【Special Features : Article】

The Venice Commission's Involvement in the Establishment of a Human Rights Protection System in Asia - (Variable) Geography and other relevant issues*

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Abstract

This paper, presented at the CALE Conference on "Multi-layered Constitutionalization in the Context of Integration in East Asia" (Nagoya, 8 February 2015), examines various avenues for establishing an Asian human rights protection system. A proposal to establish an Asian Court of Human Rights was made by the Constitutional Court of Korea at the 3rd Congress of the World Conference on Constitutional Justice in Seoul in September 2015.

Following an overview of existing regional human rights protection systems in Europe, the Americas, Africa, the Arab League as well as earlier attempts in Asia, the paper looks into issues which should be addressed in setting up an Asian system. These include the scope *ratione loci* and notably the question whether and which international organisation could provide an institutional framework for the system. A key to success is the question which criteria participating countries should fulfil. Drawing on European organisational structures, the author recommends a system of variable geometry, in which first only few likeminded countries participate. Later, partial opt-outs could be envisaged in order to enable also hesitating countries to participate but these countries should not be in a position to limit progress of the likeminded group of countries. The paper insists that from the outset the purpose of adding a regional layer of human rights protection in Asia should be full individual access in order to achieve a high common standard of human rights protection in Asia. While the system should be specifically designed for the Asian continent, a reference to Asian values must not be used to reduce the level of protection provided. The necessary dialogue on establishing the Court should involve many actors (universities, civil society, constitutional and supreme courts, etc.), even if eventually a treaty will have to be prepared by governments.

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I. Introduction

This paper was prepared for the seminar "Multi-layered Constitutionalization in the Context of Integration in East Asia" (Nagoya, Japan, 8 February 2015)[1], which gave occasion to ponder various issues, which ought to be taken into account in establishing a human rights protection system in Asia. However, before going into the substance, we will present the Venice Commission and the World Conference on Constitutional Justice in order to explain why these bodies are involved in this topic.

1. Venice Commission

Founded in 1990, right after the fall of the Berlin Wall as a response to this event, the Venice Commission is an advisory body of the Council of Europe. I should point out that the Council of Europe, which has 47 member States covering nearly the entire European continent, is distinct from the European Union, which has 28 member States.

Being part of the Council of Europe, the Venice Commission is open to the participation of non-European countries and has a total of 60 member States, including the

[1] The author is most grateful to Prof. Obata and CALE for organising the seminar and for inviting him as a speaker.

47 members of the Council of Europe. Excluding the Middle East[2], in Asia, Kazakhstan, the Republic of Korea, and Kyrgyzstan are full members and Japan is an observer.

The Venice Commission is composed of independent experts in the field of constitutional law. They are mainly university professors and judges of constitutional or supreme courts.

The main activity of the Commission consists of providing legal opinions for the preparation of constitutional reforms and para-constitutional legislation (electoral laws, legislation on the structure of the Judiciary etc.).

The Commission only acts upon request, which can come from the State concerned, the organs of the Council of Europe or international organisations that participate in the work of the Venice Commission (the European Union, OSCE/ODIHR). In practice, most of the requests for advice come from Governments and Parliaments, but the Commission also provides *amicus curiae* briefs for Constitutional Courts when they ask for them.

Typically, the State concerned prepares a draft constitution or draft law and sends it to the Venice Commission for opinion. The Commission will then establish a working group of its members (called rapporteurs) who first prepare individual comments on the basis of the text received. Then, they travel to the country concerned where they meet with the authorities - Government, Parliament (including opposition), if appropriate the Constitutional Court, the Supreme Court or the Judicial Council - as well as with civil society.

On the basis of the comments and the results of the visit, the rapporteurs prepare a draft opinion with the assistance of the Secretariat. This draft opinion is communicated to all member States of the Commission, including the member State concerned, which can send a reply. Finally, the draft opinion is discussed with all members and the requesting authority, before it is adopted at the plenary session of the Commission in Venice. Most importantly, the opinions of the Venice Commission are public and they are available on the web-site of the Venice Commission. In its opinions, the Commission makes recommendations on how to improve the draft text concerned. As such, the opinions are not binding, but often political bodies such as the Monitoring Committee of the Parliamentary Assembly of the Council of Europe or the European Union will call upon

[2] Israel is a member, the Palestinian National Authority has a special co-operation status http://www.venice.coe.int/WebForms/members/countries.aspx.

the State concerned to implement these recommendations and sometimes such calls can carry a heavy political weight.

While the centre of the work of the Commission is the preparation of opinions, the Commission also works for the implementation of the Constitutions and the principles contained in them. It does so by supporting Constitutional Courts and equivalent bodies, foremost by fostering an international dialogue between constitutional judges.

As a basis for this dialogue, the Venice Commission provides a permanent platform for the exchange of information between courts. Tools for this exchange are the CODICES database[3], which provides information about important cases from over 80 Constitutional Courts, Constitutional Councils, Constitutional Chambers and Supreme Courts in Europe, Asia, Africa and the Americas, as well as from the European Court of Human Rights, the Court of Justice of the European Union and the Inter-American Court of Human Rights. All contributions are prepared by liaison officers appointed by the courts themselves.

The liaison officers also have access to the confidential on-line Venice Forum, through which the courts can quickly exchange information and request assistance.

2. World Conference

The useful work of the Venice Commission with Constitutional Courts soon attracted the attention of non-European Courts, first in Western Africa, through the Association of French Speaking Constitutional Courts – ACCPUF – which asked to join the Venice Commission in the production of the CODICES database in 2002.

First with ACCPUF, then with other regional or language based groups of constitutional courts, the Venice Commission concluded co-operation agreements, in particular with the Southern African Judges Commission, the Conference of Constitutional Control Organs of Countries of New Democracy (CIS countries), the Union of Arab Constitutional Courts and Councils, the Ibero-American Conference of Constitutional Justice, the Conference of Constitutional Jurisdictions of Africa and, of course, the Association of Asian Constitutional Courts and Equivalent Institutions.

It was in 2005, following a visit of a delegation of the Constitutional Court of Indonesia to Strasbourg, that the author had the honour of representing the Venice

[3] www.CODICES.CoE.int.

Commission at the 3rd seminar for Asian Constitutional Court Judges in Ulaan Baatar. This series of conferences was initiated and sponsored by the German Konrad Adenauer Foundation. In Ulaan Baatar, the Venice Commission offered to co-operate with the Asian Courts.[4] The participating courts[5] were invited by the Venice Commission to contribute to the CODICES database and to participate in the Venice Forum.

Given that through this and similar arrangements over the years with other regional and linguistic groups[6] the Venice Commission had already started to co-operate with courts in a large part of the World, the Commission tried to bring all the constitutional courts, constitutional councils and supreme courts together at the first World Conference on Constitutional Justice, in Cape Town, South Africa on 23-24 January 2009.

On the basis of a declaration[7] adopted at this event, the Venice Commission assisted a Bureau, composed of representatives of the regional and linguistic groups, in the establishment of the World Conference as a permanent body. A first draft of the Statute[8] was discussed *inter alia* with the Circle of Presidents of the Conference of European Constitutional Courts in October 2009[9]. At the time, the European Courts were still sceptical, which led to the draft being further revised at various meetings of the Bureau[10] and it was finally adopted during the 2nd Congress of the World Conference on Constitutional Justice, hosted by the Federal Supreme Court of Brazil in Rio de Janeiro, Brazil on 16-18 January 2011.[11]

The Congress in Rio de Janeiro gave a fresh impetus to the discussions. This enabled the Bureau to prepare a final version of the Statute, which was adopted at another

[4] http://www.venice.coe.int/AACC/mgl_speech_sc.htm.
[5] The Constitutional Council of Cambodia, the Constitutional Courts of Indonesia, the Republic of Korea, Mongolia and Thailand, and the Supreme Court of the Philippines.
[6] Conference of European Constitutional Courts, Association des Cours Constitutionnelles ayant en Partage l'Usage du Français (ACCPUF), Southern African Chief Justices Forum, Conference of Constitutional Control Organs of the Countries of New Democracy, Union of Arab Constitutional Councils and Courts, Conference of Constitutional Jurisdictions of the Portuguese-Speaking Countries, Ibero-American Conference of Constitutional Justice.
[7] http://www.venice.coe.int/WCCJ/WCCJ_CapeTown_E.asp.
[8] Prepared at its meeting in Merida, Mexico, in April 2009, on the occasion of the VIth Ibero-American Conference of Constitutional Justice (http://www.cijc.org/CONFERENCIAS/MEXICO/Paginas/default.aspx - accessed 02/02/2015).
[9] http://193.226.121.81/default.aspx?page=congres/congres (accessed on 02/02/2015)
[10] Meetings of the Bureau took place in Venice on 12 December 2009 and 5 June 2010.
[11] Eighty-eight Constitutional Courts, Constitutional Councils and Supreme Courts as well as 10 regional and linguistic groups of courts from Africa, the Americas, Asia and Europe participated in this congress on the topic "Separation of Powers and Independence of Constitutional Courts and Equivalent Bodies".

meeting on 23 May 2011 in Bucharest during the XVth Congress of the Conference of European Constitutional Courts.

According to its Article 10, the Statute[12] entered into force on 24 September 2011 with the accession of 30 Constitutional Courts, Constitutional Councils or Supreme Courts exercising constitutional justice.

The World Conference has three organs, the General Assembly, the Bureau and the Secretariat. The General Assembly meets on the occasion of the congresses, which are held every three years. The Bureau, meets annually, is composed of representatives of the 10 regional and linguistic groups and three Courts elected by the General Assembly.

Article 1 of the Statute provides that the World Conference promotes constitutional justice – understood as constitutional review including human rights case-law – as a key element for democracy, the protection of human rights and the rule of law. The World Conference pursues its objectives through the organisation of regular congresses, by participating in regional conferences and seminars, by sharing experiences and case-law and by offering good services to members on their request.

The main purpose of the World Conference is to facilitate judicial dialogue between constitutional judges on a global scale. Due to the obligation of judicial restraint, constitutional judges sometimes have little occasion to conduct a constructive dialogue on constitutional principles in their countries. The exchange of information that take place between judges from various parts of the world in the World Conference further the reflection on arguments, which promote the basic goals inherent to national constitutions. Even if these texts often differ substantially, discussion on underlying constitutional concepts unites constitutional judges from various parts of the world who are committed to promoting constitutional justice in their own country.

These judges sometimes find themselves in situations of conflict with other state powers because of decisions they had to hand down. Their participation in the World Conference provides them with a forum that enables them to exchange information freely with their peers in a framework where judges from other countries can offer moral support. This support can be important in upholding constitutional principles, which the judges are called upon to defend in their line of work.

[12] http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-WCCJ%282011%29001-e.

Conversely, the Courts and Councils, members of the World Conference commit to the principles of the World Conference and they may see their membership suspended by the General Assembly of the World Conference in case of flagrant violations of these principles.[13]

II. 3rd Congress of the World Conference on Constitutional Justice – the Korean proposal to establish an Asian Court of Human Rights

From 28 September to 1 October 2014, the World Conference on Constitutional Justice organised its 3rd Congress in Seoul upon invitation by the Constitutional Court of the Republic of Korea. At the time of the Congress, the World Conference on Constitutional Justice already united 94 Constitutional Courts and Councils and Supreme Courts in Africa, the Americas, Asia and Europe.[14]

While the first two congresses of the World Conference in Cape Town and in Rio de Janeiro were simple gatherings of constitutional courts and the groups uniting them, the 3rd Congress, hosted by the Constitutional Court of the Republic of Korea on 28 September to 1 October 2014, was the first one to be governed by the Statute.

Four sessions at the 3rd Congress in Seoul dealt with the main topic 'Constitutional Justice and Social Integration' whereas a fifth, closed session undertook a stock-taking of the independence of the courts.[15]

An important element of the 3rd Congress was the key-note speech for session II by the host, President Park Han-Chul of the Constitutional Court of the Republic of Korea. In this speech[16], President Park proposed to establish such an Asian Court of Human Rights.

The Seoul Communiqué, which was adopted by the participants of the 3rd Congress, supported up this proposal stating:

> *"Furthermore, the participants were informed about the initiative of the Constitutional Court of the Republic of Korea to promote discussions on human*

[13] Article 9 of the Statute.
[14] 95 Courts are members as of 02/02/2015: http://www.venice.coe.int/WebForms/pages/?p=02_WCCJ.
[15] At its meeting in Venice in 2013, the Bureau had decided that the independence of the member courts should be a permanent topic for future congresses.
[16] http://www.venice.coe.int/WCCJ/Seoul/docs/WCCJ_key-note-session_2-Park_ENG.pdf.

rights co-operation, including the possibility of establishing an Asian human rights court based on international human rights norms, in order to enhance human rights protection in the region. Recognising the great contribution by existing international human rights Courts in Europe, the Americas and Africa to the protection of human rights in the respective regions through the effective implementation of international human rights norms, the participants encourage participating Asian Courts to promote such discussions."[17]

While the Seoul Communiqué was an important step for President Park's initiative, a concrete follow-up was of course necessary. The next step was the preparation of a 'feasibility' report. President Park charged the main organiser of the 3rd Congress, the Deputy Head of International Relations of the Court, Ms Lim Kook-Hee to prepare a report on the possibilities for establishing such a Court.

In this framework, Ms Lim Kook-Hee participated in the 101st plenary session of the Venice Commission (Venice, 12-13 December 2014) and visited Strasbourg on 15 December 2014 where she met with various resource persons: Mr Michael O'Boyle, the Deputy Registrar of the European Court of Human Rights, Mr Philippe Boillat, the Director General for Human Rights and the Rule of Law of the Council of Europe and Mr Jörg Polakiewicz, the Director of the Directorate of Legal Advice and Public International Law of the Council of Europe as well as with the Secretariat of the Venice Commission.

The Venice Commission was also able to assist in establishing contact between the Korean Court and the Inter-American Court of Human Rights. A Korean delegation visited the Inter-American Court in January 2015.

I am convinced that in order to get such a complex project moving, many actors on several levels have to work together. Knowing their interest in this topic from previous visits in Japan, I had the pleasure of suggesting to the Constitutional Court of Korea to contact Prof. Obata and Prof. Ejima. I am most grateful to the Centre for Asian Legal Exchange - CALE[18] for having taken the generous initiative of bringing us together here in Nagoya.

[17] http://www.venice.coe.int/wccj/seoul/WCCJ_Seoul_Communique-E.pdf.
[18] http://cale.law.nagoya-u.ac.jp/index_eng.html (accessed 03/02/2015).

Let me give you a brief overview of the existing regional human rights protection systems before I turn to the various issues which should be addressed in such an endeavour.

III. Existing systems of Human Rights protection as a model

There are major regional human rights protection systems in Europe, the Americas, Africa and the Arab countries. Due to restrictions of time, I can only refer to some of them.

1. Europe

In Europe, two major international organisations deal – at least partially – with human rights. The oldest and the organisation specialised in the field is the Council of Europe, which nearly covers the entire continent[19] with its 47 member States. The Council of Europe is the "mother" organisation for the European Court of Human Rights in Strasbourg. However, the Council of Europe not only hosts the Court, the contribution of the whole organisation is essential for the functioning of the Court. The Council's Committee of Ministers supervises the execution of the judgments and its various other parts assist the member States in living up to the Convention's commitments. The Council of Europe provides legislative support for drafting (including through the Venice Commission), provides human rights training for judges, prosecutors, police, prison guards and other categories of civil servants, promotes human rights education in schools, trains youth leaders and provides many more services that help the states in improving human rights.

At the same time, the Council of Europe also monitors the member States' performance in fulfilling their commitments.[20] Of course, the central body that monitors human rights protection is the European Court of Human Rights, which is the result of the merger of two

[19] With the exception of Belarus and Kosovo, which are not yet Council of Europe member States.
[20] For example the Anti-Torture Committee CPT (http://www.cpt.coe.int/en/), the Anti-Corruption body GRECO (http://www.coe.int/t/dghl/monitoring/greco/default_en.asp) but also many others (https://wcd.coe.int/ViewDoc.jsp?id=132237&Site=COE, accessed 03/03/2015)

bodies – the European Court and the Commission for Human Rights – through Protocol 11 to the European Convention on Human Rights in Strasbourg[21].

Following the exhaustion of national remedies, individuals can appeal to the European Court of Human Rights, which will first decide on admissibility (a high percentage of cases are inadmissible). The Court has 47 members (one for each party), but it decides in chambers of seven judges. Following the decision of a chamber, the parties may request a referral of the case to the Grand Chamber, which is composed of 18 Judges[22].

Following the accession of many Eastern European States to the Council and Europe and their accession to the European Convention on Human Rights, the case-load of the Court increased dramatically, culminating in a delay of some 160.000 cases in 2011. However, the member States effectively reformed the Court, the most important element being the introduction of Protocol 14 to the Convention, which reduced the number of judges required for admissibility decisions from three to one. Together with procedural streamlining and an important enlargement of the Registry, these reforms resulted in a decrease of the number of pending cases to 69.900 in early 2015.[23] This reform was thus an enormous success.

On the other hand, the European Union, which has 28 member States, established the Court of Justice of the European Union in Luxembourg. This Court originally dealt with economic issues only but it was forced by a national court, the Constitutional Court of Germany, through the Solange I judgment[24], to establish its own human rights jurisdiction. Without a specific legal basis for the protection of Human Rights, the Court of Justice first drew inspiration from "constitutional traditions common to the Member States"[25]. In practice, this meant that the Luxembourg Court followed the case-law of the Strasbourg Court.

A new element came in when the European Union proclaimed its Charter of Fundamental Rights in 2000 and, especially, when the Charter was transformed into binding law through the Lisbon treaty in 2009. With the Charter, new dynamics developed.

[21] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, Strasbourg, 11.V.1994, Since its entry into force on 1 November 1998, this Protocol forms an integral part of the Convention (ETS No. 5).
[22] http://www.echr.coe.int/Documents/FAQ_GC_ENG.pdf (accessed 03/02/2015)
[23] http://www.humanrightseurope.org/2015/01/stat-attack-launch-of-the-european-court-of-human-rights-judicial-year/ (accessed 03/02/2015).
[24] Solange I, BVerfGE 37, 271 ff.
[25] Court of Justice of the European Communities, case Nold 4/73 [1974] ECR 491, §13.

It is not only the Court of Justice of the EU that interprets the Charter, but national Constitutional Courts also refer to it in their judgments[26]. This means that in Europe, in respect of the EU and its 28 member States, which are all parties to the European Convention on Human Rights as well, two European Courts deal with human rights and they apply two parallel human rights treaties.

The Charter contains a number of rights which do not exist in the Convention, for instance Article 8 on data protection. However, many of the fundamental rights contained in the Charter overlap with rights contained in the European Convention on Human Rights Convention, for example the right to a fair trial under Article 6 of the Convention is covered by Article 47 of the Charter. It is these overlapping rights that bring about the danger of divergent interpretation between the two texts.

The emergence of a human rights system with two basic texts, interpreted by two separate courts, could easily lead to a divergence in protection standards and this should be avoided.[27] It is also very important from the point of view of the individual to make it clear which human rights standards he or she can rely on and which Court will have the final say in human rights matters. The member States also insist that the EU, to which they have devolved many competences, is bound by the same standards as they are themselves and the EU needs to be coherent and credible in its relations with other States.[28] Even if the EU has developed a reasonably well-functioning system of internal control over its own

[26] A number of Constitutional Courts have referred to the Charter. Most active in this regard were the Constitutional Court of Austria (U466/11-18, U1836/11-13 of 14.03.2012, G 47/2012, G 59/2012, G62,70,71/2012 of 07.06.2014,66/2013 of 12.03.2014, U466/11-18, U1836/11-13 of 14.03.2012, KR 1-6, 8/00 of 12.12.2000) and the Constitutional Court of Belgium (146/2013 of 07.11.2013, 49/2011 of 06.04.2011, 103/2009 of 18.06.2009, 58/2009 of 19.03.2009, 167/2005 of 23.11.2005). Other examples are the Constitutional Courts Croatia (SuS-1/2013 of 14.11.2013), Poland (P 9/04 of 31.01.2005), Romania 967/2012 of 20.11.2012) or Spain 37/2011 or 28.03.2011, 292/2000 of 30.11.2000).

[27] There is already an example of a very wide interpretation of the Fundamental Rights Charter, that, if pursued could potentially lead to divergent interpretation. In the case the judgment in Åklagaren v Hans Åkerberg Fransson (Case C-617/10 REC, Åklagaren v. Hans Åkerberg Fransson), the Court of Justice of the European Union used a very wide interpretation of the applicability of the Convention when it held that the EU Charter applied wherever a state acts "within the scope of European law"; see Polakiewicz, Jörg, Concluding remarks: Present Challenges and Future given at the Conference Fundamental Rights in Europe: A Matter for Two Courts, Oxford Brookes University, Strasbourg, 13 June 2014, available at http://www.coe.int/en/web/dlapil/speeches-of-the-director/-/asset_publisher/ja71RsfCQTP7/content/-fundamental-rights-in-europe-a-matter-for-two-courts-?.

[28] Since Solange I, the European Union has taken up human rights as a key topic, not only within the Union – for instance with the establishment of the Fundamental Rights agency in Vienna – but also in its external relations, where often there is a conditionality between trade or accession agreements and human rights protection. In accession negotiations, now in the Balkans, with Albania, Montenegro and Serbia, the EU strongly insists on improvements in the human rights field (see conditions for EU membership at http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm).

activity, external control is necessary. This is why the Lisbon treaty obliges the European Union to become a party to the European Convention on Human Rights[29].

The very idea of the European Union, an international organisation joining the European Convention on Human Rights, which only envisages the membership of individual States, is complicated[30]. Given that it has taken over certain competences from its member States, the European Union had already become a member of other international organisations in these fields, for instance the UN Food and Agriculture Organisation or the World Trade Organisation[31]. However, accession to the European Convention on Human Rights does not follow the same logic.

On the basis of Article 6.2 of the EU Treaty and Article 59.2 of the Convention[32], which had opened the way for EU accession to the Convention, the Council of Europe and the European Union prepared a Draft Accession Agreement[33], which was then submitted to the Court of Justice of the European Union for opinion.

Already in 2011 – before the end of the negotiations on the Draft Accession Agreement - the Presidents of the Strasbourg and the Luxembourg Courts had adopted a joint communication, welcoming accession.[34] However, in its Opinion 2/13 of 18 December 2014[35] the Court of Justice of the European Union brought the process of accession effectively to a halt.[36] The strong insistence by the Court in its Opinion on "preserving the

[29] Article 6.2: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties." This second sentence was an indicator of a struggle between the EU and member states, which agree to the goal of an external control of acts of the Union but which do not wish give the EU a general competence in human rights matters, fearing that then the EU would exercise a general control of human rights also in the member states. Accession of the Union to the Convention had been envisaged before the Lisbon Treaty, but already in 1996, the Court of Justice of the European Communities had found that there was not a sufficient legal basis in the treaties (Opinion 2/94 [1996] ECR I-1759). In order to pursue this goal, the Lisbon Treaty introduced such an explicit legal basis in Article 6.2 TEU, Odermatt, Jed, The EU's Accession to the European Convention on Human Rights: An International Law Perspective, KU Leuven, Working Paper No. 136 – April 2014, https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp131-140/wp136-odermatt.pdf (accessed 10/2014).

[30] For criticism of this approach, see Schilling, Theodor, On Equal Footing: The Participation Rights Envisaged for the European Union After Its Accession to the European Convention on Human Rights, Human Rights Law Review, 2014, 14, p. 197–229.

[31] Odermatt, Jed,*ibid*.

[32] This paragraph had been introduced by Protocol 14 to the Convention.

[33] Available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf.

[34] Joint communication from Presidents Costa and Skouris, 24 January 2011, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf.

[35] http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=138983; press release http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140180en.pdf (accessed 03/02/2015).

[36] Odermatt, Jed, Court of Justice of the European Union finds Draft Agreement on EU Accession to ECHR is Incompatible with EU Law, Cambridge Journal of International and Comparative Law, Post 20 December 2015,

specific characteristics of the EU and EU law"[37] will make accession of the Union to the Convention hard to achieve.

Following a thorough analysis of the Opinion, negotiations are likely to resume. The negotiators have to satisfy not only the stringent demands of the Court of Justice, but they also have to remain acceptable for the 19 non EU members States, which are parties to the Convention, especially Russia and Switzerland. Without ratification of the accession agreement by all 47 member States of the Council of Europe (and the EU itself), no accession is possible. This means that each member State has a *de facto* veto power. Difficult negotiations therefore lie ahead.

It will also be interesting to see how European Constitutional Courts react to Opinion 2/13. The very strong insistence of the Luxembourg Court on the fully autonomous nature of EU law[38] puts into question the achievements of the Solange I process. It was the opening of EU law to external influences in the field of human rights which enabled the German Constitutional Court to come to the conclusion in the Solange II judgment that the EU provided a sufficient level of protection from the viewpoint of national constitutional law. Maybe Constitutional Courts will resume control of EU law according to national constitutional standards.

While the delay in the accession of the European Union is deplorable, not least from the viewpoint of the Union itself, the relations with some of its member States are a more serious challenge for the European Court of Human Rights.

Due to the conflict between the European Court of Human Rights and Russia, the entry into force of Protocol 14, simplifying the procedure of the Court, was considerably delayed. The reason for this conflict are judgments, which – it seems – displeased the Russian authorities, starting with Ilaşcu v. Moldova and Russia[39] where Russia was held responsible for the acts of the *de facto* authorities in the region of Transnistria in the Republic of Moldova.

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http://cjicl.org.uk/2014/12/20/court-justice-european-union-finds-draft-agreement-eu-accession-echr-incompatible-eu-law (accessed 03/02/2015).

[37] Paragraph 161 of Opinion 2/13.

[38] "…the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law", paragraph 193 of Opinion 2/13.

[39] ECtHR, Ilaşcu and others v. Moldova and Russia, no. 48787/99.

Even more resented was the Kononov v. Latvia judgment[40]. Russia was not even a party in these proceedings, but the European Court of Human Rights found no violation of the Convention when Latvia sentenced Mr Kononov for war crimes, which he committed as a communist partisan in 1944.

Another conflict opposes the United Kingdom to the European Court of Human Rights. In the case Hirst v. UK, the European Court held that the UK violated the Convention when it denied all prisoners without distinction the right to vote[41]. This judgment has not been implemented in the UK and – probably to avoid outright conflict – the Committee of Ministers postponed this judgment's execution until 2015.[42] For the general public, another judgment was even more contentious, Abu Qatader v. UK, where the Court prevented the expulsion of an Islamist hate preacher to Jordan because of the danger that he might be tortured there. As a consequence, the UK Government wants to adopt a human rights bill, which would break the formal link between British courts and the European Court of Human Rights, which had been established by the Human Rights Act.[43] The question whether the United Kingdom should leave the European Convention on Human Rights is being seriously considered.[44]

Even in Switzerland a wave of resentment against the European Court of Human Rights has built up, especially on the right wing of the political spectrum. This may be related to the traditional Swiss insistence on its independence and the rejection of the idea of "foreign judges". While it is unlikely that Switzerland will leave the European Convention on Human Rights, such discussions probably contributed to the insistence of Switzerland on 'subsidiarity' in the process of reform of the Court. [45]

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[40] ECtHR, Kononov v. Latvia, no. 36376/04; On this point see Vermin, J, *Crossing the line*, Russian Law Online, http://www.russianlawonline.com/content/crossing-line.

[41] For arguments for and against implementation, presented to the House of Lords, *European Court of Human Rights rulings: are there options for governments?*, Vaughne Miller, International Affairs and Defence Section, House of Lords Library, Standard Note SN/IA/5941.

[42] Decision adopted by the Committee of Ministers at the 1208th meeting (23 25 September 2014), http://www.coe.int/t/dghl/monitoring/execution/reports/pendingcases_EN.asp?CaseTitleOrNumber=hirst&StateCode=UK.&SectionCode.

[43] Conservatives plan to scrap Human Rights Act – read the full document http://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document.

[44] Theresa May: Tories to consider leaving European Convention on Human Rights: http://www.bbc.com/news/uk-politics-21726612; see also arguments presented by Vaughne Miller, International Affairs and Defence Section, House of Lords Library, Standard Note SN/IA/6577

[45] Swiss Parliament: 13.3237 – Interpellation, *Kündigung der Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20133237; *La Suisse sera plus isolée si elle dénonce la Convention*, interview with Prof. Walter Kälin, http://www.tdg.ch/suisse/La-Suisse-sera-encore-plus-isolee-si-elle-denonce-la-Convention/story/22597456/print.html; Bundesrat vehement gegen Kündigung

Notwithstanding these challenges, the European Court of Human Rights is an outstanding success. Human rights protection has become a key element of European legal culture and many Europeans are rightly proud of these achievements.

2. Americas

Like the European system until the entry into force of Protocol 11 to the Convention in 1998[46], the Inter-American human rights protection system has two main components: the Inter-American Commission on Human Rights, established in 1959 and the Inter-American Court of Human Rights, established in 1979. Both organs now have their legal basis in the American Convention on Human Rights, which was ratified by 25 States.[47]

The Inter-American Commission has its seat in Washington D.C. It is composed of seven Commissioners who are elected by the General Assembly of the Organisation of American States. In addition to general country reports[48], the Commission was authorised in 1965 to examine individual cases of human rights violations[49].

Domestic remedies have to be exhausted before a petition can be filed. Once a case is found admissible, the Commission first tries to find a friendly settlement, but it will prepare a report on the merits with recommendations if this is not possible.

In respect of States which have made a declaration accepting the jurisdiction of the Inter-American Court[50], the petitioner can request that the case be transferred by the Commission to the Inter-American Court of Human Rights if the State does not comply with the recommendations within two months. However, the applicants cannot bring cases to the Court themselves. Only the States and the Commission can refer a case to the Court.

The Court has its seat in San José, Costa Rica. Its seven Judges are elected by the General Assembly of the Organisation of American States for a period of six years. If none

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der Menschenrechtskonvention, http://www.nzz.ch/aktuell/schweiz/bundesrat-vehement-gegen-kuendigung-der-menschenrechtskonvention-1.18082582.

[46] http://conventions.coe.int/Treaty/en/Treaties/Html/155.htm.

[47] Trinidad and Tobago originally signed the Convention on 28 May 1991 but denounced it in 1998 referring to a constitutional obligation, established by the Judicial Committee of the Privy Council, to speedily execute persons convicted to the death penalty. An appeal to the Convention bodies would have delayed such executions (http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm#Trinidad%20and%20Tobago). .

[48] http://www.cidh.oas.org/pais.eng.htm.

[49] http://www.oas.org/en/iachr/mandate/functions.asp.

[50] Article 62 of the Convention.

of the even judges is a national of the defendant State, the State can nominate an *ad hoc* judge.[51]

Like the European Court of Human Rights[52], the Inter-American Court can adopt provisional measures "in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons".[53]

A unique aspect of the Inter-American system is the role of the *Centro por la Justicia y el Derecho Internacional (CEJIL).*[54] CEJIL is a semi-official NGO which also brings cases on behalf of victims of human rights violations to the Inter-American Commission and supports them in the procedure before the Inter-American Court of Human Rights. This is particularly important for defending the rights of indigenous people or communities in Latin America who often are unable to present formal applications on their own. The establishment of a similar body might be of interest also for other regional mechanisms, notably in Asia.

Another particular feature of the American system is that the Court, which supervises the execution of its own judgments, often insists on highly symbolic forms of reparation, such as public apologies to victims.[55] This is very different from the European system, which focuses on compensation and on general (often legislative) measures, rather than symbolic measures.

In Asia, however, it might be difficult to request public apologies from the authorities if this would result in a 'loss of face'.

Like the European Court, the American system faces some challenges. Venezuela denounced the American Convention on 10 September 2013 because the Court had allegedly given "political" judgments.

A recent issue relates to the Dominican Republic. Following a judgment of the Inter-American Court finding a violation of the Convention by the Dominican Republic because

[51] This is different from the Inter-American Commission were a national of the State concerned has to recuse him/herself.
[52] Rule 39 of the Rules of the Court (http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf, accessed 03/02/1015).
[53] Article 63.2 of the Convention.
[54] https://www.cejil.org/en.
[55] For example, in the Barrios Altos case Peru agreed to disseminate the judgement, make a public expression of apology to the victims, to erect a memorial monument in Lima, to grant scholarships, school uniforms and educational materials to the victims (http://www.corteidh.or.cr/docs/casos/articulos/seriec_87_ing.pdf).

it refused citizenship to Haitian immigrants[56], the Constitutional Court of the Dominican Republic found in its judgment TC/0256/14 that the instrument accepting the jurisdiction of the Inter-American Court of Human Rights in respect of the Dominican Republic had not been adopted in a constitutional manner. The effects of this judgment are still unclear.[57]

However, notwithstanding these difficulties, the Inter-American too is a highly successful and effective system of human rights protection, which also contains many elements of potential relevance for other regions.

3. Africa

The African Charter on Human and People's Rights of 1981 establishes the African human rights protection system, which has two components: the African Commission on Human and People's Rights and the African Court on Human and People's Rights. The Commission was established in 1986 and has its seat in Banjul, Gambia. It is therefore often called the "Banjul Commission". The Commission has eleven members who have renewable six-year mandates.

The African Court on Human and People's Rights was established by Article 1 of the Protocol to the Charter, which was ratified by 27 States. The Court, which is composed of 11 judges, has it seat in Arusha, Tanzania. Seven States (Burkina Faso, Ghana, Malawi, Mali, Rwanda, Tanzania and Cote d'Ivoire) have accepted the jurisdiction of the Court including for complaints brought by non-governmental organisations with observer status with the African Commission and from individuals. Similar to the European system, the execution of the Court's judgments is monitored by the Committee of Ministers of the African Union.

Since its establishment, the Court has received 28 applications and has finalised 23 of them. It gave its first judgment against Senegal in 2009 (inadmissibility).[58] On 14 June 2013, it handed down its first judgment on the merits, finding a violation of the Charter

[56] Inter-American Court's press statement (in Spanish): http://www.corteidh.or.cr/docs/comunicados/cp_28_14.pdf (accessed 03/02/2015).
[57] See a press statement by the Inter American Commission on this issue: http://www.oas.org/en/iachr/media_center/PReleases/2014/130.asp (accessed 03/02/2015).
[58] Application No 001/2008, Michelot Yogogombaye v. Senegal (http://www.african-court.org/en/index.php/2-home/171-application-no-001-2008-michelot-yogogombaye-versus-the-republic-of-senegal).

against Tanzania[59]. In 2014, Burkina Faso was condemned for failing to investigate the murder of a newspaper editor.[60]

In the light of this recent case-law, the African Court seems to be set on a promising course towards an effective human rights protection system.

A specific aspect of the African system is the inclusion of group rights and people's rights, notably family protection by the state[61], the right to self-determination[62], the right to development[63], the right to peace and security[64] and to a general satisfactory environment[65].

On the other hand, the Charter also sets out duties of individuals such as the duty towards ones family and society[66] and to cultural values[67], or the duty of non-discrimination and tolerance.[68] There is a controversial discussion about the inclusion of duties in human rights catalogues.[69] While the inclusion of reference to duties would seem acceptable, it should be made very clear in the text that human rights cannot depend on the prior fulfilment of duties. The respect for human rights cannot be refused, even if a person has not fulfilled his or her duties.

4. Arab League

The League of Arab States, usually referred to as the Arab League, unites 22 Arab States. In 1994, the League prepared the Arab Charter of Human Rights, but the text did not enter into force. A revised version of that text was however adopted by the Arab

[59] Applications No 009&011/2011 – Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila V. The United Republic of Tanzania (http://www.african-court.org/en/index.php/2012-03-04-06-06-00/all-cases-and-decisions/2-home/161-applications-no-009-12-joint-case), see also http://jurist.org/forum/2013/07/roland-adjovi-tanzanian-candidates.php (accessed 01/02/2015).
[60] Application Application 013/2011, Judgment in the matter of late Norbert Zongo and others v. Burkina Faso (http://www.african-court.org/en/index.php/news/latest-news/524-judgment-in-the-matter-of-late-norbert-zongo-and-others-v-burkina-faso); see also http://www.opensocietyfoundations.org/voices/killing-norbert-zongo-african-court-stresses-state-obligation-protect-journalists (accessed 01/02/2015).
[61] Article 18.
[62] Article 20.
[63] Article 22.
[64] Article 23.
[65] Article 24.
[66] Article 27.
[67] Article 29.7.
[68] Article 28.
[69] Brems, Eva, *Human Rights: Universality and Diversity*, The Hague (2001), p. 425 seq.

League in 2004 and entered into force in 2008.[70] The Arab Charter contains political, civil, economic, social and cultural rights and the right to development.[71]

The Arab Human Rights Committee is composed of seven experts elected by the member States. It monitors the implementation of the Charter by the member States through national reports from the parties and by issuing comments and recommendations.[72]

In September 2014, a ministerial meeting of the Arab League approved the statute of a future Arab Court for Human Rights. It will enter into force with seven ratifications. The seat of the Court is to be in Bahrain. An inter-state complaint procedure is foreseen, but unfortunately no individual complaint mechanism.[73]

5. Asia / Pacific

While the current initiative of the Constitutional Court of Korea carries much weight, it is not the first attempt to establish a Human Rights Court in the wider Asian region, in particular in the Pacific.[74]

In 1985, the non-governmental Law Association for Asia and the South Pacific (LAWASIA) tried to establish a regional human rights mechanism for the Pacific at a meeting in Fiji, which was attended by 63 governmental and NGO delegates. [75]

A draft Pacific Charter of Human Rights was elaborated at a further meeting in Samoa in 1989. The draft was inspired by the African Charter on Human and Peoples' Rights and provided for civil and political rights, and some economic, social and cultural rights. A

[70] http://www.lasportal.org (Charter available in Arabic only). English text available at: http://www1.umn.edu/humanrts/instree/loas2005.html (accessed 03/02/2015).
[71] Article 2.
[72] https://www.fidh.org/International-Federation-for-Human-Rights/north-africa-middle-east/league-of-arab-states/Human-Rights-organizations-and (accessed 02/02/2015).
[73] NGOs have made proposals on how to improve the Statute: http://www.hrw.org/news/2014/06/06/proposed-arab-court-human-rights-empty-vessel-without-substantial-changes-draft-stat (accessed 02/02/2015)
[74] Hao Duy Phan, A Blueprint For a Southeast Asian Court Of Human Rights, Asian-Pacific Law & Policy Journal, Volume 10, Issue 2, pp. 384-433 (http://blog.hawaii.edu/aplpj/files/2011/11/APLPJ_10.2_phan.pdf) and Hao Duy Phan, A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia - The Case for a Southeast Asian Court of Human Rights (2012); Imrana Jalal, P., Why do we need a Pacific Regional Human Rights Commission?, pp. 177 seq. (http://www.victoria.ac.nz/law/nzacl/PDFS/SPECIAL%20ISSUES/HORS%20SERIE%20VOL%20VIII/09%20Jalal.pdf).
[75] Secretariat of the Pacific Community, Pathways for the Pacific: Regional Human Rights Mechanisms http://www.spc.int/rrrt/publications-media/publications/item/379-pathways-for-the-pacific-regional-human-rights-mechanisms, p. 23.

commission supervising implementation was to be established. However, the Charter was not adopted at the inter-governmental level.[76]

A renewed call for a Pacific regional mechanism is being made under Strategic Objectives 12.1 and 12.5 of the Pacific Plan[77] and, with the support of the Office of the High Commissioner for Human Rights, the Secretariat of the Pacific Islands Community prepared an excellent report on the possibilities for establishing such a system in 2012.[78]

In continental Asia various potential fora exist: the Asia Co-operation Dialogue[79] is a rather lose grouping of 32 Asian countries, which promotes dialogue between its members and pursues various projects in fields such as energy, agriculture, biotechnology, tourism, poverty alleviation, IT development, e-education and financial co-operation. However, the Asia Co-operation Dialogue does not yet have a human rights dimension.

Conversely, as part of its "human dimension", the Conference on Interaction and Confidence Building Measures in Asia (CICA) is a multi-national forum for enhancing co-operation towards promoting peace, security and stability in Asia[80]. CICA has, as one of its priorities, the promotion of respect for fundamental rights and freedoms. The relevant 2007 concept paper[81] refers to "protecting respect for fundamental rights and freedoms within the provisions of the UN Charter, the Almaty Act and other CICA documents" as one of the goals of CICA. The parallel action plan foresees *inter alia* the holding of CICA conferences on human rights.[82]

The initiative to establish an Asian human rights protection system could thus refer to work done in these fora and try to include them in discussions in order to obtain sufficient political weight.

In 2009, the Association of Southeast Asian Nations (ASEAN) established the ASEAN Intergovernmental Commission on Human Rights (AICHR)[83]. One of the main tasks of this Commission was to prepare the ASEAN Human Rights Declaration, which was

[76] Text of the Charter: http://pacific.ohchr.org/docs/Draft_Pacific_Charter_Memoranda.pdf (accessed 03/02/2015).
[77] Pacific Regional Consultation for Members of Parliament on the Pacific Plan (Strategic Objective 12.5), Human Rights Conventions & Standards and their Application to Domestic Law Policy and Practice (29 October-2 November 2007).
[78] See above, footnote 76.
[79] http://www.acddialogue.com/ (accessed 28/01/2015)
[80] http://www.s-cica.org/page.php?lang=1 (accessed 28/01/2015).
[81] http://www.s-cica.org/page.php?page_id=30&lang=1 (accessed 28/01/2015).
[82] See also point 18 of the Declaration of the 2010 of the Third Summit of the Conference on Interaction and Confidence Building Measures in Asia (http://www.cicaistanbul.org/belgeler-8.tr.mfa, accessed 28/01/2015).
[83] http://aichr.org/about/.

adopted 2012 in Phnom Penh[84]. The Declaration builds on the Universal Declaration of Human Rights of the United Nations and includes both rights civil and political rights as well as economic, social and cultural rights. The Declaration adds further rights, for instance the right to safe drinking water and sanitation (Article 28.e). However, there were also critical voices[85] which pointed to the danger that the reference to "corresponding duties" in Article 6 of the Declaration[86] might be used to withhold human rights from a person who is not considered to have fulfilled his or her duties towards society. Other clauses questioned were the references to "national security" and "public morality" in Article 8 of the Declaration as grounds for limiting the exercise of human rights and fundamental freedoms.

The establishment of the ASEAN system was certainly difficult because of the diversity of the ASEAN member States. Therefore, the adoption of the ASEAN Human Rights Declaration was a remarkable achievement and further work will be necessary to make the system more independent.

III. Issues to be addressed in the establishment of an Asian system for the protection of human rights

The task of establishing an Asian system for the protection of human rights or even an Asian Court of Human Rights is daunting. Numerous questions need to be addressed. The replies to these questions will determine how efficient it can be from a human rights perspective. From the outset, we can identify obvious trade-offs between size (larger membership) and quality.

[84] http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration
[85] Statement by the High Commissioner for Human Rights at the Bali Democracy Forum of 7 November 2012, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12752&LangID=E.
[86] Article 6 of the Declaration reads : "The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives."

1. Scope *ratione loci*

(1) Intergovernmental organisation as a basis

A major issue is that Asia lacks a continental international organisation. The European Court of Human Rights is an emanation of the Council of Europe. The Inter-American Court of Human Rights was established within the Organization of American States and the African Court of Human Rights is part of the African Union. The project to establish an Arab Court of Human Rights is set within the framework of the Arab League.

In Asia, if a continental human rights court or mechanism[87] was established such an international organisation would need to be created at the same time. Why is such a "framework organisation" necessary for a human rights court? Such a court or a human rights commission needs individuals as members and they in turn need to be appointed. In one way or another, the States, i.e. the Governments, need to be involved, first in the drafting of the founding treaty[88] or decision in establishing the mechanism. In the case of a treaty, there is also a need to have a depositary, a body which keeps the signatures and ratifications, as well as any declarations or reservations and notifies the parties to the treaty thereof. Usually, the "framework organisation" fulfils this task. It is true that this function, which resembles that of a notary, could be entrusted to the United Nations, whose treaty office is available also for regional treaties. However, the involvement of an international organisation can be essential in the appointment of judges or members of the human rights mechanisms.

Depending on the model chosen, an involvement of an intergovernmental organisation can also be necessary in the implementation of the decisions taken by the human rights body. This is the case of the European system, where the Committee of Ministers supervises the execution of the judgments of the European Court of Human Rights. In the Inter-American System, the Court itself has this task.

Admittedly, it could be imagined that such a human rights body be established by an international non-governmental body, but without the participation of States, it seems unlikely that the decisions of such a non-governmental body would be followed by the

[87] Prof Obata doubts whether a Court handing down legally binding decisions can be established: Obata, Kaoru, Perspectives for a Regional Human Rights Regime in East Asia; *How should Asians Interpret the History of European Regional Constitutionalization*, Nagoya University Journal of Law and Politics, No. 245 (2012), pp. 299–322 (in Japanese, English translation available).
[88] E.g. the European Convention on Human Rights.

States concerned. The involvement of the States is therefore indispensable if such a mechanism is to be effective.

(2) Participating countries

A related question is the geographical scope for the establishment of an Asian human rights court or system. Asia is a vast continent; its countries are very diverse. They are probably less homogenous than European countries, even with all their differences.[89]

While there is a geographical definition of Asia, being separated from Europe by the Urals and the Caucasus and by the Suez Canal from Africa, there are also different references as concerns Asia as an entity. Often, the Middle East is seen as a region of its own. More importantly, Asia contains countries which differ widely not only in size, history and culture but – essentially – in the respect for human rights by their Governments. In Asia, we find genuinely democratic states but – sadly – also some of the worst dictatorships in the World; let me only mention North Korea. Including those in such a system would obviously defeat the purpose of protecting human rights. Therefore, the geographical scope will need to be limited to countries that share the genuine protection of human rights as a goal. Let us call them like-minded countries. In East and South-East Asia, there are some which could be candidates, let me only mention South Korea, Japan, Mongolia or Indonesia, but there are of course also others.[90]

We can compare the issue of including more or less Asian States to the discussion about widening or deepening the European Union. Some countries first wanted a more profound coherence between the member States of the EU whereas others wanted to take in new members more quickly. Of course, one element in this discussion was the need to "stabilise" some countries, for example democratic Greece after the end of the military dictatorship. However, it is probably true that some countries supported the enlargement of the EU in order to avoid its further deepening.[91]

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[89] Obata, Kaoru, Perspectives for a Regional Human Rights Regime in East Asia; *How should Asians Interpret the History of European Regional Constitutionalization*, Nagoya University Journal of Law and Politics, No. 245 (2012), pp. 299–322 (in Japanese, English translation available).

[90] Taiwan would probably be an interesting partner but the question of its status in international law might complicate co-operation.

[91] A similar, albeit less know discussion took place in the Council of Europe after the fall of the iron curtain. The issue was how quickly the Council of Europe should accept new members. After having expanded to Central Europe (Hungary, Czechoslovakia and Poland), the Deputy Secretary General of the Council of Europe, Mr Leuprecht resigned from his post in 1997 in protest against the accession of Bosnia and Herzegovina, Croatia and Russia to the Council (http://www.rferl.org/content/article/1085587.html, accessed 27/01/2015), see also Bates, Ed, The Evolution

(3) Relationship to the European system

Another territorial issue concerns the borders between Asia and Europe. The Council of Europe, and, as a consequence the European Court of Human Rights, have five members, which geographically are either partially or totally in Asia. Both Russia and Turkey have the larger part of their territory in Europe and Armenia, Azerbaijan and Georgia are – according to a geographical definition – totally in Asia because they are on the south rim of the Caucasus range, which is supposed to separate Europe from Asia. As a consequence, the question of their participation in an Asian system of human rights protection can be legitimately raised. The question is pertinent because the Constitutional Courts of three of these countries (Azerbaijan, Russia and Turkey[92]) are indeed members of the Association of Asian Constitutional Courts and Equivalent Institutions and the Seoul *Communiqué* calls upon the participating Asian Courts to promote discussions on the establishment of an of an Asian Court of Human Rights.

The question that arises is whether countries already covered by the European Convention on Human Rights, should join another regional human rights protection mechanism. In 1998, the Venice Commission had the opportunity to pronounce itself on a similar issue when it was asked to give an opinion on the legal problems arising from the coexistence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States (CIS) and the European Convention on Human Rights. Having established that the human rights protection resulting from the CIS Convention was more limited than that of the European Convention, the Venice Commission recommended for "those States which are members of the Council of Europe or candidates to become members, ratification of the ECHR is mandatory and the ECHR should have priority over other European systems for protection of human rights."[93]

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of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights, Oxford (2010), p. 448.

[92] http://www.aaccei.org/ccourt?act=members (accessed 28/01/2015).

[93] CDL-INF(1998)008, Opinion on the legal problems arising from the coexistence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights, p. 13.

(4) Seat

Whenever an international body is set up, the question of its seat needs to be decided. The problem may be that several founding members wish to have the seat in their country. However, unless this is a very complex body, a single seat should be chosen.[94]

Strasbourg was chosen as the seat of the Council of Europe and the European Court of Human Rights because of its symbolic value for the reconciliation between France and Germany after the war.[95]

Of course a special responsibility comes with the seat and hosting such a body can also entail significant costs for the host country.

(5) Variable Geometry

In Europe, we have numerous examples of so-called 'variable geometry'. This means that States co-operate with others in varying composition. Some States participate in all activities whereas others opt out of certain topics and others can opt-in by co-operating with an existing body or organisation even if they are not a member of it. Variable geometry exists in the European Union – in fact the term most often refers to the EU[96] – but there are also several forms of variable geometry in the Council of Europe.

For example, the Schengen area, which unites States with a common external visa regime, was first established outside the EU, but has been integrated into the EU legislation through the Amsterdam Treaty in 1997. The Schengen Agreement enables border-free travel between its participating States and is probably one of the most visible achievements of European integration. The Schengen area covers most EU members. Croatia, Bulgaria and Romania are not yet members, but the United Kingdom and Ireland, both EU members, have permanently opted out. On the other hand, it also includes Switzerland and Norway, which are not EU members.

The Euro area is also an element of variable geometry in the EU. Denmark and the United Kingdom have permanently opted out, whereas all other EU member States already

[94] The European Union still faces this challenge. Often specialised agencies are established in member states, which do not host the main seat, for example the Fundamental Rights Agency of the EU has its seat in Vienna, Austria. Unfortunately, the dispute over the seat of the European Parliament – Strasbourg or Brussels – still bogs down this institution.

[95] The proposal for Strasbourg was made by the then foreign minister of the United Kingdom, Sir Ernest Bevin (http://en.strasbourg-europe.eu/history,127,en.html, accessed 02/02/2015).

[96] There was discussion about the concept of "concentric circles" whereby the EU would have an inner core and other countries would participate only in part of its activities. A similar concept is "Enhanced cooperation" introduced through the Treaty of Amsterdam and then the Lisbon Treaty, which enables at least 9 EU member States to establish co-operation.

have the Euro or are bound to introduce it. In another area, defence, Denmark has a specific opt out from foreign policy discussions with defence implications.

The Council of Europe has six partial agreements, seven enlarged partial agreements and two enlarged agreements.[97] Partial agreements unite some of the Council member States. Enlarged partial agreements link some members of the Council of Europe and some non-members of the Council. Enlarged agreements cover all 47 member States and some non-Council members. The Venice Commission is one of the two enlarged agreements. As an enlarged agreement, the Venice Commission includes all 47 member States of the Council of Europe as members and it has 13 more, mostly non-European members.[98]

A different variant of variable geometry in the Council of Europe is the (revised) European Social Charter[99], which is a treaty of the Council of Europe.[100] It complements the European Convention on Human Rights in the field of social rights. Like any other multilateral treaty it is of course binding only on the parties, which have ratified it. However what makes it interesting from a structural point of view is that the parties can select the obligations which they wish to undertake. The parties have to accept common Part I of the Charter, but they can choose six out of nine Articles of Part II and an additional number of Articles from Part II which the parties "may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than sixteen articles or sixty-three numbered paragraphs."[101]

Using similar elements of variable geometry might be useful in establishing an effective human rights protection system in Asia. One avenue which might be interesting to explore in this respect would be whether ASEAN would be interested in opening its – still embryonic – system of human rights protection to other Asian countries.

[97] http://conventions.coe.int/Treaty/Commun/ListeTousAP.asp?CL=ENG (accessed 27/01/2015).
[98] http://www.venice.coe.int/WebForms/members/countries.aspx.
[99] http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm.
[100] Quesada, Luis Jimena, The European Social charter: the Committee and the protection of social rights in times of economic crisis - Conference on "Protecting economic and social rights in times of economic crisis: what role for the judges?" Ouro Preto, Brazil, 5-6 May 2014, CDL-LA(2014)003 (http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-LA(2014)003-e). The Social Charter of 1961 was revised in 1996.
[101] Article A of Part III of the revised Social Charter.

2. Scope *ratione personae* - the ultimate goal: individual access

The highest level of human rights protection can be achieved through individual access, even this can lead to a serious overburdening of the commission/court concerned. In 2011, the European Court edged close to a collapse when it had around 160.000 cases pending. The European Convention had become a victim of its own success.

However, radical changes in its procedure enabled the Court to bring its case-load down to 69.900 cases[102]. It was necessary to reduce the number of judges deciding on admissibility from three judges to one.[103] However, these measures enabled the Court to considerably reducing its case-load. This is proof that a well-managed Court can deal with a very high case load.

The question is, however, not whether individual access is desirable, but whether it can be achieved from the outset. Originally, the European Convention provided for individual petitions only as an option for countries made a declaration of submission under the jurisdiction of the Court also for individual complaints under then Article 25 of the Convention. Protocol 11 to the Convention, which entered into force in 1998, removed this option and made the right of individual petition compulsory for all States parties to the Convention.

Like in Europe, it may be necessary to introduce individual access in Asia first as an option for States, which are willing to submit to such a jurisdiction. The result of such an option would be a system of variable geometry because not all States would have the same obligations. However, this may be the price to pay for establishing such a system in the first place.

3. Scope *ratione temporis*

From the outset, it will also be important to avoid misunderstandings. An Asian system of human rights should be geared towards the future. The history of Asia includes dire periods of war with unspeakable atrocities having been committed. The collective

[102] http://www.humanrightseurope.org/2015/01/stat-attack-launch-of-the-european-court-of-human-rights-judicial-year/ and http://www.echr.coe.int/Documents/Annual_report_2014_ENG.pdf (accessed 03/02/2015).
[103] Protocol No. 14 to the Convention on for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Strasbourg, 13 May 2004, ETS. No. 194.

memories of these crimes remain vivid and this history hampers dialogue in the region.[104] Unresolved territorial disputes add to these historic tensions.[105]

Dialogue about what has happened in the past is necessary and such dialogue should lead to more mutual understanding, but this may take time. However, past violations of human rights and the still open wounds should not prevent the establishment of a human rights protection system, which is directed towards a better future.

Therefore, in the process of establishing such a system, it may be necessary to set out clear rules that this system is applicable to future cases only. Otherwise, unresolved conflicts from the past might doom the common goal of establishing a regional human rights protection system.

4. Asian values

In the past, the concept of Asian values has been advanced in order to contest the idea of universal human rights and to justify authoritarian rule.[106] When I refer to Asian values, I do so by insisting on universal human rights as a minimum standard. Based on these universal standards, national and regional systems should provide additional rights but cannot derogate from the minimum standard. In this sense, Asian values can provide specific features of an Asian system of human rights protection and they can facilitate the acceptance and support of such a system by the people which it is to protect. In the process of establishing the system care should be taken that Asian values are understood as concept which is open to further development of human rights.

As seen above, each regional human rights mechanism has its specific characteristics. For example, when we compare judgments of the European and the Inter-American Courts, the European Court is certainly much more sober in its decisions, focusing on monetary

[104] Obata, Kaoru, Perspectives for a Regional Human Rights Regime in East Asia; *How should Asians Interpret the History of European Regional Constitutionalization*, Nagoya University Journal of Law and Politics, No. 245 (2012), pp. 299–322 (in Japanese, English translation available).
[105] E.g. disputes relating to the Senkaku Islands or the Sprately Islands.
[106] Sen, Amartya, Human Rights and Asian Values, Sixteenth Morgenthau Memorial Lecture on Ethics & Foreign Policy, New York (1997)
(https://www.carnegiecouncil.org/publications/archive/morgenthau/254.html/_res/id=sa_File1/254_sen.pdf); Boll, Alfred M., The Asian values debate and its relevance to international humanitarian law, 31-03-2001 Article, International Review of the Red Cross, No. 841, https://www.icrc.org/eng/resources/documents/misc/57jqzl.htm; Inoguchi, Takashi / Newman, Edward,
Introduction: "Asian Values" and Democracy In Asia, Proceedings of a Conference held on 28 March 1997 at Hamamatsu, Shizuoka, Japan, as Part of the First Shizuoka Asia-Pacific Forum: The Future of the Asia-Pacific Region: http://archive.unu.edu/unupress/asian-values.html.

compensation and general measures, which often involve legislative amendments. By contrast, the Inter-American Court often goes further and calls for symbolic measures like a public apology by the Government or the construction of a monument in memory of the victims.[107]

In Africa, especially in South Africa, the complex notion of *ubuntu* has been developed in the field of constitutional law and human rights. The *ubuntu* understanding of justice is the restoration of equilibrium.[108] Justice Mokgoro of the Constitutional Court of South Africa explains that generally "ubuntu translates as 'humaneness'. In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation."[109]

In Asia, reference is often made to the Confucian notion of harmony: 'the exemplary person pursues harmony (*ho*), not sameness'[110]. I do not know this concept, but for an outsider this might also provide a useful basis for human rights protection. Reference to such specific Asian values might facilitate the emergence of a regional consensus in the preparation of an Asian system of human rights protection, while building on universal standards.

5. Networking

In order to achieve the necessary impetus in the prospective participating (like-minded) countries, it is essential to 'weave' an effective multi-level network for the promotion of the establishment of an Asian human rights mechanism or court.

On the international level, it would seem essential to seek the support of the UN Office of the High Commissioner for Human Rights (OHCHR), which already supported the

[107] For example in the Barrios Altos case, http://www.corteidh.or.cr/docs/casos/articulos/seriec_87_ing.pdf (accessed 01/02/2015).
[108] Mogobe B. Ramose, An African perspective on justice and race, http://them.polylog.org/3/frm-en.htm (accessed 25/01/2015).
[109] Constitutional Court of South Africa, *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC), CCT 3/94 of 06/06/1995 [308], CODICES RSA-1995-3-002.
[110] Confucius, *Analects* 13.23.

establishment of a human rights mechanism for the Pacific.[111] Other Asian fora referred to in section II.5 above might be usefully included in the discussions.

On the governmental level, this networking exercise should include Constitutional and Supreme Courts, Ministries of Justice, Ministries of Foreign Affairs and interested Members of Parliament.

On the non-governmental level, it would be important to include human rights NGOs, universities and interested journalists, who can amplify the call for such a system.

There may even be commercial actors who are interested in a human rights mechanism in Asia, law firms or other private companies, and they may be willing to invest money in this project. Such contributions can make a difference but, of course, the other actors have to be on their guard to avoid that these commercial interests do not interfere with the goal of human rights protection.

Even if this may not be usual practice in all countries concerned, the success of this endeavour will also depend on an effective dialogue between the governmental and non-governmental actors. Our seminar here in Nagoya is an excellent example of such a dialogue and I am grateful to Prof. Obata and CALE for having taken this initiative!

V. Conclusion

We have seen that establishing an Asian human rights protection system is a complex issue where many players need to interact. Various models exist, which all have advantages and disadvantages.

We have seen that a number of questions are relevant. In Asia, you have the advantage of being able to find answers to these questions before setting up such a system. This may enable you to avoid the pitfalls of your predecessors.

I presented examples of variable geometry to show that it is possible to conceive a human rights protection system where not all members have the same degree of obligations. Some States can go ahead and accept more stringent conditions, whereas others can join in, but accept these conditions at a later stage. Such a system of variable geometry may indeed allow including States, which otherwise might refuse to participate

[111] http://www.spc.int/rrrt/publications-media/publications/item/379-pathways-for-the-pacific-regional-human-rights-mechanisms (accessed 02/02/2015).

in a human-rights system. However, I insist that in order to get the process going, it is important to first have a consensus within a smaller group of like-minded core States able to make substantial commitments.

Partial opt-ins could be envisaged once the system has been set up and should be introduced by this core group. Otherwise, the hesitant countries could slow down or even completely stop the progress of the more advanced ones.

You should build impetus in various fora and you will need a flexible concept, which can be adapted as you go along.

Believe me, the goal is worth it! It feels good to live in a country where human rights are protected at a high level, but it is also good to know that there is a regional body to which one can turn if national authorities do not provide these rights.

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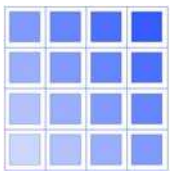

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