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The International Bill of Human Rights, coherence and complementarity

Emmanuel Decaux

THE INTERNATIONAL BILL OF HUMAN RIGHTS, COHERENCE AND COMPLEMENTARITY

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ABSTRACT

The Universal Declaration of Human Rights derives its political inspiration and its legal standing from the United Nations Charter. It gave hard substance to the general commitment to cooperate to bring about "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" pursuant to article 55 (c) of the UN Charter. For want of time, the participants at the San Francisco Conference had been unable to draw up a list of human rights and so confined themselves to the incantatory references to human rights that form a sort of leitmotiv of the Charter in answer to the hopes and expectations of NGOs, especially US associations and trade unions.

However, in his closing speech to the San Francisco Conference, President Truman voiced the wish that the UN would adopt "an international bill of rights acceptable to all the nations involved". Actually, this mission was to be the first mandate given to the new Commission for the Promotion of Human Rights, the creation of which was expressly provided for by UN Charter article 68. ECOSOC resolution E/RES/1946/9 (II) of 4 June 1946 setting up the Commission on Human Rights asked it to draw up an "international bill of rights" (par. 7) on the basis of the early work of the "nuclear commission" which had been tasked with preparing the ground.

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1. On the place of human rights in the United Nations Charter, see the commentary by Jean-Pierre Cot, Alain Pellet and Mathias Forteau (eds), *La Charte des Nations Unies*, 2 vols. (Paris: Economica, 2005) 3rd edn.

of the Charter in answer to the hopes and expectations of NGOs, especially US associations and trade unions[2].

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We ought first to emphasize the shift in terminology employed in the context of the UN when speaking of the International Bill of Human Rights. Initially, an International Bill of Human Rights was very commonly evoked, along the lines of the 1689 Bill of Rights or of what is referred to as the American Bill of Rights[4]. In French, there was talk of the future *Déclaration internationale des droits de l'homme*, before René Cassin put forward the idea of a *Déclaration universelle*.

But the term International Bill of Human Rights soon came to be used in a broader sense. To the best of my knowledge, it was General Assembly resolution 217(III) of 10 December 1948 that enshrined the new paradigm. While the adoption of the Universal Declaration featured under letter A, the resolution also contained a plan of work, under letter F, entitled 'Preparation of a draft covenant on human rights and draft measures of implementation': 'C*onsidering* that the plan of work of the Commission on Human Rights provides for an International Bill of Human Rights, to include a Declaration, a Covenant on Human Rights and measures of implementation'. In other words, the General Assembly planned a three-stage development from the outset with (i) a declaratory stage—that of the principles, with the Declaration proper—(ii) the treaty stage—that of the legal obligations with a 'general covenant' and specialized instruments—and (iii) the jurisdictional stage—that of guarantees, with the optional procedures for redress. The term 'International Bill of Human Rights' from then on encompassed these three stages, although somewhat fuzzily. But clearly the Bill of Rights, the *Charte des droits de l'homme*, was no longer just a part—the Universal Declaration as such—but constituted the whole, the 'plan of work', before forming a true legal *corpus*.

Beyond the political or symbolic use of the expression, it has been enshrined in law by the Human Rights Committee in its general comment 26 on continuity of obligations that was adopted in 1997 further to North Korea's denunciation of the International Covenant on Civil and Political Rights. To demonstrate the irreversible character of adhesion to the Covenant, the Committee underscored the specific 'nature' of the treaty: 'Together with the simultaneously prepared and adopted International Covenant on Economic, Social and Cultural Rights, the Covenant codifies in treaty form the universal human rights enshrined in the Universal Declaration of Human Rights, the three instruments together often being referred to as the "International Bill of Human Rights". As such, the Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect' (par. 3).

Thus the Committee takes the view that the Bill forms a substantive 'block', even if its parts are of different natures. In the case in point the Committee was not discussing the optional protocols but it may be wondered whether they too are an integral part of the whole—the official publications of the Office of the High Commissioner for Human Rights puts them under the same heading, whereas the abolition

2. On this influence, see Michael Reisman, '*Private International Declaration Initiatives*', in colloque de la CNCDH, *La Déclaration universelle des droits de l'homme (1948-1998), Avenir d'un idéal commun* (Paris: La Documentation française, 1999), p. 79-116.
3. Jean-Bernard Marie, *La Commission des droits de l'homme* (Paris: Pedone, 1975).
4. Cf. Mary Ann Glendon, *A World Made New*, *Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001). Stephen Schlesinger, *Act of Creation, The Founding of the United Nations* (Boulder: Westview Press, 2003).

of the death penalty is far from being unanimously accepted in the UN. In any event it is important to emphasize from the outset that the expression 'International Bill of Human Rights' has now acquired new legal actuality, I was going to say new legal acuity: without going so far as to speak of *jus cogens*, the Committee has gone beyond the treaty-based logic of voluntarism and state sovereignty. It should be emphasized besides that the French presidency, speaking in the name of the European Union at the 60th anniversary of the Universal Declaration 'welcome[d] the fact that the Universal Declaration of Human Rights [was] now recognised by an increasing number of States as a major contribution to the development of customary international law'[5].

We shall return to these legal questions, but I would now like to go back to the general issue of the coherence and complementarity, by distinguishing a double movement of deconstruction and reconstruction of the whole that the Universal Declaration forms.

1. DECONSTRUCTING THE UNIVERSAL DECLARATION

The mandate given to the Commission on Human Rights was a global one and was aimed at all human rights for everyone. The US proposals presented on 6 February 1947 listed four 'categories of rights' to be considered:

– (a) personal rights, such as freedom of speech, information, religion and rights of property; (b) procedural rights, such as safeguards for persons accused of crime;

– (c) social rights such as the right to employment and social security and the right to enjoy minimum standards of economic, social and cultural well-being;

– (d) political rights, such as the right to citizenship and the right of citizens to participate in their government[6].

The fact is that the Universal Declaration lists a set of rights, with a subtle articulation marked by article 22 which refers to 'realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights (...)'.

But the commentaries, after this compromise draft, were to reflect a degree of caution that contained the seed of the split between two series of rights. As René Cassin said in a speech of 24 May 1948:

Among traditional rights were those connected with the ideas of freedom, physical freedom, freedom of opinion and of association. A preliminary instrument might define their scope and specify the means by which they could be applied. It was not certain, however, that certain economic and social rights, which ought to be mentioned in the proposed International Covenant, could be included in that preliminary instrument. Such rights would require longer study, being more difficult to define by their very nature. Moreover, certain specialized agencies might have to be consulted with regard to them. Decisions of a legal nature, which were more easily taken on the national plane, might cause difficulties on the international plane. That was all the more true when the recognized possessor of a right was a collective body such as the United Nations[7].

Likewise, in something of a departure from the initial US proposal, Mrs Roosevelt underscored before the 3rd Committee of the General Assembly that the US government did not think that the economic, social and cultural rights listed towards the end of the Declaration necessarily called for intervention by the governments concerned, except in implementing the article [22] that introduced the articles relating to those rights[8]. The Soviet Union's raising of the stakes probably counted for a good deal in this caution, which was recalled in plenary session at the time the Declaration was adopted.

5. Statement delivered by H.E. Jean-Maurice Ripert, France's permanent representative, in the name of the European Union, in the General Assembly, 10 December 2008.
6. E/CN.4/17.
7. E/CN.4/SR.48.
8. Meeting of 30 September 1948, p. 32.

The Cold War ideological divide was very soon to be transformed into a technical differentiation between two categories of rights. But it should be pointed out that the United States with the New Deal, the United Kingdom of the Welfare State and France with the *Conseil national de la Résistance* programme and the 1946 preamble set a great deal of store by economic and social rights. For having heard a young Russian diplomat of the new generation state in public some years ago in Geneva that dictatorships defended social rights better than democracies, taking Stalin and Hitler as examples, such a reminder is all the more necessary today. The reference to the 'three generations', popularized after Karel Vasak, is too often understood as an excuse for a selective reading of human rights. It is historically false both internally and internationally. In France, rights of 'solidarity' were enshrined already with the 1791 Constitution that was to go with the 1789 Declaration. In the international arena, humanitarian law was enshrined by the mid-nineteenth century, workers' rights by the Treaty of Versailles with the 1919 constitution of the International Labour Organization, before the whole of human rights in the context of the United Nations Charter in 1945. But this schematic presentation is above all politically dangerous in fostering the belief that liberal democracies have ignored economic and social rights and conversely dictatorships of all persuasions can promote economic and social rights while riding roughshod over civil liberties.

1.1 The rift in the universal framework

Even if the historical context of the Cold War fostered this rift between two major categories of rights, it is on the technical plane that it should be situated. It reflects first of all an institutional cleavage between the UN and the specialized organizations, whether those of older standing such as the ILO or contemporaneous ones like UNESCO, even if that organization is the direct heir to the International Institute of Intellectual Cooperation of the inter-war years. The counterpart to this extreme specialization, which was based on tripartism in the case of the ILO and on the role of 'intellectuals' in the initial running of UNESCO, was to set apart the successful work conducted in parallel. Admittedly UNESCO made an eminent contribution to the genesis of article 19 of the Universal Declaration, but cumbersome administration quickly contributed to the segregation of the activities of the organizations, notably in the field of human rights, where synergies would have been called for.

At the same time the Human Rights Commission was quick to wager that it would be easier to elaborate two parallel instruments rather than one 'general covenant'. The idea of preparing two International Covenants prevailed by the early 1950s, entailing a separation between the two instruments, despite the cross-references in sharing a common Preamble and article 1. Although they were adopted on the same day by the General Assembly, the two Covenants are not 'identical twins' for all that: the International Covenant on Civil and Political Rights establishes a Human Rights Committee tasked with studying periodic reports from the states parties and, as need may be, examining 'communications' submitted to it by states or individuals. There is no such thing in the International Covenant on Economic, Social and Cultural Rights. It was only ECOSOC practice that was to lead to the establishment, on the basis of a simple resolution, of a Committee of Economic, Social and Cultural Rights tasked with examining periodic reports from states parties.

But beyond this technical differentiation, erecting a hurdle to the full justiciability of economic, social and cultural rights, the mere existence of two separate instruments mechanically entailed particularly harmful political consequences. Even if one can debate the scope of the Universal Declaration of 1948 it does enshrine a set of rights that are incumbent upon all member states of the United Nations[9]. Not just the fifty or so states that were present at the time the vote of the General Assembly was made but also all those that were subsequently admitted on the basis of article 4 as 'peace-loving states which

9. See especially Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989) and the International Law Association's work on *International Human Rights Law and Practice*.

accept the obligations contained in the present Charter (...)'. The Declaration is part of UN law: from the outset it was the authorized interpretation of the Charter and while it does not have the same legal value as the Charter—some members of the Human Rights Commission thought to make it an amendment of the Charter, but this solution soon proved technically and politically impossible—it is part at least of UN 'derived law'.

But in practice, the transition from the declaratory stage to the treaty phase was not a step forward. On the contrary it was a long detour if not a step backwards enshrining the formal divisibility between two categories of rights and calling into question the initial universality by a return to the logic of treaty law based on sovereignty and the will of states. The fact is that states were offered a form of opting out with the parallel adoption of the two Covenants by the General Assembly on 16 December 1966. States are free to choose to ratify one, both or neither treaty, to make an *à la carte* commitment by multiplying their reservations, whereas the Universal Declaration was a block, a coherent and inseparable whole. By referring to the Declaration, the preambles of the Covenants admittedly underscore that this ideal 'can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights' and vice versa, but there is nothing to specify at this stage that these 'conditions' are dependent upon the ratification of both Covenants.

In other words, states may legitimately claim to abide by human rights, in their own way, internally without necessarily having to commit themselves to give an account thereof on the basis of international undertakings. This was Cuba's argument up until its recent signing of the Covenants, whereas paradoxically people's democracies were the first to ratify the Covenants, if only to influence the supervisory instances[10]. The fact that the major Western democracies and the new Third World democracies, marking a clean break with the isolation of authoritarian regimes, have ratified both Covenants makes it difficult to defend the argument that an exemplary democracy can revel in legal autarky.

But while in practice most states have now ratified both Covenants, a clear difference remains with two parallel instruments that came into force on the same day, each with its own membership: 167 parties for the Covenant on Civil and Political Rights and 160 for the Covenant on Economic, Social and Cultural Rights[11]. That is reflected too by some highly symbolic choices such as that of the United States, which remains a signatory of the International Covenant on Economic, Social and Cultural Rights, or that of China, which, with its small steps strategy, is still a signatory of the International Covenant on Civil and Political Rights. Eventually it is to be hoped that these historical anomalies will vanish and all states will be bound by both Covenants and their protocols, but that is just a stage in a more far-reaching reconstruction[12].

1.2 The rift in the European framework

As it happens, by a mirror effect, the separation introduced into the UN's work found its extension in the regional framework. Regionalization was in a sense to duplicate the consequences of the split between two categories of human rights.

Admittedly the European Convention on Human Rights is wholly in line with the Universal Declaration, as its preamble recalls, but initially its purpose was only 'to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration'. The separation was to be effected on an empirical rather than an ideological basis. Here again, need we recall the role of the Labour Party in Britain or of the post-war three-party government alliance in France, with their emphasis on 'social democracy', or the influence of Christian democracy in Germany and Italy, with the weight

10. Emmanuel Decaux, 'La mise en vigueur du Pacte international relatif aux droits civils et politiques' (1980) 2 *Revue générale de droit international public*.
11. As at 1 October 2011.
12. See the present author's study as special rapporteur on the universal implementation of human rights instruments, A/HRC/Sub.1/58/5 and ADD.1, as well as resolution 2006/1 of the Human Rights Sub-Commission.

given to the 'social doctrine of the Church'. The *travaux préparatoires* show that priority was given to the foundation course of democracy through the fundamental freedoms, leaving aside for the most part the rights that were more difficult to formulate—beginning with the rights that were to be found in the first protocol: the right of ownership in the face of post-war nationalizations, the right to education in the face of independent schools, the right to free elections in the face of hereditary chambers, etc.

In this way, the situation thus created could but strengthen a Manichean vision opposing *liberty rights*, based on non-interference by the liberal state and *claim rights* implying 'provision of services' from a welfare state[13]. The idea that the rights guaranteed referred only to 'negative obligations' of the states parties was soon belied by case law, beginning with articles 2 and 3 on the right to life and the prohibition of torture, where the Court was brought to specify a series of positive obligations incumbent upon states. Similarly the idea that only economic and social rights would have a cost is belied by the cost of administering justice or of the prison service. And if compliance with the principle of non-discrimination does have a potential cost, especially in respect of wages to end inequalities against women, it is a necessary cost.

There was nothing and is nothing today to prevent us going further and enshrining economic, social and cultural rights in the framework of the system of protection of the European Convention on Human Rights. Paradoxically it is through the interplay of article 1 of Additional Protocol I applied to the various 'social claims' and of article 14 on non-discrimination that social rights are indirectly protected by the Court. The outcome would be more satisfactory and above all more didactic if the Court could do so directly by interpreting substantive rights.

Further still, until the 1980s social democratic governments like Austria's attempted to secure the adoption of an additional protocol to the European Convention on Human Rights enshrining economic and social rights, without achieving sufficient results at the time when the Community dynamic was kicking in. Similarly the 1993 Summit was to open the way to the preparation of an additional protocol on cultural rights, including those of people belonging to national minorities, but the exercise was to be a short-lived one[14].

But down the years a perverse argument has been introduced into the debate; the risk of weakening the system of the European Social Charter adopted in 1961 and revised in 1996. A strange game of ping-pong went on with the ball going backwards and forwards with no headway being made on either side. On one side nothing was done to protect social rights within the framework of the European Convention on Human Rights, and on the other side no progress was made towards the justiciability of social rights in the framework of the European Social Charter, whereas one might have imagined a two-pronged dynamic, as was implemented with the protocol on group communications. In the end it would not be utopian to see the two systems moving closer together, thereby answering the wishes of Nicolas Valticos, on the strength of his experience at the ILO before becoming a judge of the European Court of Human Rights.

It is only more deplorable, then, that the Social Charter—let alone the revised Social Charter—does not feature in the package of requirements made of new Council of Europe member states, whereas it should by all logic form the second pillar of the system. On this point it has to be acknowledged that the Council of Europe is lagging behind the United Nations, where there is at least a formal parallel between the two Covenants.

But it is on another front that social rights are being visibly eroded. The Charter of Fundamental Rights of the European Union had made definite space for such rights, especially upon the insistence

13. Jean Rivero, *Les Libertés publiques, tome 1, Les droits de l'homme*, coll.thémis, (Paris: PUF, 1973).
14. 8th International Colloquy on the European Convention on Human Rights organized in Budapest, *Yearbook of the European Convention on Human Rights*, Vol. 38A (1995). For the discussion on cultural rights, see especially the series of conferences in Fribourg organized by Patrice Meyer-Bisch and the PhD thesis by Mylène Bidault, *La protection des droits culturels* (Brussels: Bruylant, 2009).

of France in whose eyes the new text could not simply duplicate the European Convention on Human Rights, as Guy Braibant often emphasized before the French National Advisory Commission on Human Rights[15]. Even if it was at the price of concession to the British negotiators the Charter included a substantial chapter on 'solidarity'. The reference to 'rights, freedoms and principles' allowed for differentiated application, leaving considerable leeway for interpretation to the Court. This fine balance was constantly challenged, first at the time of the Convention leading to the 'Constitutional Treaty' and then more modestly during the negotiation of the simplified Lisbon Treaty. In both instances, technical clauses aimed to paralyse the rare headway made in Nice in the field of social rights. Yet more, the programme of work of the new Fundamental Rights Agency (FRA) systematically leaves aside those same rights while it would have been logical for it to be tasked with implementing the whole Charter and nothing but the Charter. This contrary selectivity merely underscores the social deficit of the European Union, in profound contradiction with the spirit of the founding fathers. Here too it is necessary to get back to basics if 'social Europe' is to be meaningful for our fellow citizens who see Community policies chopping and changing between unbridled deregulation and finicky rules and regulations. Confronted with the 'crisis' that has hit all states full on, Europe will either be about social matters or there will be no Europe.

2. RECONSTRUCTING THE INTERNATIONAL BILL OF RIGHTS

And yet this ever widening rift was not inevitable. In the diplomatic arena, references to human rights laid down by the Universal Declaration, as to a whole, have never ceased to be made. Leading on directly from the Universal Declaration, the 1951 Convention relating to the Status of Refugees covered all of the rights in detail, as did the 1965 International Convention on the Elimination of all Forms of Racial Discrimination, especially in its article 5[16]. By means of individual or group communications provided for by article 14 it recognizes the Committee's competence to examine complaints in all domains covered by the Convention. Even if the practice remains limited insofar as implementation of article 14 is dependent upon an optional declaration by the state, the precedent is indicative of an integrated human rights approach.

Moreover, at the moment the adoption of the two Covenants was enshrining in law the 'divisibility' of the two series of rights, the 1968 Teheran Conference on Human Rights underlined that 'Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible' (13)[17]. From that time on, references to the universality and indivisibility of human rights were to be recurrent. The 1993 Vienna World Conference on Human Rights recalled in its turn, without fear of repeating itself, that 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis' (I, 5).

The fact remains that a classification of human rights is essential both intellectually[18] and for practical purposes: a specific approach may be required in the face of a particular type of violation, whether genocide, torture or enforced disappearances, or the particular situation of a 'vulnerable group'. And even in the absence of a specialized instrument, the applicant will invoke before the court the breach of one or more specific rights, just as the litigant will present its arguments in order. Such differentiation

15. Guy Braibant, *La Charte des droits fondamentaux de l'Union européenne, Témoignage et comment*aires, (Paris: Le Seuil, 2001) coll. Point. See also Laurence Burgorgue Larsen, Anne Levade and Fabrice Picod (eds), *Le Traité établissant une Constitution pour l'Europe, Partie II, La Charte des droits fondamentaux de l'Union* (Brussels: Bruylant, 2005).
16. See Emmanuel Decaux, *Les grands textes internationaux des droits de l'homme* (Paris: La Documentation française, 2008).
17. *The United Nations and Human Rights, 1945-1995*, United Nations Blue Books Series, 1995, p. 266.
18. Emmanuelle Brisolia and Ludovic Hennebel (eds), *Classer les droits de l'homme* (Brussels: Bruylant, 2004).

was contained in seed in the precise enumeration in the Declaration compared with the vague hold-all approach in the 1945 UN Charter. Inasmuch as this logical and practical categorization does not imply any legal hierarchy, it is in that sense that human rights are indivisible, theoretically, and interdependent in practice. But it is above all politically that it is essential to assert the solidarity of all human rights in the context of the rule of law[19].

2.1 Treaty-based dynamics

The Vienna Conference did not stop at reasserting the major principles, it sought to strengthen the system of protection of human rights. It encouraged states to ratify existing instruments and to conclude new treaties, directed especially at the rights of the disabled. It finally wanted the complaints procedures to be generalized. Fifteen years later, this programme of work has only been completed in part, but it has made a substantial contribution to strengthening the coherence of the treaty-based system of protection of human rights.

In this way an optional protocol to the 1979 Convention on the Elimination of all Forms of Discrimination against Women was adopted in 1999. As for the Convention on the Elimination of Racial Discrimination, it is a very complete set of fundamental rights that is thus opened up to individual and group communications, transcending the usual split. In the case of the 1990 International Convention on the Protection of all Rights of Migrant Workers and their Families, it is article 77 that provides for the possibility of individual or group communications.

The Convention on the Rights of Persons with Disabilities adopted in 2007 also covers all of human rights, whether civil and political rights or economic, social and cultural rights. And the Convention has an optional protocol that provides for individual communications. It can be noted, besides, that initially France did not sign the protocol so as not to prejudice ongoing talks on the justiciability of economic, social and cultural rights.

This is the field where the decisive battle was being played out. In 1993 the Committee for Economic, Social and Cultural Rights had been urged to prepare its own additional draft protocol on communications[20]. But once the draft completed, the Human Rights Commission shilly-shallied further, appointing an independent expert and extending consultations before knuckling down and setting up a working group and finally a drafting group. It was this open-ended drafting group chaired by Catarina de Albuquerque that adopted the draft in due time for an official adoption of the new protocol by the General Assembly on the 10 December 2008. After long hesitations, despite the repeated recommendations from the French National Advisory Commission on Human Rights, France has been firmly committed to negotiations for the last rounds of negociation, organizing a session in Nantes that contributed to thinking through ideas on the fringe of the official talks of the drafting group.

The track record is now a remarkable one since, 60 years after the Universal Declaration was adopted, it is an identical regime that is now enshrined with the potential recognition of 'international justiciability' of all human rights. It should be emphasized that the communications procedures, with strict rules of admissibility and of examination on the merits by colleges of independent experts do not constitute *res judicata* but are quasi-judicial procedures[21].

In the specific instance of the ICESCR, things are decidedly more complex still since—echoing the key formula of article 22 of the Universal Declaration—'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving the full

19. On *L'État de droit en droit international*, see le colloque de Bruxelles de la Société française pour le droit international, (Paris: Pedone, 2009).
20. Emmanuel Decaux, 'La réforme du Pacte international relatif aux droits économiques, sociaux et culturels', in Mélanges *en l'honneur de Nicolas Valticos, Droit et justice* (Paris: Pedone, 1999).
21. Emmanuel Decaux, 'Que manque-t-il aux quasi-juridictions pour dire le droit ?', in *Mélanges en l'honneur du président Bruno Genevois, Le dialogue des juges* (Paris: Dalloz, 2008).

realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures' (art. 2(1)). The ever longer general observations of the Committee sufficiently underscore the complexity and density of the rights guaranteed. It is in this area that the now classical threesome identified by Absjörn Eide in his pioneering study on right to food is most concretely illustrated: states are under an obligation to respect, protect and fulfill the enshrined rights.

It will be interesting to see whether states confronted with the development of individual or group communication before the Committee for Economic, Social and Cultural Rights, as with the Human Rights Committee will strengthen the internal justiciability of rights, by conferring a self-executing character on the Convention. This would be in their best interest, other than that it might reintroduce a sort of latent dualism where municipal courts could not control violations of the Covenant, so rendering ineffective the idea of exhaustion of all internal remedies. Sound application of the principle of subsidiarity should entail reinforced jurisdiction of the domestic courts, as is the case for example of the *Cour de cassation* in respect of international labour conventions.

The fundamental question of the 'justiciability' of economic, social and cultural rights is often framed the wrong way around. It is because there is no case law that these rights remain imprecise and uncertain and not because they are imprecise and uncertain that they are not justiciable. The same might have been said of the elliptic formulas of the Convention on Civil and Political Rights or of the European Convention on Human Rights on the idea of 'independent and impartial court', 'cruel, inhuman or degrading treatment' and even more on the protection of 'private and family life' which has encompassed some highly unexpected areas, extending as far as transsexualism. The legislator, to whom article 2(1) of the International Covenant on Economic, Social and Cultural Rights refers, will have to specify the legal regime of the rights guaranteed, like the recent statute on the right to housing, distinguishing between administrative mechanisms and resort to the courts of law.

But the essential point is that the International Bill of Human Rights is henceforth consolidated, with two symmetrical pillars, to pick up on René Cassin's metaphor. It is now a single legal block, reflecting the solidarity and indivisibility of human rights. For the states that have accepted the two Covenants and their protocols, that commitment is irreversible and merely reflects the intangibility of human rights[22]. The 1993 Vienna Conference made the universal ratification of international instruments on human rights a collective objective. It is a horizon that is no longer unattainable. It remains to be seen what the consequences of this move from multilateral to universal will be through the crystallization of the International Bill of Human Rights.

2.2 Institutional dynamics

Alongside this development of international instruments, the 'institutional system' for the protection of human rights has come a long way. A first reform introduced further to the World Conference in Vienna was the creation of the position of United Nations High Commissioner for Human Rights by General Assembly resolution 48/141 adopted on 20 December 1993[23]. The resolution does not simply recall in one of its recitals 'that all human rights are universal, indivisible, interdependent and interrelated and that as such they should be given the same emphasis', it precisely defines, in article 3, the remit of the High Commissioner who shall:

– (a) Function within the framework of the Charter of the United Nations, the Universal Declaration of Human Rights, other international instruments of human rights and international law (...)

– (b) Be guided by the recognition that all human rights – *civil, cultural, economic, political and social* – are universal, indivisible, interdependent and interrelated (...) (emphasis added).

22. Olivier de Frouville, *L'intangibilité des droits de l'homme en droit international* (Paris: Pedone, 2004).
23. Text in *The United Nations and Human Rights*.

The interleaved formula is taken up again when the resolution specifies that the High Commissioner's responsibilities shall include 'To promote and protect the effective enjoyment by all of all civil, cultural, economic, political and social rights' (art. 4(a)). The resolution is innovative in using alphabetical order, which is no more arbitrary than any other, to avoid repeating the usual division between the two series of human rights.

More concretely still, the Human Rights Commission endeavoured to 'redress the balance' among thematic mandates, thereby getting back into the way of thinking that was to be cast off. This is not the place to go back over the ins and outs of the reform of the system of human rights that came about with the 2006 creation of the Human Rights Council[24]. But a new shift in language can be noted, since resolution 60/251, adopted by the General Assembly on 15 March 2006 '*Reaffirming* the commitment to strengthen the United Nations human rights machinery, with the aim of ensuring effective enjoyment of all human rights, civil, political, economic, social and cultural rights, including the right to development (...)'. Even if the list is no longer in alphabetical order, so as to introduce more logically *in fine* the reference to the right to development, it is a single enumeration and not two sets of rights of separate kinds. The General Assembly '*Decides* that the Council shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner' (2). Point 4 takes up the formula from the recitals, emphasizing the 'principles of universality, impartiality, objectivity and non-selectivity'.

Many defensive features appear in this careful language, but there is nothing ambiguous about the overall character of the mandate. The job is to protect all human rights, the reference to 'fundamental freedoms' drawn from the Charter probably reflects a symbolic attempt by Western democracies to strike a balance in counterpart to the enshrinement of the 'right to development', but has no practical implication, this wording barely being used in the works of UN organs.

While no mention of the 'International Bill of Human Rights' occurs as such, it is found by way of popularization in the documents of the High Commissioner's Office, beginning with 'Fact Sheet No. 2' which has been regularly revised since the fortieth anniversary of the Universal Declaration of Human Rights in 1988. Oddly the fact sheet does not explain the choice of this title, concluding simply with a reference to a veritable *Magna Carta* for mankind.

The question of the legal scope of the International Bill of Rights remains intact. Its hybrid nature, juxtaposing the Universal Declaration and treaties that have been ratified to various degrees, does not simplify a debate that has an obvious political dimension for persistent objectors. There is no better illustration of this than Cuba's reaction when the working group on arbitrary detention—of which Louis Joinet was the president-rapporteur—referred not just to the Universal Declaration but to the relevant provisions of the Covenant. It could be argued that the Covenant was at the very least a resolution of the UN General Assembly and as such an 'objective element' of interpretation even for states that had not ratified the treaty. The legal quarrel was not followed through, though, since the working group considered that the Declaration was a sufficient basis for effective action in respect of third states and mention of the articles of the Covenant would be superfluous.

In a way this tactical retreat only reinforced the mandatory scope of the Universal Declaration that became the sole basis on which subsidiary organs could rely, in the increasingly theoretical hypothesis that a state would not have ratified nor even signed anything. But with regard to the 'complaint procedure' before the communications group—the so-called confidential procedure of resolution 1503 which was largely maintained as it stood by the 2000 and 2006 reforms—the Universal Declaration is the exclusive basis of the control exercised[25]. All UN member states by dint of their membership of the organization accept that allegations of massive and systematic violations of human rights might

24. Emmanuel Decaux (ed.), *Les Nations Unies et les droits de l'homme, enjeux et défis d'une réforme* (Paris: Pedone, 2006).
25. A/HRC/5/21.

be presented against them. In practice, states naturally contest the admissibility or the relevance of the allegations but never the obligatory character of the Universal Declaration or the jurisdiction of the communications group, which is worth emphasizing, without infringing the confidentiality requirement which is the condition *sine qua non* of constructive dialogue with the states. Clearly then the Universal Declaration is not just any declaration[26].

There remains the theoretical question of the mixed nature of the International Bill of Human Rights. Oddly enough, by emphasizing the *instrumentum* and not the substance, the Committee's general observation does not simplify the answer. One can admittedly begin from the two extreme positions. One the one side, a virtuous state that has ratified both Covenants and their protocols would see the International Bill of Human Rights crystallize as a whole endowed with an irreversible character and so going beyond simple treaty-based logic. The consequences of this would have to be drawn internally, which remains to been done in France further to the ratification of Protocol No. 2 abolishing the death penalty and which cannot be denounced. Although the constitutional revision has made it possible to surmount the provisional hurdle of the decision of 13 October 2005, France is nonetheless bound henceforth by a perpetual commitment that no contrary measure by the constitution-maker could undo. In other words, France has unwittingly put in place a sort of supra-constitutionality identical to that relating to the republican form of the regime. Hence the very idea of an International Bill of Human Rights overturns both national sovereignty and legal nationalism.

At the other end of the spectrum, a state that had not even signed the Covenants—since signing in itself implies the commitment not to do anything against the object and purpose of the treaty—would be fully bound by the Universal Declaration, which is already a great deal in practical terms, but it is hard to see how the Covenants could be binding on it aside from being an objective to attain, pursuant to the political—one dare not say moral—commitments assumed by all states at the World Conference in Vienna. The annual resolutions of the Commission and now of the Council restating those commitments in favour of universal ratification should not be underestimated. It is more than vice paying tribute to virtue, it is the beginning of a certain *opinio juris*, through the idea that ratification is an advancement of human rights and not a simple neutral technical feature, as in the law of the sea, for example. Yet we are a long way short of Stendhalian crystallization and the components remain at the stage of decomposition.

The same will be said of intermediate situations of partial ratification, or ratification subject to reservations that are contrary to the object and purpose of the treaty, as in the case of the United States with the assertion of the primacy of internal law over the Covenant[27]. Until such time as universal ratification is achieved, we remain, at least so it seems to me, in an intermediate position where mention of the International Bill of Human Rights is merely a convenience of language. There still remain two separate roads to travel to secure the protection of human rights: the treaty-based road, with the Covenants and their protocols, and the custom-based road by way of the Universal Declaration[28]. When these two roads have merged, then we shall be able to speak of a double custom- and treaty-based nature, or even of the constitution of a norm of *jus cogens*. We shall move from two merely complementary sets of treaties arising from the Universal Declaration and that sixty years on are now symmetrical, to a truly coherent International Bill of Human Rights.

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26. Emmanuel Decaux, 'Le droit déclaratoire et le droit programmatoire', *La protection des droits de l'homme et l'évolution du droit international*, colloque de Strasbourg de la Société française pour le doit international, (Paris: Pedone, 1990).
27. See Alain Pellet's special report of the International Law Commission on reservations to treaties, especially the 8th report.
28. A compartmentalized view of the various instruments still prevails. It is symptomatic that in the recent Joël Andriantsimbazovina et al. (eds) *Dictionnaire des droits de l'homme*, (Paris: PUF, 2008), the comments on the Universal Declaration and that on the two Covenants were written by two different scholars. Moreover, in Dominique Chagnollaud and Guillaume Drago (eds), *Dictionnaire des droits fondamentaux* (Paris: Dalloz 2006), Florence Poirat, under 'Déclaration universelle des droits de l'homme et Pacte de 1966' seems to completely omit the ICESCR.