

The International Protection of Human Rights: A Luxury Imposed by the West?

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1. Introduction

The above topic was suggested to the writer by a study group, mostly law students, of the University of Fribourg (Switzerland) who were organising a series of talks on it. What follows are some reflexions on that theme.

The question asked by the group is well-formulated and will continue to be discussed for a long time to come. It is, of course, very general in character and can be envisioned from a legal as well as from other viewpoints. On the legal level, it can be approached as an issue of constitutional law or from the angle of international systems for the protection of human rights. It is the latter point which is of interest here.

To answer the question asked, two issues must be considered: (i) Does the «West» impose human rights standards on the international community? (ii) Can these standards be characterised as «luxuries»?

2. Does the «West» Impose Human Rights Standards on the International Community?

It is true that the *international* protection of human rights is largely a regional or sub-regional phenomenon. Some systems, such as that established by the European Convention on Human Rights (ECHR),¹ define the protected rights in a relatively restrictive way, while more recent ones, such as the regime of the American

¹ Convention of 4 November 1950, see *Human Rights in International Law. Basic Texts*. 3rd ed. Strasbourg: Council of Europe Publishing, 2007, p. 33.

Convention,² are more generous and include both individual and collective rights. The African Charter³ not only deals with the rights of individuals and with peoples' rights, but also with the *duties* of individuals.

Conversely, the European Convention unquestionably offers a sophisticated and possibly the most efficient judicial approach to the protection of human rights on the international level — a situation that could be characterised by the motto: «Protect only essential rights, but do so effectively». There are, finally, national communities whose human rights remain altogether unprotected on the international level.

The conclusion to be drawn from the above is that, if the word «West» refers to the world's industrialised nations, one of the most effective international protection systems is found in the *developing* world —that established by the American Convention —, while the populations of some of those nations are totally deprived of international protection. There are, accordingly, non-«Western» communities wallowing in the luxury of advanced human rights protection and Western countries deprived thereof.

Therefore, on a world-wide scale, human rights and their protection are far from being monolithic. There is, in fact, considerable diversity: What X considers indispensable would be a luxury for Y. This may be due to economic disparities, to ethical, ethnic and cultural differences, and to a lack of tolerance, but also —and chiefly— to an absence of political will. Thus the differences just referred to may serve to dissimulate political deficits (in States such as Myanmar, Zimbabwe or North Korea).

Despite disparities between countries, sub-regions and regions, a number of rights and freedoms are recognised world-wide. This is illustrated by the UN Covenant on Civil and Political Rights⁴ and by the fact that some of them are «core rights» which cannot be derogated from even «[i]n time of public emergency which threatens the life of the nation», *i.e.*:

- (i) the right to life (Article 6);
- (ii) the prohibition of torture or of cruel, inhuman or degrading treatment or punishment (Article 7);
- (iii) the prohibition of slavery and servitude (Articles 8.1 and 2);
- (iv) the prohibition of imprisonment for debt (Article 11);
- (v) the principle of legality or *Nullum crimen, nulla poena sine lege* (Article 15);

² American Convention on Human Rights, of 22 November 1969, *ibid.*, p. 643.

³ African Charter on Human and People's Rights, of 27 June 1986, *ibid.*, p. 579.

⁴ Covenant of 16 December 1966, *ibid.*, p. 51.

- (vi) the right of individuals to be recognised as persons before the law (Article 16);
- (vii) the freedoms of thought, conscience and religion (Article 18);

and, perhaps, when claimed in connexion with the enforcement of those principles, the right to a fair trial (Article 14). The above form the non-derogable human rights of the 1966 Covenant, which apply universally and have the character of *jus cogens* as defined in Article 53 of the Vienna Convention on the Law of Treaties;⁵ and similar clauses can be found in the 1969 American Convention (Article 27) and in the ECHR (Article 15).

These elements show that there are «core» human rights belonging to everyone, anywhere, in times of peace and of conflict. They may be called universal natural rights and as such cannot be considered to have been devised by the «West» and imposed on other countries.

3. Are International Human Rights Standards «Luxuries»?

The term «core rights» suggests that these rights are critical, so much so that life without them could be regarded as not worth living. However, even human rights not belonging to this special category are of prime importance, in the «West» and everywhere else, and cannot, therefore, be viewed as «luxuries».

Human rights are violated either because domestic law fails to protect them or because, even if it does not, the domestic authorities apply the law improperly. This is illustrated by the case-law of the European Court of Human Rights (ECtHR). In *Streletz, Kessler and Krenz v. Germany*,⁶ the Court's Grand Chamber had to deal with the applications of three high officials of the German Democratic Republic (GDR) who, during the cold war, had given or transmitted orders to shoot all those who, by climbing the Wall separating the two Germanys, were trying to escape to the West. The applicants, tried and convicted for their acts by courts of the Federal Republic, turned to the Strasbourg Court claiming violations of Article 7 of the ECHR (*Nul- lum crimen, nulla poena sine lege*). In so doing, they alleged that the acts for which they were convicted had not been punishable in the GDR at the time at which they had been accomplished. In essence the Court's Grand Chamber rejected the argument, pointing out that while the GDR's human rights legislation was impeccable, it was simply not applied. The Court rejected the applicants' plea that they should have been judged by reference to the reality of the situation in East Germany and found

⁵ United Nations Treaty Series, Vol. 1155, p. 331.

⁶ N° 34044/96, 35532/97 and 44801/98, GC, judgment of 22 March 2001.

that their conduct should be appreciated under the law which they themselves had put on the books. This, then, was a case where the domestic law was fully consonant with human rights law but was not complied with by the authorities of the State which had enacted it.

The practice of the same Court does, however, reveal dysfunctions which could, indeed, suggest the presence of a particular kind of «luxury» —or waste.

Today individuals and their legal representatives have a regrettable tendency to bring *just about anything* to Strasbourg, as if the Human Rights Court were a regular fourth instance. This tendency partly explains why the Court is overwhelmed by cases only a small fraction of which are likely to have any merit, the result being that scores of interesting and possibly deserving claims cannot be dealt with for years to come. Here, the whole human-rights apparatus becomes a «luxury» and, moreover, an obstacle to the proper functioning of an international human rights mechanism.

In addition, some individuals —and even judges—tend to indulge in *extravagant interpretations* of protected human rights: claims of convicts to serve their term in a non-smoking prison tract; claims to have a television set in their cell, or to have access to video games.

Such frivolous applications, which impede the functioning of international systems of protection, cannot of course be used to discredit *international mechanisms of protection of human rights as a whole*. Nor can it be said that in some countries these rights are so well protected that *any such mechanism amounts to a «luxury»*: even if the laws are perfect —which is never the case— their application by national authorities may turn out to be defective.

This happens when national authorities, for instance for security reasons, pursue policies clearly disregarding internationally protected human rights such as the respect for private life guaranteed by Article 8 of the ECHR. An example is provided by the (now defunct) Swiss practice of registering and monitoring contacts of individuals in Switzerland with foreign agencies and persons which could result in a threat against the State and its security. That practice was considered contrary to Article 8 of the ECHR by the Court's Grand Chamber in *Amann v. Switzerland*.⁷ The recent case of *S. and Marper v. United Kingdom*⁸ was about the storing by the British authorities of fingerprints, cellular samples and DNA profiles of suspects after unsuccessful proceedings against them. Here too violations of Article 8 of the ECHR were found.

⁷ N° 27798/95, judgment of 16 February 2000.

⁸ N° 30562/04 and 30566/04, GC, judgment of 4 December 2008.

Faulty application of the law may also occur in isolated cases unconnected with any national policies. An excellent example, always in the context of European practice, is provided by the case of *Storck v. Federal Republic of Germany*.⁹ Being quite unusual, that case deserves fuller treatment.

Waltraud Storck was an unruly and rebellious youth. So much so that her father, allergic to disobedience and contradiction, decided to have her locked away in private psychiatric clinics, without her consent and without a court order. There she remained —except for a short period during which she had escaped from such an establishment, after which she was recuperated by the police —for a quarter of a century, receiving «treatment» which was so successful that today she moves around in a wheelchair without there being any question of professional activities or of a career. While her grievances were accepted by the court of first instance —the Bremen Regional Court—, the latter's judgment was quashed by the Court of Appeal, and all her subsequent complaints were made in vain.

Invoking Articles 5 (right to liberty and security), 8 (right of respect for private and family life) and 6 (fair trial) of the ECHR, Ms. Storck then turned to the European Court in Strasbourg. Her application was handed over to a committee of three judges, which declared it inadmissible (Article 35.4 of the Convention). Normally this would have meant that the applicant had had her day in court. Not in this case, however, for she subsequently managed to persuade her case-officer in the Court's Registry to re-submit the case to the Committee. The latter, then, reversed its inadmissibility decision and transmitted the case to the Court's Fourth Section. The competent chamber of that Section held the complaint to be admissible, despite argument by Germany to the effect that applications declared inadmissible by committees were definitively disposed of and could not be revived, found violations of Articles 8 and 5 of the Convention, and ruled that the respondent State was to pay a large sum (€ 75'000) to the applicant to provide just satisfaction under Article 41 of the ECHR.

Though it is relatively little known, the *Storck* case deserves attention for at least four reasons:

- (i) It certainly cannot be asserted, in a general way, that German law is defective regarding the protection of individual rights. What was at stake in this particular case was the attitude of the German authorities —police and courts—, which left much to be desired.

⁹ N° 61603/00, judgment of 16 June 2005.

- (ii) In the absence of an international control mechanism such as that established by the ECHR, this truly scandalous affair would never have come to light, and there would have been no atonement for what the applicant had been made to suffer.
- (iii) Without the courage and persistence of a case-officer of the Strasbourg Court, in the face of existing practice —cases declared inadmissible by committee decisions have never or nearly never been re-opened—, this initial miscarriage of justice would have gone unnoticed.
- (iv) Without the honesty —and open minds —of the members of the Committee of three judges which originally had declared it inadmissible, justice would never have been done.

How can anyone, in view of what precedes, contend that international systems for the protection of human rights are «luxuries», *i.e.* superfluous?

4. Conclusions

The conclusions to be drawn from the above reflexions can be summarised as follows:

- (i) The «luxury» allegedly inherent in the international protection of human rights has not been imposed on the developing world by developed States, the so-called «West».
- (ii) One may, however, see a certain «luxury» —or waste—in the possibility for individuals and their legal representatives to misuse international control mechanisms by soliciting them routinely and by suggesting interpretations of human rights provisions that go way beyond what they were meant to protect, thereby trivialising a body of law which serves as a bulwark against violence and arbitrariness.
- (iii) Human rights violations are often due to inadequate domestic laws which do not, or do not fully, protect the individual's essential rights. This may be due to economic pressure and cultural peculiarities, to an absence of political culture or to a «deficit» in democratic values. Even though State sovereignty prevents international human rights organs from annulling deficient laws, judgments criticising them may —and often will— be understood as invitations to change them.
- (iv) But, as shown in *Amann*, in *S. and Marper* and, most convincingly, in *Storck*, human rights violations are not always due to inadequate legislation. They are, quite often, the result of misguided policies of the executive or of individual mistakes committed by administrations and courts in the application of the law.

- (v) It follows that the presence of adequate mechanisms of international protection of human rights is essential, especially when «core» rights are at stake: there is no question of «luxury» here, but one of an absolute necessity which can arise for anyone, anywhere and at any time. And, even though adjustments may be required where international crimes¹⁰ or terrorism are concerned, the level of protection cannot be lowered significantly.

A further conclusion results from statistical data drawn from the practice of the ECtHR, by far the busiest international human rights organ. Before that Court, only five to six out of 100 applications are likely to be found admissible, half of which may turn out to be ill-founded on the merits; indeed, the State is not *invariably* wrong. One may well ask whether such an important mechanism—the question arises for other systems as well—is proportionate to the task at hand if it finds only two or three human rights violations in 100 applications?

There are, in the present writer's view, three reasons for answering in the affirmative: (i) in human rights matters, one cannot simply rely on quantitative arguments, and a remedy must be available for each and every violation; (ii) there are the *Storck*-type cases, resulting from a defective application of domestic legislation, which otherwise would never come to the fore; and (iii) along with their remedial action, international human rights organs serve a preventive function, which is to deter from future breaches.

The general conclusion of this paper must be, therefore, that the existence of international human rights mechanisms and their effectiveness are far from being «luxuries». Furthermore, there is no reason to charge that the «West» has been forcing these rights and mechanisms upon the rest of the World. But, even if it were so, there would be no excuse for disregarding them.

¹⁰ For examples of situations where, in the area of international crimes, such adjustments are necessary, see the present author, «The Rome Statute and the European Convention on Human Rights». *Human Rights Law Journal*, Vol. 23, 2002, pp. 1-12, at pp. 3-9.