى تبنّـتها الجمعية العمومية للأمم المتحدة في ١٠ ديسمبر ١٩٨٤ أصبحت سارية المفعول في ٢٦ يونيو ١٩٨٧. وانبثقت عن هذه المعاهدة "اللجنة ضد التعذيب" التى تراقب تنفيذ المعاهدة من قبل الدول الأعضاء. هذا ومثل سائر الهيئات الدولية المدافعة عن حقوق الانسان، فاللجنة ضد التعذيب تفحص التقارير المرسلة اليها من قبل الدول الاعضاء، بل يمكنها أيضا أن تستلم شكاوي فردية أو من طرف دولة ما ضد دولة أخرى. وبالمقارنة مع معاهدات أخرى حول حقوق الانسان، تختصّ المعاهدة ضد التعذيب، بفضل بندها العشرين، بعملية تحقيقية فيما يتعلق بالادّعاءات حول اللجوء الى التعذيب في اقاليم الدول الأعضاء. وتشمل هذه العملية التحقيقية استقصاء الحقائق والزيارات الى الدول المتهمة والتحاور مع المسؤولين فيها وتقديم التعليقات والمقترحات. هذا وقد تم اللجوء الى هذا الاجراء التحقيقي في دولتين متوسطتين، أي تركيا ومصر، حيث أثبتت اللجنة ضد التعذيب أن التعذيب في هاتين الدولتين يُمارس بشكل منتظم.

كم من حقوق الانسان تكتسب الاعتراف العالمي؟

لويجي فيتوريو فيراريس

ان الذكرى السنوية الخمسين للاعلان العالمي لحقوق الانسان تمثل فرصة لتقييم فاعلية ذلك الاعلان. ولذا فمن المهم قياس مدى الاحترام لحقوق الانسان مع الاخذ بعين الاعتبار الاختلافات بين شتى المجتمعات الانسانية في اطار المجتمع الدولي. فكان اعلان سنة ١٩٤٨ تجسيدا لمبادئ اوروبية - امريكية، الامر الذى أدى الى ادراك بقية أنحاء العالم عبر تمييزات تابعة لافكار غربية. واذا كانت حقوق الانسان ناتجة عن الحضارة الغربية، و إن تُعتبر "عالمية"، فلا بد من طرح مسألة قبول تلك الحقوق من طرف اولئك الذين لم يشاركوا في التطور الفكري لحقوق الانسان. هذا ويتحتم على كل عضو في المجتمع الدولي أن يحترم حقوق الانسان، ومع ذلك فهناك عدد من البلدان التى ليست مستعدة ان تُقرّ بمبادئ مركزية تخص حقوق الانسان ما لم يتم تعديلها لتأخذ بعين الاعتبار ثقافتها الخاصة. وقد تصبح مثل هذه المواقف ذرائع لتبرير العنف او الدكتاتورية. كما أنها قد تعكس تجاوبا غير منطقي لشعور العزلة وعدم القدرة نتيجة عملية العولمة الاقتصادية. غير أنه لا بد لحقوق الانسان أن تأخذ بعين الاعتبار الاعتقادات المختلفة في شتى الثقافات. ان هذه أحسن الوسائل لضمان تطور الاحترام العالمي لحقوق الانسان.

دولة الرفاه الاجتماعي كالزام قانوني

سالفو اندو

على القرن العشرين ألا يكون فقط قرن الذبائح الهائلة ولكن يجب أن يكون أيضا قرن الثورة في ثقافة وحماية حقوق الانسان وبخاصة في النصف الثاني منه. هذا وقد حظيت حقوق الانسان بالاعتراف بأنها حقوق فطرية وسيادة الدولة في هذا المجال قد أصبحت مقلّصة . ذلك لأن حماية حقوق الانسان، التى كانت في السابق تقع ضمن نطاق دساتير الدول، قد أُحيلت الى القانون الدولي والى السلطات الدولية التى نشأت بفضل مقتضيات القانون الدولي. واذا أردنا أن نعالج حقوق الانسان بجدية فلا شك أن المسألة الكبرى في القرن الواحد والعشرين ستكون المراقبة الدولية لعملية حماية وتشجيع حقوق الانسان من قبل مختلف الدول. كما أنه من الواضح أن المجتمع الدولي لا يحمي حقوق الانسان بنفس الشدّة التى تُدافع بها من طرف بعض الدساتير في عدد من الدول. غير أن عملية عولمة حقوق الانسان لا تسمح لدول منفردة أن تستغل التزاماتها تجاه المعاهدات المتعلقة بحقوق الانسان لتخفّض مستوى حماية تلك الحقوق المنصوص عليها في دساتيرها. ولذا فلا يمكن للقانون الأوروبي أن يخفّض مستوى الحماية التى تؤمنها كل دولة لمواطنيها. وهذا ينطبق على المستحقّات الاجتماعية التى تضمنها دولة الرفاه الاجتماعي. واذا كانت حقوق الانسان أساسية وغير قابلة للانتهاك فعلى دولة الرفاه الاجتماعي، كوسيلة ضرورية تنفيذا لتلك الحقوق، ألا يطرأ عليها أي تدهور.

دستورية القانون الخاص في ايطاليا

جويدو الپا

يبحث هذا المقال أثر الدستور الايطالي، بواسطة ضماناتها لحقوق الانسان الاساسية، على العلاقات القانونية بين الاشخاص العاديين، تلك العلاقات التى تشكّل الموضوع التقليدي للقانون الخاص. ويميّز الباحث بين مختلف طرق التطبيق للقواعد الدستورية ويتم ذلك عبر الاشارة الى قضايا رئيسية الى طُـبّـقت فيها تلك القواعد الدستورية. ويتم التركيز بشكل خاص على دور الحجّة الدستورية فيما يخص تطبيق مبدأ عدم التمييز وتنمية حقوق الشخصية وبناء مبدأ الخسارة البيولوجية في قضايا الضرر الشخصي وفي أجزاء معينة من قانون الالتزامات. ويستنتج الباحث أن النظام الايطالي لتطبيق القواعد الدستورية هو نظام متماسك الى حد ما ويختلف عن أنظمة أخرى نظرا لأنه لا يحمي بطريقة مباشرة حرية التعاقد طبقا للدستور. فالحدود بين القانون الخاص والقانون الدستوري يتم اعادة تحديدها نتيجة دستورية القانون الخاص.

أشغالها. ومن بين هذه العوائق: الحصول على التصديقات اللازمة حتى يصبح النظام الاساسي ساري المفعول، وصياغة النصوص والاحكام القانونية، والموقف السلبي لبعض الدول ذات نفوذ التى صوتت ضد نظام روما الاساسي.

الاعلان العالمي لحقوق الانسان: بعد مرور خمسين سنة

جوليانو فاسّالّي

يأخذ البحث بعين الاعتبار المضامين التاريخية والفلسفية والقضائية لمفهوم "الحقوق الاساسية للانسان" ذي القبول الشامل وتطور تلك المضامين التدريجي من قانون طبيعي الى قانون ايجابي. وتأييدا لهذا الرأي، يشير البحث الى عدد من الادوات الدولية التى حاولت، عبر السنين، ترسيخ مبدأ حقوق الانسان بعيدا عن كل شكّ، خصوصا بواسطة الاعلان العالمي لحقوق الانسان. وتتم الاشارة كذلك الى نماذج مختلفة لحماية حقوق الانسان، مثل تشجيع حقوق الانسان ومراقبتها توطيدا لها ضمن الدائرات القضائية الوطنية وتنمية نماذج أسمى للقضاء الدولي لتحلّ محلّ القضاء الوطني كلما يكون هذا القضاء غير كافيا أو غير موجودا.

وفي هذا الصدد، يربط الباحث الذكرى الخمسين للاعلان العالمي لحقوق الانسان بالتوقيع في روما على النظام الاساسي للمحكمة الجنائية الدولية الدائمة. ويعتبر البحث هذا الحدث خطوة نحو تنفيذ أكثر فعالية للحقوق الاساسية للانسان. كما يسرد البحث النزاعات والصعوبات التى واجهتها صياغة نظام روما الاساسي، بل يتطرق الى المحتويات الرئيسية لهذا النظام وبخاصة الجرائم التى تقع ضمن اختصاص المحكمة الجنائية الدولية. كما يشير البحث الى العوائق التى يجب التغلب عليها قبل أن تبدأ هذه المحكمة

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