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THE UNIVERSE OF HUMAN RIGHTS

O UNIVERSO DOS DIREITOS HUMANOS

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ABSTRACT

Human rights have encountered many challenges in their several centuries-old history. Especially since on the political level they are often instrumentalized by the States. Uncertainty reigns in philosophy. We do not know their foundations very well: is it Nature, God, Reason? Various authors have pointed out the incompatibility between the universality of human rights and cultural differences, from 18th century European counterrevolutionaries to Nazi jurists. Claude Lévi-Strauss himself warned Unesco of this in the aftermath of the Second World War. However, the twentieth and twenty-first centuries made it possible to overcome these uncertainties. The case law of the various international and national courts on crimes against humanity allows us today to formulate more precise definitions of the universality of human rights, even if it is sometimes difficult to articulate them with the minority rights and the rights of indigenous peoples.

KEYWORDS: China. Human rights. Levi-Strauss. UNESCO. Indigenous people.

RESUMO

Os direitos humanos enfrentaram muitos desafios em sua história de muitos séculos. Especialmente porque, em nível político, eles são frequentemente instrumentalizados pelos Estados. A incerteza reina na filosofia. Não conhecemos muito bem seus fundamentos: seria a Natureza, Deus, a Razão? Vários autores apontaram a incompatibilidade entre a universalidade dos direitos humanos e as diferenças culturais, desde os contrarrevolucionários europeus do século XVIII até os juristas nazistas. O próprio Claude Lévi-Strauss alertou a Unesco sobre isso após a Segunda Guerra Mundial. Entretanto, os séculos XX e XXI possibilitaram a superação dessas incertezas. A jurisprudência dos vários tribunais internacionais e nacionais sobre crimes contra a humanidade nos permite hoje formular definições mais precisas sobre a universalidade dos direitos humanos, mesmo que às vezes seja difícil articulá-los com os direitos das minorias e os direitos dos povos indígenas.

PALAVRAS-CHAVE: *China. Direitos humanos. Lévi-Strauss. UNESCO. Povos indígenas.*

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CRIMES AGAINST HUMANITY. 1. THE DECISIONS OF INTERNATIONAL COURTS. 2. FRENCH COURT DECISIONS. 3. EUROPE: THE COUNCIL OF EUROPE. CONCLUSION: FOR THE CONTEXTUALIZATION OF HUMAN RIGHTS.

INTRODUCTION: ARE HUMAN RIGHTS NATURAL?

As we will see, in western tradition, human rights are based on a secularized Nature. They would come from a nature common to all men. But what human nature is? It is not necessarily good: multiple historical examples the demonstrate, as well as psychoanalysis. In addition, much of the processes of civilization and scientific progresses aims to free itself from some of its constraints. Medicine, for example, is trying to correct certain traits: cancer, AIDS, infarction are part of nature. F. Engels, in *Dialectics of Nature*, wrote it perfectly:

> "It is precisely the transformation of nature by man, not nature alone into as such, which is the most essential and direct foundation of human thought, and the intelligence of man has grown to the extent that he has learned to transform nature. This is why, by maintaining that it is exclusively nature which acts on man, that it is exclusively the natural conditions which everywhere condition its historical development, the naturalist conception of history is one-sided and it forgets that man reacts on nature, transforms it and creates new conditions of existence ".

In addition, anthropology shows that man is not at home in nature. To use it, he must make an alliance with it. The itineraries humans can upset those of nature. For example, rivers: to cross them, even more to cover them with a bridge, is to disrupt an order. Hence the custom attested in all European cultures to throwcoins in the river before crossing it. Religious rites often accompany the construction of a bridge. Pontife comes from *Pontifex*. The Romans had their gods of crossroads, *dii termini*; our ancestors put oratories at the crossroads.

At a minimum, therefore, it should be recognized that human rights are only the healthy part of human nature. But almost immediately comes the debate about relativism. The healthy part of human nature is not the same in all cultures. As Margaret Mead had already shown with regard to the people of Oceania, some value peace, others are more aggressive. And what about the populations of New Guinea, where war is an almost permanent fact and where the hierarchy of roles reduces women to an extremely inferior condition? Married couples don't even live together...

We know that marxists hardly believe in human nature and think, not without reason, that human rights have often been a lie. The position of the nazi jurists, because there was indeed a nazi theory of law, illustrates in an extreme way the divergences which one can conceive on the concept of Nature. This text will therefore consist in two parts. The first will be devoted to debates on the universality of human rights and will have an historical and anthropological character. The second will examine the progress that human rights have owed jurists and judges over the past 40 years.

PART I : THE UNIVERSALITY OF HUMAN RIGHTS IN QUESTION

How to qualify the diversity of human societies with regard to human rights? Several analyzes are possible.

A) THE IRREDUCTIBLE DIVERSITY

For some authors of very different traditions, diversity is a fact desired by God or by Nature. It is irreducible by a universality which is only a pipe dream, or even a perversion. The first case is that of european counter-revolutionaries in the 18th century; the second that of Nazi jurists in the 20th century. A more contemporary current believes that human rights are the Trojan horse of the Islamists.

1) EUROPEAN COUNTER-REVOLUTIONARIES

The fire of Enlightments did not burn everywhere and always. Not only european powers leagued against the french Revolution disagree, but too talented counter-revolutionary thinkers. Among these, Joseph de Maistre who wrote in 1797 *Considerations on France*. God is the origin of everything; strictly speaking, man can do nothing.

> "For me, I will never believe in the fruitfulness of nothingness. So he cannot make a constitution, even less a Declaration, a fortiori a Declaration which would be universal."

Man is above all diverse, any attempt at universalization of his rights is just an illusion of Reason:

> "The constitution of 1795, like its elders, is made for man. However, there is no of man in the world. I have seen in my life, French, Italians, Russians, etc. I even know, thanks to Montesquieu that we can be Persian: but as for the man,
> I declare that I have never met him in my life; if it exists, it is without my knowledge (...) A constitution which is made for all nations is not made for any: it is a pure abstraction, a scholastic work made to exercise the mind according to an ideal hypothesis, and that we must address to man, in the imaginary spaces where he lives."

A few years before, in 1790, E. Burke (1729-1797) had condemned the french Revolution in a book which had a great success in Europe: *Reflections on the Revolution of the France*. He wrote there that the french Revolution was based on abstract principles not taking into account historical and cultural particularities: a people have for first duty to preserve its traditions; there can be no universal system. Portalis, the principal editor of the Civil Code, had taken refuge in England during the most tense period of the French Revolution. Codifier, he no less believed in the action of the time (i.e. concrete conditions), saying:

> "Strictly speaking, we don't make no codes. They make itselves with the time."

Counterrevolutionaries also opposed the primacy of the individual, basis of human rights declarations. The individual only exists in relation to authorities superior to him: God, political power, family. We can also cite Jérémy Bentham. He is not a counter-revolutionary; he even welcomed the french Revolution when it started. But he distanced himself from it with the outbreak of violence from 1792. For him, the 1789 Declaration provoked Terror and anarchy in France. He writes that so-called natural rights, even more imprescriptible, are nonsense[1]. In history, the counter-revolutionaries lost. Nevertheless, even detached from its theocentric foundation, the assertion of Joseph de Maistre is to be taken seriously in the beginning of the 21st century. Nazi jurists, in their very specific way, also dreamed of a return to the past.

2) GERMAN AND NAZI JURISTS[2]

Hitler thought that Greeks and Romans were Aryans. He dreamed of a neoclassical architecture for *Germania*, the Berlin which he wanted to build after the victory over the democracies and the USSR, which had become a set of German colonies, following the project of the *Ossteinsatz,* which implied not only the liquidation of the Jews, but also the more progressive one of the Slavs, so as to make room for the German settlers. It is probably right to remember here that if in France we had about twenty *Oradour-sur-Glane*, the Soviet Union counted about five thousand. And among those who carried out the extermination by the *Einsatzgruppen* in the Soviet Union, there are many jurists, including doctors in law. Doctors and lawyers included a particularly large proportion of Nazis.

However, the Nazis, as Johann Chapoutot clearly says, are not Martians. They are part of certain european currents that existed before they came to power in 1933. Raciology was considered a very honorable science throughout Europe. Eugenics was advocated in many North American states, Scandinavia, and Switzerland, democratic countries. Euthanasia bills were introduced in England in 1936. In France, in 1935, Alexis Carrel, Nobel Prize winner in

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1 Cf. Benjamin BOURCIER, Pourquoi l'anarchie ?-Analyse de la critique benthaminienne des droits de l'homme, *Revue d'études benthaminiennes*, 2012.

2 On the question of nazi culture and law, see recent works of french historian Johann CHAPOUTOT. Of course, he is a quite democratic author. See : *La loi du Sang-Penser et agir en nazi*, Paris, Gallimard,2014 ;*La révolution culturelle nazie*, Paris, Gallimard,2017.

medicine in 1912, proposed to create a "*euthanasia establishment provided with appropriate gases*"[3]. The case of the United States needs some developments.

The eugenics movement began after the First World War and set itself the goal of restricting immigration. Its most famous figures are Madison Grant, author of the bestseller: "*The Decline of the Great Race*", and Harry Laughlin, author of a no less well-known work on eugenics. Multiple reviews appeared as *The Journal of heredity.* Madison Grant was close to the *Center for Eugenic Studies* in Washington, devoted to the biological aspects of immigration.

He organized seminars where it was shown, for example, that the fetuses of African-Americans had a smaller skull than those of Whites.

The main idea of eugenics was that Whites born outside the United States, especially the Jews, were less intelligent, which could ultimately make lower the intellectual level of the American nation. Even among African-Americans, associations recommended promoting the birth of the most talented children. Congress therefore passed laws drastically restricting immigration through a quota policy. Eugenics became part of the programes of more than 350 american universities, including Harvard and Berkeley. Between 1915 and 1920, a dozen States passed laws authorizing forced sterilization. Among them, the State of Virginia. The Supreme Court validated the virginian law in the *Carrie Buck* case in 1927: society must prevent procreation of those who are incapable. 6000 forced sterilizations had already been carried out, this number doubled after this decision. 27 of the 48 States passed eugenics laws, which hit the poor, members of minorities, the disabled and the marginalized as a priority. Eugenics persisted, even after the crisis of 29, which proved that even intelligent people could fall into misery. By the late 1930s, more than 30,000 Americans had been forcibly sterilized.

Upon coming to power, the Nazis will claim american legislative precedents, moreover invoked by the advocates of defense during the Nuremberg trial. Hitler had read *The Decline of the Great Race* and congratulated its author. After the discovery of the Holocaust, eugenics disappeared from american collective consciousness. But eugenic laws continued to be applied until the 1970s. By that time, more than 60,000 Americans had been forcibly sterilized. The only staunch opponents of eugenics were the Catholic Church and the Soviet Union. On November 15, 2014, Pope Francis denounced "*false compassion*" which tended to facilitate abortion, provide euthanasia, use human lives as guinea pigs to save others. On October 29, 2019, at the Vatican, representatives of monotheistic religions signed a joint declaration rejecting euthanasia and assisted suicide. As for China, in 2013 it launched a major DNA sequencing program for the gifted. 2.200 individuals with an IQ at least 160 will be sequenced, a program

3 See Antoine LECA, *L'ordre sanitaire national-socialiste-Rémanence,résilience et récurrences au XXI siécle*,LEH Editions, Bordeaux, 2016.

to be carried out by the *Beijing Genomics Institute*, the world's largest DNA sequencing center.

Like eugenics, anti-Semitism was widespread in Europe. Social Darwinism also reigned in the social sciences: that is, the idea that history was dominated by the struggle of the strong against the weak and the necessary elimination of the latter. Idea that Darwin had never formulated to apply it to human societies. As far as the law is concerned, the whole historicist current of the study of law in 19th century Germany, with Savigny, was against the idea of codifying. French law was considered to be abstract. It preferred to inscribe the law in the soul and customs of a people. This is what the nazi jurists will later say, asserting themselves as naturalists and saying, like Himmler, that every German carried the law inside him. But of course, Savigny cannot be confused with nazi jurists. The latter reinterpreted this doctrinal current in the context of unprecedented brutality of anti-semitism. And as soon as they came to power, they boasted of having liquidated the legacy of the French Revolution. Hitler condemns the French Revolution:

> "The French Revolution has formulated wordy theories and grandiloquent proclamations that Jewish intellectualism of past centuries, with its quarrelsome systematism, has transformed into sacred dogma of the revolutionary International."

On April 1, 1933, Doctor Goebbels, in charge of propaganda, announced in a radio speech what constituted in his eyes the greatest victory of the Nazis:

> "We erased the year 1789 from German history".

A training manual for SS police officers explains:

> "Following the french Revolution, civil law gradually crept in all States, which resulted in the legal concept of citizenship becoming completely detached from race. Birth and race no longer weighed in the granting of citizenship: "Everyone who wears a human face, it was said now, are equal".

The french Revolution rose up against Nature, the dogma of Nazi ideology. In 1936 Bruno Richter wrote in an handbook:

> "The National Socialist is jus-naturalist because the German people are a natural living community".

Nazi jurists combine these ideas with anti-semitism. Like the Jews, the french Revolution had the worship of the law. The Civil Code, the fruit of the Revolution, was against customs, while customs, much more than the law, express the soul of a people The Jews are the people of the Law. The Jew is a being of abstraction because he is cut off from Nature. As a result, it creates artificial laws which are the negation of Nature. This is why the Jew is positivist, like Kelsen. He must stick to a law, a code, a written standard. Hence the importance among Jews of exegesis. Jews are the archetypes of formal jurists. Karl Schmitt, a great constitutional author, writes:

> "Jewish law is a polarity between Jewish chaos and Jewish legality, between anarchist nihilism and positivist normativity, between grossly sensual materialism and the most abstract moralism. "

Five years before the obligation to wear the yellow star, Karl Schmitt proposed to confine the works of Jewish intellectuals to specific areas of libraries that would be renamed *Judaica*. Quotes from Jewish authors should mention that they are Jews. The idea of a Jew, for example egalitarianism or universalism, can thus be read and perceived not as a worthy idea, but as the emanation of a racial identity. To universalist discourse, as the french historian of law Antoine Leca points out, he opposes his theory of *Grossraum*, the homogeneous "*big space*", the basis of a new international order governed by "*a prohibition of intervention for powers foreign to this space*".

It's the doctrine of Beijing right now. It was also, before, of Soviet Union, the Brezhnev doctrine known as "*limited sovereignty*". Maybe we can compare it with what Vladimir Putin seems to think about "*the near abroad*", that is to say the former Soviet republics which resumed their independence following the collapse of the Soviet Union.

In contrast, Nazi jurists are therefore jusnaturalists. But for them, Nature is obviously very different from what Saint Thomas Aquinas thought of. Himmler's speeches are self-explanatory:

> "We National Socialists got to work, not without respecting law, because we carry it within us, but without respecting the laws. I immediately decided that if a section of the law got in our way, I would ignore it and that, to accomplish my task in the service of the Führer and the people, I would do what my conscience and popular common sense would dictate to me. Abroad, we naturally speak of a lawless police State. They speak of lawlessness, because what we do does not correspond to what they understand by law, but, in truth, by our work, we lay the foundations of a new right, the right to life of the German people. The fundamental concepts of law must correspond to the blood and the spirit secreted by the body of our race. "

What is origin of law for nazi jurists? Contrary to french ideals, man is not endowed with inalienable rights by birth, that is to say by Nature. Legal ethnology is called to the rescue. Eberhard von Künssberg is a professor of history of law at the University of Heidelberg. In 1936 he wrote a *Legal Ethnology*. Its aim is to find the oldest, most archaic standards, those which are closest to the birth of the German people. For example, since the Germans practiced polygamy, one must question the validity of the monogamous standard, a Judeo-Christian imperative. These ideas are relayed institutionally. Himmler created within the SS Research Center (*Anherbe*) a department for the history of Indo-Germanic-

German law, the activities of which were reflected in numerous articles in the review *Germanien* and in several editorial collections.

In this line, "*popular common sense*" becomes a source of law. In 1940, judge Robert Barth defended a thesis in law in Hamburg on *Popular common sense in criminal law*. Law is not the product of Reason, but of instinct. The same common sense shows that in nature equality does not exist and that its essence is the difference, which one should especially not try to reduce, in the name of the hierarchy between the races. Walter Buch, a lawyer, writes:

> "The essence, not only of men, but also of all things, is the difference. But look around! There is no identity, no equality. Nature does not want it. And brotherhood, therefore! The buzzard will never share its nest with the bat. Likewise, the Eskimo of the frozen expanses of the Arctic will have no brotherhood for the Negro of Somalia, who feels at home in the hot tropical sun. They are all obliged to live according to the laws of their life, of their race".

France is soon occupied by the Germans. On November 28, 1940, Alfred Rosenberg gave a speech in the gallery of the Palais-Bourbon, in the Chamber of Deputies:

> "The emancipation of the Jews was followed, a hundred years later, by that of the Negroes. The declaration of a french minister that there would be no difference between Whites and Blacks and that France was not a nation of forty, but one hundred million inhabitants, was a logical consequence idea of 1789 and a racial capitulation of the most terrible kind, in accordance with the infamous slogan Liberty, Equality, Fraternity".

In the same line, the Nazi jurists are hostile to the classic Roman law which put on an equal footing populations of different races. Hostility to Roman law was not born with the Nazis: it was rooted in Germany in a long struggle between Germanists and Romanists. But this hostility is well situated in the original phase of the Nazi party. In 1920, article 19 of the program of the National Socialist Party stipulates:

> "We demand the substitution of a german law of the community for the Roman law, united with a materialist vision of the world. Roman law is individualistic, Germain law community".

In fact, Roman law is Jewish law. More precisely, it has become a Jewish right. Because we must distinguish two kinds of Roman law. The original Roman law, in fact very little known, truly Aryan (it is that of Nordic immigrant populations in the Mediterranean), and the later Roman law, corrupted by semitic authors: Ulpian and Papinian, two North African Levantines, who influenced Roman law by oriental ideas; Salvius Julien, an African, Julius Paulus, a Semite. Alfred Rosenberg calls them:

> "Imperial doctors foreign to the people".

In 212 AD, the emperor Caracalla, a "*racial bastard*" "put the finishing touches on this decadence of Roman law by granting the right of citizenship to all the inhabitants of the Empire, in fact, a conglomerate of races. The problem is that this mysterious original Roman law remains very hypothetical. As for Germanic law, it is extremely little known, and to be honest, inconsistent. It is necessary to quote here Houston Stewart Chamberlain, however very favorable to the Nazi, son-in-law of Wagner, and very esteemed by the Nazis:

> "Roman law is as incomparable and inimitable as Greek art. This ridiculous teutomania will not change anything. We are told jokes about "German law" which we would have been deprived of by the introduction of Roman law; there has never been "German law", only a chaos of crude and contradictory rights, one for each people."

In conclusion, Nazi law, if it has fortunately disappeared, interests us as a counter model. Faced with the universal observation of the difference which they share with other authors who are not at all Nazi, jurists firmly anchor it in Nature and therefore consider it as irreducible, since one must never contradict the laws of Nature. According to Hitler, who extends a long tradition opened by Rudolf Virchow (1821-1902), one must "*study the laws of Nature in order not to act against it, otherwise, it would be rebelling against the Sky*"[4]. But the deadly consequences of this attitude come from the fact that Nazi jurists combine them with anti-semitism and a racial ideology that will cost the lives of millions of Europeans. They are found today in the ideas of extreme-right parties which are reappearing in Europe, especially in countries formerly subject to Soviet power. Let's not forget Jean-Paul Sartre's words about France:

> "What gossip: freedom, equality, fraternity, love, honor, country, what do I know?" That did not prevent us at the same time from holding racist speeches, dirty negro, dirty Jew, dirty rat".[5]

At the start of the 21st century, we have forgotten the hostility that the french people at the end of the 19th manifested in a similar fashion to the Italians. We now know that Nature is not what the Nazis believed. The aptitude for mutual aid and cooperation would exist in both human and non-human species (including plants), with a biological substrate[6]. Which is in social terms the theory of the anthropologist Marcel Mauss postulating that all societies are governed by a triple obligation: give, receive, give back[7] .

4 See H.PICKER, *Hitlerstischgespräche im führenhauptquartier*, notes of 1st december 1941, french translation Presses de la cité, 1969, p.166.

5 Jean-Paul SARTRE, Préface à Frantz Fanon, *Les Damnés de la terre*, « Cahiers libres », Maspero, Paris, 1961

6 See Pablo SERVIGNE andGauthier CHAPELLE, *L'entraide. L'autre loi de la jungle*, Les liens qui libèrent, 2019.See too : Matthieu RICARD, *Plaidoyer pour l'altruisme-La force de la bienveillance*, Paris, NIL éditions, 2013.

7 Joël CANDAU, Pourquoi coopérer, Terrain, 2012,4-25.

Joël Candau, from the Laboratory of Anthropology and Sociology of the University of Nice affirms:

> "Our species is the only one where we observe strong cooperation, regular, diverse, risky, extensive and implying sometimes costly sanctions between individuals without kinship relationships"[8].

These ideas were not unknown in the 19th century, we find them notably in the pen of Pierre Kropotkine (1842-1921), activist and anarchist theorist, thinker of self-management. He considered that mutual assistance was the general rule within each species. Another type of contemporary opposition to human rights analyzes them as a secular religion which would be hijacked by the Islamists and would contribute to the sinking of Europe.

3) HUMAN RIGHTS TODAY: A SECULAR RELIGION?

Sometimes unknowingly inspired by the christian ideal of love the other, human rights would be based on the religion of the identical, the negation of differences, and the prohibition in positive law of discrimination. This transcription into positive law took place from the second half of the previous century. The year 1950 saw the entry into force of the European convention of human rights. In France, the new Criminal Code of 1994 covers a range of practices as criminal offenses discriminatory classified as "*attacks on the dignity of the person*". The one who offers the public some advantage should not exclude anyone for reason of sex, race or religion.

For the french historian of law Jean-Louis Harouel[9], this transcript presents dangers (the cover of his latest work is illustrated by a representation of the European Court of Human Rights ...reversed). On the one hand, it makes a dangerous transition from morality to right: christian love has always been a matter of individual morality, not a legal imperative. Tending the other cheek is certainly a respectable moral imperative. He did not prevent the canonists from developing the just war theories. And faced with Hitler, was it enough to turn the other cheek? Still in the demand of a certain realism, is it reasonable to believe in the interchangeability of cultures to better ensure brotherhood human?

These general objections would be reinforced by the dangers that Islamism presents.

Tolerance towards Muslim identity signs, propagators of values contrary to humanism, was allowed by the legal imperatives of non-discrimination. Which reminds us of a debate already present during the French Revolution.

8 See Alain CAILLE, *Extension du domaine du don*, Actes Sud, Arles, 2019.

9 See Jean-Louis HAROUEL, *Les droits de l'homme contre le peuple*, Paris, Desclée de brouwers, 2016

We remember the apostrophe of Saint-Just: "No freedom for the enemies of freedom". We will add that for proponents of radical Islam, there is no separation between the political and the religious, which is precisely a guarantee of freedom, which was the proper of Christianity, even if history has shown that there may also have been Christian fanatics.

On all these questions, the debate remains open. It is certain that the world today is no longer that of 1789. When they did not know each other, different cultures could ignore each other without too much of difficulties. Likewise, migratory phenomena, such as those unfairly called "*invasions*" which marked the end of the Roman Empire spread out over centuries, not years. The opening of spaces and the acceleration of history pose formidable problems to our contemporaries. It is true that the need for a deconstruction of Islam is obvious: Islam does not can be reduced to Salafists, no more than Sunnists or Shiites. But one doctrine may very well prevail when initially it is not shared by the majority. History is full of examples of this.

In addition, it is certain that measures inspired by human rights can be used backwards by opponents of these rights. But wouldn't it be even reverse measures? On the other hand, human rights are not reductible to the negation of differences. All international law of minorities and indigenous peoples is included in the overall framework of human rights. And this international law is well marked by the need respect for cultural particularities, as we will see in the second part of this communication.

This respect for cultural particularities and their reconciliation with human rights has been at the center of a debate between anthropologists which has evolved considerably from the middle of the last century to the present day.

B) THE WELL-TEMPERED DIVERSITY OF ANTHROPOLOGISTS[10]

Several options were possible during the times, from universalism to temperate relativism.

1) UNIVERSALISTS

A brief survey of the history of Western political ideas shows that philosophers, obviously a very small part of the population, supported the idea of universalism by bringing it closer to that of the existence of a natural right. But what kind is it? For Plato, there is an unchanging natural order, in morals as well as in mathematics and aesthetics, which can be discerned at all times and in all cultures. But in practice, travelers and shopkeepers on the contrary note the

10 See Polly VIZARD, Antecedents of the idea of human rights- A Survey of Perspectives, *Human Development Report* , 2000, Background Paper, et: Ellen MESSER, Anthropology and human rights, *Annual Review of Anthropology*, 1993, 22, 221-249; Mark GOODALE, Introduction to Anthropology and human rights A new Key, *American Anthropologist*, March 2006.

diversity of customs. Herodotus notes that of the differences between funeral rites and writes:

> "If men were allowed to choose among all the customs of the world those which seemed best to them, they would study them and then conclude that they preferred their own, being convinced of their superiority over others".

Distinguishing himself from Plato, Aristotle, who thinks as a sociologist, writes that natural law does not come from an immutable order, but from Reason's ability to analyze certain facts concerning human nature. His ideas greatly influenced Roman and medieval thought. For example, Saint Thomas Aquinas writes:

> "What is contrary to Reason is contrary to human nature, and vice versa".

In the seventeenth century, Hugo Grotius, troubled by the Wars of Religion, wrote that to govern relations between States they must be based on the principles of natural law. This reasoning is valid even if God did not exist or if it was supposed that he was not interested in the affairs of men. This would imply that men and States are still behaving in a reasonable manner. But Raymond Aron wrote correctly:

See too, of Norbert ROULAND : Anthropological Foundations of Human Rights, *Revista eletronica do Mestrado em direito da UFAL*, V.6, N1,(2015)-*Doutrina Estrangeira* ; le Chapitre II (*Les droits de l'homme sont-ils une illusion* ?) de *Retour du Bresil-Impresssions d'un juriste anthropologue français*, Paris L'Harmattan, 2018,71-106 ; Les droits de l'Homme sont –ils mortels ?, *Droit et Cultures*,74 ,2017 /2,199-217 ;Morale et diversité culturelle*, Revue de la Recerche juridique*,2016-4, XLI-164,1433-1497.

Other works are very useful to read : American Anthropological Association (1947). "*Statement on Human Rights*." *American Anthropologist* 49(4/1)(Oct- Dec 1947): 539-543. AN NAIM, A. A., Ed. (1992). Human *Rights in Cross-Cultural Perspectives: A Quest for Consensus*. Philadelphia, University of Pennsylvania. Donnelly, J. (1989). *Universal Human Rights in Theory and Practice*. Ithaca, Cornell University Press. DONNELLY J. (1999). Human Rights and Asian Values: A Defense of "Western" Universalism. The East Asian Challenge for Human Rights. In: J. R. Bauer and D. A. Bell. Cambridge, Cambridge University Press. GANGLIANG D. , SONG GANG (1995). Relating Human Rights to Chinese Culture: The Four paths of the Confucian Analects and the Four Principles of a New Theory of Benevolence. Human Rights and Chinese Values: Legal,in: *Philosophical and Political Perspectives*. M. C. Davis. Oxford, Oxford University Press. HAOCHENG,J. (1995). *On Human Rights and Their Guarentee by Law. Human Rights and Chinese Values: Legal, Philosophical and Political Perspectives*. M. C. Davis. Oxford, Oxford University Press. POLLIS, A. (1996). "Cultural Relativism Revisited: Through a State Prism." Human Rights Quarterly 18: 316-344. POLLIS, A. and P. SCHWAB (1979). Human Rights: A Western Construct with Limited Applicability. Human Rights, in:*Cultural and Ideological Perspectives*. A. POLLIS, and SCWAB, P. ,New York, Praeger. SEN, A. K. (1997). "Human Rights and Asian Values." *The New Republic* ,33 July 14 and 21, 1997. SEN, A. K. (1999b). Culture and Human Rights. Development as Freedom,. Oxford, Oxford University Press. SILBERBAUER, G. (1993). *Ethics in Small-Scale Societies. A Companion to Ethics*, in: P. SINGER. Oxford, Blackwell. First Published 1991. STEINER, H. J. and P. ALSTON, Eds. (1996). *International Human Rights in Context: Law, Politics, Morals. Oxford,* Oxford University Press. WILSON, Richard, ed. 1997 *Human Rights, Culture and Context: Anthropological Approaches*. London: Pluto. WILSON, Richard ASHBY, and Jon P. MITCHELL, eds. 2003 *Human Rights in Global Perspective: Anthropological Studies of Rights, Claims, and Entitlements*. London: Routledge.

> "Those who believe that States act only according to their interests and not according to passions are ignorant people."

The european shipwreck of the Great War and Nazism had passed through there. In the 18th century, the French Declaration of Human Rights of 1789 affirmed that all men were equal before the law. But at that time, did we have an exact idea of the diversity of cultures in the world? ... probably not. For a few short years, slavery was abolished in the French colonies.

Universalists therefore believe that it is possible to define neutral and impartial standards with a universal character.

It is otherwise with relativists among whom, to varying degrees, anthropologists can be placed.

2) RELATIVISTS

In 1952 Unesco published a series of texts devoted to the problems of racism in the world. Lévi-Strauss's contribution introduced to a new reflection on western culture. It surprised many readers. Yet the idea of Claude Lévi-Strauss criticizing universalist conceptions of human rights was widely shared among anthropologists of that time. Lévi-Strauss stated in particular:

> "The great declarations of human rights also have this strength and this weakness of stating an ideal too often forgotten that man does not realize his nature in an abstract humanity, but in traditional cultures where the most revolutionary changes leave whole swathes behind and explain themselves according to a situation strictly defined in time and space. Caught between the double temptation to condemn experiences that affect him emotionally, and to deny differences that he does not understand intellectually, modern man has engaged in a hundred philosophical and sociological speculations to establish vain compromises between these contradictory poles , and give an account of the diversity of cultures while seeking to remove what it retains for him scandalous and shocking"[11].

A few years earlier, in 1947, in the context of the preparation of the Universal Declaration of Human Rights, the Executive Committee of the American Association of Anthropologists said:

> "Respect for the difference in cultures is validated by the scientific fact that no method of qualitative evaluation of cultures has been found ... standards and values are relative to the culture to which they belong, so that all attempts to formulate postulates arising from the beliefs and moral codes of a culture cannot contribute to the development of a declaration of human rights applicable to humanity as a whole. Human rights in the 20th century cannot be limited to the standards of any existing culture, or dictated by the aspirations of a single people."

11 Claude Lévi-Strauss, *Race et Histoire*, Paris, Denoël, réédition 19 87,23.

Relativist authors take an empirical approach, no longer taking into account only Reason, but also emotions, subjective choices, historical and cultural context. They are of very diverse tendencies. There are Marxists, but also communitarians. And many anthropologists. They therefore insist on the diversity of cultures, the absence or presence of the "*rights*" categories and "*obligations*", the fact that the individual as such only has an existence subordinated to his belonging to his kinship and village community networks.

For many traditional societies, such as the Inuit, the Hopi and Navajo Indians, etc. ... humanity is confined to their own community. Beyond that, they are non-humans. Here too it is necessary to quote Claude Lévi-Strauss:

> "For vast fractions of the human race and for tens of millennia, this notion [of humanity] seems to be completely absent. Humanity ceases at the borders of the tribe, the linguistic group, sometimes even the village; so much so that a large number of so-called primitive populations designate themselves by a name which signifies "men" (or sometimes - we will say with more discretion - the "good", the "excellent", the "complete") , thus implying that the other tribes, groups or villages do not participate in the virtues - or even of human nature, but are at most composed of "bad" of "wicked", of "earth monkeys" or of " chicken eggs ". We often go so far as to deprive the stranger of this last degree of reality by making it a "ghost" or an "appearance."[12]

In our Antiquity, the individual was above all defined by his belonging to a city much more than to the human race in general. Anthropologists also point out that rules and customs are inseparable from the groups that express them and cannot be evaluated from the outside, and that Reason is not universal.

But in our time, we have to talk more about a tempered relativism.

3) TEMPERATE RELATIVISTS

It is observed, especially in our era of globalization, that cultures are not static: they evolve. They are also not monolithic. Except in the increasingly rare hunter-gatherer societies, social divisions exist. When we say that such a society has such values, we should also seek to know which dominant group within this society expresses these values. In addition, recourse to tradition is often a process of legitimization for these dominant groups: a certain number of traditions are recent inventions and are not necessarily shared by everyone (distinctions between men / women, adults / young people, etc.).

Some anthropologists argue that the fundamental question is less the ontological definition of human rights than the way of understanding how this idea is inscribed and modified in different cultural contexts. Others point out that cultures cannot be judged as a whole: elements such as human sacrifice, female circumcision, anthropophagy, slavery are today to be condemned. But

12 *Ibid.* ,21.

that does not mean that all the values of these societies must be too condemned. If that were the case, all Roman law would have to be thrown out, since much of it is devoted to the legal problems of slavery. Likewise, if the Aztecs made countless human sacrifices, this is not enough to condemn all their culture; Bartolomé de Las Casas presented them as the expression of great piety.

That said, it is true that the old idea of natural law is increasingly challenged. Modern natural law would rather come from intercultural comparisons. In 1995 Malaysian human rights specialist Norani Othman wrote:

> "Is Western discourse the only one who can formulate such conceptions of human rights? Or can, in a specific and autonomous manner, the assertion of human rights be generated by Western cultures, philosophical idioms and religious conceptions that are also non-Western?"

In 1948 Herskovits already claimed that common denominators could be derived from variable data. In most major religions, there is the idea that everyone should treat others the way they would like them to be treated. This is what some people call it the *Golden Rule*.

I don't have place here to systematically study all these traditions. I would just like to take the example of what is known today as *Asian values*.

4) ORIENTAL EQUIVALENTS OF HUMAN RIGHTS

In 1947, Unesco, still in the context of the preparation of the Universal Declaration of Human Rights, had taken opinions of thinkers from different cultures. Chung-Sho Lo, Professor of Philosophy at the University of West China, noted that it was difficult to find the chinese equivalent of the term *right*. But that did not mean that human rights were incomprehensible to the Chinese. It has long been believed that criticism of tyrants and the fight against oppression were legitimate.

Following a mission to China some 20 years ago, I wrote an article describing all the debates between chinese academics of this time on the question of human rights[13]. Some were very close to western conceptions. Professor XU BING, of the Academy of Social Sciences, whose research has been published in the prestigious review *Studies in Law*:

> "The flag of human rights, throughout history, has led humanity from barbarism to civilization, from a lower degree of civilization to a higher degree, from autocracy to democracy, from personal government to that of law".

He recognizes that even if human rights were first proclaimed by the bourgeoisie, this historical fact is not enough to disqualify their universal character, transcending the division into social classes. These rights are those

13 See N.ROULAND, La doctrine juridique chinoise et les droits de l'homme, *Revue universelle des droits de l'homme*, 30 avril 1998, volume 10, numéros 1-2,pp. 1-27.

which every man has, simply because he is a man. In addition, Professor XU BING is one of the rare authors to frankly address the question of the gap in China between the constitutionalization of human rights and their effectiveness:

> "In any country, whatever the level of development of its government and that of its legal system, it is inevitable that violations of human rights may occasionally occur: otherwise there would be no need to debate over these rights. For historical reasons, our people are very unfamiliar with human rights ideas."

At preparatory meetings for the 1993 World Conference on Human Rights in Vienna, Asian countries such as China, Malaysia and Singapore support the idea that certain Asian cultural particularities could constitute exceptions to the application of human rights. However, some Chinese authors are of a different opinion. In the past, let us quote the words of HSUN TZU, a Chinese Confucianist thinker of the third century before our era:

> "What makes life in society possible? The rights of the individual. What makes these rights possible? Justice. Consequently, when rights and justice are in harmony, harmony is assured (…) the consequence of an individual life without cooperation with others is poverty; the consequence of a life in society without recognition of individual rights is conflict. Poverty breeds anxiety, conflict misfortune. In order to remove anxiety and conflict, nothing is more effective than the institution of a life in society based on the clear recognition of the rights of individuals. "[14]

In 1995, Chinese human rights writers such as DU GAGJIANQ and SONGGANG argued that the foundations of a modern chinese human rights theory can be found in Confucius. Obviously, he was not a democrat. On the contrary, it is for a strictly hierarchical society, hierarchy being the condition of harmony. However, he has repeatedly said that we must revolt against oppressive powers. We also find in him the almost universal principle according to which one should not do to others what one would not want them to do to you.

Also in 1995, YU HAOCHENG wrote that one must distinguish Marx's criticism of human rights, that is to say the way in which they are applied, from their intrinsic value (Marx was for the freedom of the press) and that we should not fall into the simplicity of saying that human rights are only an invention of the western bourgeoisie inapplicable to China. But in accordance with Marxist doctrine, he writes that human rights can only be truly realized when basic needs are met, which is not untrue, moreover.

In this too rapid panorama of oriental ideas, what about Hinduism? Hindu thought is organized around *dharma*, a principle which confers cohesion with all that exists. It has a multiplicity of meanings: in that of law, it unifies human relationships. The individual is not first, but is one of the elements in

14 HSUN TZU, *The Way of Kings*.

the complex chain of reality. Each living organism has its place in an ascending hierarchy: plants, insects, animals, oviparous, viviparous, human beings. The classifying principle plays to the maximum for the latter, in the form of the caste system.

Humanity does not have a nature that would make it specifically different from other life forms. It is simply more advanced.

But the distinction between the degrees of evolution transcends the primordial separation instituted by western thought between humanity and the rest of the world. There is more distance between high and low castes than between the lowest castes and animals. Birth assigns each being their place in this hierarchy. Such a vision may seem unbearable to us. But it becomes more understandable if we place it in its essential dimension. The caste system is inseparable from the belief in reincarnation: each individual is reborn according to his merits accumulated in the previous life. In this system, the ideas of legal equality, individual rights and universals are obviously absent. Complementarity between castes plays the same role as with us legal equality: the mechanism of reincarnation plays the role of a balance between rights and duties. More the more you have done your duties, the more rights you have. In addition, the cosmic vision of man separates it less from nature than in Western thought.

Ultimately, how can we summarize the attitude of anthropologists towards human rights? First, they have remained on the sidelines of the debate on their formulation at the international level for reasons which are sometimes contradictory. Their favor for cultural relativism has backfired, to the extent that many non-European leaders have used it to justify what were only gross violations of human rights. The instrumentalization of human rights by the States is, in my opinion, one of the biggest pitfalls today. They have been invoked to justify several invasions in the Middle East, when it is not mentioned in the case of Tibet or North Korea, for obvious reasons: the military power of China.

Some anthropologists, one can think of Lévi-Strauss who, on this point, had clearly separated from his students in the Laboratory of Social Anthropology, refused to intervene in these debates by invoking the rigor and the neutrality of scientific discourse. Conversely, others who had invested a great deal in the defense of the micro-societies which constituted their fields of study considered general discourses on human rights to be too abstract and distant. Finally, some were afraid of losing access to their land for political reasons, the decolonized states not supporting their possible interventions. That said, the attitude of anthropologists has changed considerably since their condemnation in the mid-twentieth century of human rights in the name of cultural relativism.

In North America, a series of publications which intervened from the 1980s marked a complete turning point compared to the relativistic positions taken in the mid-twentieth century.

Beginning in the mid-1990s, anthropologists specializing in various regions of the world studied how, in practice, what we call human rights can be identified in various societies. Their idea is to build a large database that can be used for cross-cultural comparisons. A key document in 1999 is the *Declaration on Anthropology and Human Rights* made by the Human Rights Committee of the American Association of Anthropologists, which took the opposite view from the 1947 declaration.

Anthropologists are now denouncing the instrumentalization of human rights by states. They study the conditions in which practices such as infanticide, female circumcision, and the inferiorization of women have occurred, so as to diminish, if not disappear, these practices. They are also studying how to prevent inter-ethnic conflicts and the many human rights violations they cause. They also intervene in the definition of cultural rights and try to ensure that indigenous peoples can independently choose their own mode of development.

We can therefore legitimately speak today of a conversion of anthropologists to human rights.

As far as the current trend towards cross-cultural comparisons is concerned, I am in favor of it.

Provided, however, that the limits of the method are well understood.

In practically all traditions and religions one can find citations legitimizing reverse practices. Some sourates in the Koran incite violence, others in tolerance. Muslims and other monotheists have been able to coexist peacefully at times and in some places, in others not.

Not need to mention the relationship between Hindus and Muslims: Gandhi's nonviolence did not teach… Violence and love of neighbor are present in the Bible. One can even find violence in certain Buddhists, for example in Burma. Religions may fall from Heaven, but they are embodied in societies that are specific and evolve, each at their own pace.

This means saying once more than more than the texts, what matters is their interpretation, *hic et nunc*.

PART II: PROGRESS: HUMAN RIGHTS SEIZED BY THE JURISTS

Long time the universal Declaration of 1948, several local Declarations appeared. And international courts were too created, from the end of the second world War.

A) THE REGIONALIZATION OF HUMAN RIGHTS[15]

Such an expression may seem an oxymoron. How can universal human rights be regionalized? Wouldn't the proclamation of a certain number of rights

15 See Danielle LOCHAK, *Les droits de l'homme* ,Paris, La Découverte, 2009,54-56.

by the Universal Declaration of Human Rights in 1948 not be enough? It is in fact the legal formulation of the intercultural comparisons recommended by anthropologists. It is an attempt to reconcile the universality of human rights with the preservation of cultural identities, which is also recognized as a fundamental right by several international instruments. As the French jurist Danielle Lochak writes:

> "We must accept the idea that the perception of human rights is conditioned by history and by various social, economic or political factors, so that the universality of rights risks remaining theoretical and abstract if it does not take this diversity into account (...) We must therefore think of a mode of articulation between the universal and the particular which, without compromising on the existence of a foundation of fundamental principles, a sort of "common law" of humanity, does not exclude that these principles with a universal vocation are implemented in a variable way, while respecting plural cultural identities ".

It was on this attempt that Claude Lévi-Strauss (he did not trust jurists, keeping a bad memory of his studies of law, as he writes in *Tristes Tropiques*) as we have seen, expressed a certain number of doubts in *Race and History*, quoted before. Let us cite some examples of regionalization. Even before the vote on the Universal Declaration in 1948, the member States of the Organization of American States adopted the American Declaration of the Rights and Duties of Man in 1969. It brings together 24 States out of 35, but does not include the North America, since neither Canada nor the United States is a member. The African Charter on Human and Peoples' Rights was adopted in 1980 under the aegis of the Organization of African Unity. A protocol that entered into force in 2004 created an African Court on Human and Peoples' Rights, but acceptance of its jurisdiction by states remains optional. The Arab and Islamic world has known several declarations of human rights.

In 1981 the Islamic Council for Europe proclaimed in Paris on Unesco premises an Universal Islamic Declaration of Human Rights, all of whose articles are based on verses from the Koran and traditions Sunni prophets (*hadith* are not taken into account). Some proclaimed rights are identical to those of the Universal Declaration. But essential differences remain. For example, the assertion of character Relative of Reason:

> "Rationality in itself, without the light of revelation of God, neither can nor constitute an infallible guide in the affairs of humanity, nor bring spiritual nourishment to human life."

Other difference, the proclamation of rights must be accompanied by that of duties, especially towards God:

> "At the end of our ancestral Alliance with God, our duties and obligations take precedence over our rights."

We can also cite, in 1994, the Arab Charter on Human Rights. Here we must also note its divergences from the Universal Declaration. Human rights are based on the divine will, but above all they are asserted only within the limits of the principles defined by Muslim law.

Is this kind of divergence irreducible? The future will tell us. Let's not forget that at the beginning of the previous century, a muslim State, Turkey, impressively secularized its law, even going so far as to ban women from wearing the veil. And after decolonization, Arab leaders like Bourguiba in Tunisia and Nasser in Egypt had taken similar steps. And even in Iran, under the Shah's regime, reforms had been taken to diminish the influence of the clergy and improve the status of women in the direction of greater equality with men. In Afghanistan, under the communist regime of the allies of the Soviet Union, we observe the same kind of development. We always come back to the same observation: it is the interpretation of canonical texts that allows them to evolve, and that in all civilizations.

It remains the specific case of indigenous peoples. They are concerned by the 2007 United Nations Declaration on the Rights of Indigenous Peoples, which represent more than 300 million people worldwide, subject to a wide variety of legal statuses. It is therefore not a text with a universal vocation in the strict sense, but it nevertheless concerns all these peoples, whose status, as we have seen, has become a major concern of anthropologists. It contains statements very similar to international instruments and criminal case law. It affirms that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different. It condemns all doctrines invoking the superiority of peoples or individuals based on differences of racial, religious, ethnic or cultural order. He claims that they are racist, scientifically false, legally worthless, morally and socially unjust.

Article 7 specifies that indigenous peoples have the right to life, physical and mental integrity, liberty and security of the person. Genocide or other acts of violence cannot be committed against them, including the forcible transfer of indigenous children from one group to another. Remember that until the 1960s, Aboriginal children in Canada were taken from their families and placed in orphanages. Article 8 specifies that indigenous people, peoples or individuals, have the right not to be subjected to forced assimilation or the destruction of their culture. Article 11 adds that they have the right to observe and revive their cultural traditions and customs. This article is important because it confirms the observations of anthropologists: customs and traditions are not monolithic blocks, they can evolve over time. Article 46 specifies that the rights enumerated in the Declaration must be consistent with human rights and fundamental freedoms.

We can deduce that certain customs cannot be admitted, even justified by traditions or respect for the right to be different. For example, human sacrifices, excision, anthropophagy, domestic violence, infanticide of little girls, etc. Traditions are revisited with one of the ideas of modernity, especially of Western origin, which are therefore not all bad. The notion of cultural exception therefore has its limits. Texts are one thing, but what counts above all is the way in which they are applied or not and punishable. From this point of view, indisputable progresses have been made since the end of the previous century.

We must therefore study international criminal case law, and also the specific case of french law. We will see a lot of overlap, which is a good sign.

B) THE COURTS DECISIONS ABOUT CRIME AGAINST HUMANITY[16]

Since the end of the 20th century, we have witnessed the international repression of certain crimes. Due to their nature, they affect the whole world; on the other hand, in the absence of this type of repression, they would risk going unpunished. The list of these crimes, which may vary depending on the text, always includes at least genocide, crimes against humanity and war crimes.

1) THE PENAL DECISIONS OF INTERNATIONAL COURTS

> "Litigation in international criminal case law concerns human rights insofar as it includes crimes against humanity, such as assassination, extermination, enslavement, deportation and any other inhuman act committed against all civilians, before or during the war, or persecution for political, racial or religious reasons, whether or not these acts or persecutions constituted a violation of the internal law of the country where they were perpetrated."

This definition, the first legal definition of crimes against humanity, was formulated within the framework of the statutes of the international military tribunals of Nuremberg and Tokyo (the declaration of Moscow of October 30, 1943 distinguished between the criminals whose exactions had been committed on a given territory, which was intended to be tried by the courts of these same territories after their release, and the major criminals whose crimes were without precise location, who would be punished by virtue of a decision taken by the Allied governments). However, these crimes against humanity had to be linked to crimes against peace and war crimes. Those responsible could be individuals, but also organizations (the SS, the Gestapo).

It was not until the end of the 20th century that international criminal jurisdictions were established as an extension of the courts of Nuremberg and Tokyo, the first during the tragic events in Yugoslavia and Rwanda, which gave rise to numerous abuses. On February 22, 1993, at the request of France, Italy

16 See Didier REBUT, *Droit pénal international*, Paris, Dalloz, 2014.

and Sweden, the UN Security Council unanimously voted a resolution deciding the creation of an International Criminal Tribunal to try the presumed persons responsible for a serious violation of international humanitarian law committed on the territory of the former Yugoslavia since 1991. Contrary to the statute of the future International Criminal Court, the jurisdiction of this court was not linked to its recognition by States, since the measures taken by the Security Council are binding on the member States of the United Nations. It should be noted that the international context lent itself to it, since the USSR having disappeared, the Cold War had ended.

With regard to Rwanda, the Security Council adopted a resolution on June 8, 1994, in which it expressly described the acts committed in Rwanda as genocide. Resolution 955 of November 8, 1994, at the request of the new Rwandan government, established the International Criminal Tribunal for Rwanda. The jurisdiction of these international criminal courts is not subsidiary: it takes precedence over that of national courts. They are competent for genocides.

This means acts committed against one or more members of a national, ethnic, racial or religious group. Either the murders, the serious attacks on physical or mental integrity, the intentional submission to living conditions which should lead to the total or partial physical destruction of the group, measures aimed at preventing births or the forced transfer of children of one group to another group.

The national group is understood as a group of people considered to share a legal bond based on a common citizenship joined to a reciprocity of rights and duties. Ethnic group, such as one whose members share a common language or culture. Racial group, like that based on physical and hereditary traits, often identified with a geographic region, regardless of linguistic, cultural, national or religious factors. Religious groups, such as those whose members share the same religion, denomination or practices of worship.

The notion of serious impairment of physical or mental integrity has been characterized. For example: acts of torture, whether physical or mental, inhuman or degrading treatment, rape, sexual violence, persecution. The intentional element is decisive because it has been defined as the main constituent element of the offense. Genocide involves the physical destruction of a group, and therefore does not apply to acts of destruction of historical, religious or cultural heritage. With regard to crimes against humanity, the Tribunal for the former Yugoslavia has formulated a new definition, taken up by the tribunal for Rwanda. These include assassination, extermination, enslavement, expulsion, imprisonment, torture, rape, racial and religious persecution and other inhumane acts. In other words, it adds to the definitions of the Nuremberg and Tokyo courts imprisonment, torture and rape. In the category of inhumane acts we find for example a slow and atrocious death inflicted on the victims, or the fact of forcing them to dig their own grave.

These courts have adopted a strict conception of the civilian population, victim of crimes against humanity, since they limit it to civilians, even excluding combatants who are out of action. This position departs from the french conception, which extends the qualification of crime against humanity to acts committed against combatants in time of war. It was taken after a first jurisprudence which had expressly adopted in 1997 the solution of the Court of Cassation.

As far as sentences are concerned, imprisonment is the only punishment incurred, which distinguishes these courts from those of Nuremberg or Tokyo, which have pronounced death sentences. This difference is of course explained by the current retreat of the death penalty in State legislations. The prison sentence is imposed in a State designated by the court from the list of States which have informed the Security Council that they are prepared to receive convicted prisoners.

After these first two experiences, the member States of the UN have created other types of courts which have a dual nature, international and national. They retain national characteristics in their operation, in order to make their solutions more acceptable by the parties involved. We are talking about internationalized criminal jurisdictions, namely the Special Court for Sierra Leone and the extraordinary chambers in the Cambodian courts. We can also mention the jurisdictions set up in Timor-Leste, Kosovo and Bosnia-Herzegovina: their mission of repressing international crimes is incidental, insofar as it is above all a question of rehabilitating internal justices which have become non-existent as a result of conflicts. Unlike the courts for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone was not established by a resolution of the Security Council and its jurisdiction is therefore limited to the government of Sierra Leone only. It ceased operations in October 2009. Its jurisdiction included crimes against humanity, defined very closely to that used by the Courts in Rwanda and the former Yugoslavia.

In 1997, Cambodgia asked the United Nations to help it bring to justice those responsible for the genocide and crimes against humanity committed during the period of government of the Red Khmer, from 1975 to 1979. The solution of the The creation of a jurisdiction comparable to that of the Tribunals for the former Yugoslavia and Rwanda was rejected by the government of Cambodia, on the grounds that the need for peace and national reconciliation implied a judgment in Cambodia by Cambodian courts. In November 2000, a compromise was reached, providing for the integration into the Cambodian judicial system of extraordinary chambers of national and international composition, charged with trying crimes committed by the Red Khmers. These extraordinary chambers were created by a Cambodgian law of 2004.They include international judges, but they remain a minority compared to Cambodian judges. The jurisdiction of these chambers includes homicide, torture, religious persecution, as defined in the Cambodgian Criminal Code. It also includes genocide and crimes against humanity. The definition of the crime of genocide is similar to that of the statutes of the Tribunals for the former Yugoslavia and Rwanda. The definition of crimes against humanity is also almost identical to that of the International Special Tribunals. It includes the destruction of cultural property during the armed conflict. The penalties are imprisonment, from five years to life imprisonment.

The case of Afghanistan is extremely interesting[17]. After the departure of the Taliban at the end of 2001, the problem arose of the suppression of crimes against humanity committed in this country. Two types of solutions were possible. Either it was considered that this repression was essential within the framework of the restoration of peace; or one think that the priority objective was the fight against terrorism, which was, moreover, the mandate of the United Nations justifying the intervention of the coalition, obviously dominated by the United States. Historically, the Afghan system has always been dual. Sharia law applied in Kabul and the main cities; in the countryside it was a customary system very autonomous from Kabul.

Some authors have thought that it would be possible to set up jurisdictions that could integrate traditional conflict resolution mechanisms at the village level. They wished to combine international human rights law with cultural traditions. This without illusion that there could be fundamental incompatibilities between these traditions and human rights, in relation to the rights of women and certain fundamental human rights. The problem was the bringing into play, which never took place, of the responsibility of the warlords, the mujahideen, who had been nicknamed in the West "*freedom fighters*". However, they had committed crimes against humanity. But the UN has made them "*partners for peace*." The main aim therefore remained the suppression of terrorism, more than that of crimes against human rights committed since the departure of the Soviets.

The International Criminal Court was the culmination of long works, the States intending to maintain their sovereignty in the context of the Cold War and of the often strong tensions in international relations.

It was only in 1998 that a conference held in Rome resulted in the adoption of the statute of this Court, voted by 120 States. 7 States voted against:

17 See Isabella CASTROGIOVANNI,Digging up the past or burying it: Accounting for human rights atrocities in times of transition, in: Giandomenico PICCO et Antonio Luigi PALMISANO ed., *Afghanistan How much of the past in the new future*, Istituto di Sociologia di Gorizia, Gorizia,2007, pp. 132-172.

the United States, China, India, Israel, Vietnam, Bahrain and Qatar. France ratified the Convention on June 9, 2000. In May 2013, 122 States had ratified it. The United States, Russia and Israel have signed it, but have not ratified it. China, India and Turkey are among the States which criticize the Court and have not signed. In 2016, 123 States out of 193 had ratified the statute of the Court, including all the member states of the European Union. Pursuant to the principle of respect for the sovereignty of States, the Court is only competent for States which have ratified the Convention. Furthermore, it can only be seized as a subsidiary to referral to national courts. It has jurisdiction over genocide, breaches of the laws and customs of war, and crimes against humanity. With regard to the latter, it must be a widespread or systematic attack against a civilian population. It includes forced population transfers, sexual slavery, forced prostitution, forced pregnancy and forced sterilization, rape, enforced disappearances, apartheid.

The Court, which sits in The Hague, includes 18 judges and a Prosecutor elected by the Assembly of States Parties from a list of candidates proposed by them. The judges have the nationality of the States parties; the Court cannot include more than one national of the same State. In the absence of an international prison, prison terms are served in a State designated by the Court from the list of States which have indicated that they are prepared to receive convicts. The judicial phase of the activities of the Criminal Court began in 2004 with the opening of two investigations by the prosecutor. It mainly concerns southern States, the vast majority of them african. The first focused on the commission of crimes in the territory of the Democratic Republic of the Congo, the second on the situation in northern Uganda. Subsequently, other investigations took place: at the request of the Central African Republic concerning an armed conflict between the government and rebel forces; crimes committed in Mali; the situation in Darfur; the situation in Libya in the context of the 2011 uprising; post-election violence committed in Kenya in 2007 and 2008; crimes allegedly committed in Côte d'Ivoire since 2010; Georgia in 2016; Burundi in 2017.

20 FRENCH COURTS DECISIONS

This concerns crimes against humanity and war crimes. I will speak here only of the first. The question of the repression of crimes against humanity arose at the Liberation, when it was necessary to punish the atrocities committed by the Nazis in France. Subsequently, the idea appeared that crimes against humanity could be distinct from war crimes, which was concretized by a law of December 26, 1964 tending to establish the imprescriptibility of crimes against humanity, their definition being that of the statute of the court of Nuremberg, affirming that they were imprescriptible by nature.

In a judgment of February 6, 1975, the Court of Cassation, in connection with the *Touvier* case, took this line. In that decision, she classified as crimes against humanity "*common law crimes committed in certain circumstances and on certain grounds*". On May 30, 2000, the Court of Cassation refrained from classifying crimes against humanity as ordinary crimes. In a judgment of 20 December 1985 in the *Barbie* case, the Court of Cassation used the terms of the statute of the Nuremberg Tribunal to determine elements constituting crimes against humanity.

The 1992 Criminal Code created general incriminations of crimes against humanity including genocide.

In French positive law, genocide is defined by article 211-1 of the Criminal Code as

> "the fact, in execution of a concerted plan tending to the total or partial destruction of a national, racial, ethnic or religious group, or of a group determined on the basis of any other arbitrary criterion, to commit or cause to be committed, against members of this group the following acts: willful interference with life, serious attack on physical or mental integrity, submission to conditions of existence likely to lead to the total or partial destruction of the group, measures aimed at preventing births and forced transfers of children ".

Article 212-1 of the Criminal Code provides that:

> "Also constitutes a crime against humanity one of the following acts committed in execution of a concerted plan against a group of civilian population in the context of a generalized and systematic attack: 1 l willful assault on life, 2 extermination, 3 enslavement, 4 deportation forced transfer of population, 5 imprisonment or any other serious form of severe deprivation of physical liberty in violation of basic provisions of international law, 6 torture, 7 rape, forced prostitution, forced pregnancy, forced sterilization or any other form of sexual violence of comparable gravity, 8 persecution of any identifiable group or community on political, racial grounds , national, ethnic, cultural, religious or sexist, or according to other criteria universally recognized as inadmissible under international law, 9 enforced disappearance, 10 acts of segregation committed within the framework of an institutionalized regime of systematic oppression and domination of a racial group over any other racial group or all other racial groups and with the intention of maintaining this regime 11 other acts inhumans of similar characteristics intentionally causing great suffering or serious damage to physical or mental integrity ".

This definition reproduces that of article 7 of the statute of the International Criminal Court criminalizing crimes against humanity. Genocide and crimes against humanity are punishable by life imprisonment. Article 213-5 of the Criminal Code lays down the principle of the imprescriptibility of public action and the penalties for genocide and crimes against humanity, which was validated by the Constitutional Council in a decision of January 1999.

What about at european level?

3) EUROPE: THE COUNCIL OF EUROPE

Among the various european institutions, the Council of Europe, to which Russia belongs, which we often forget, embodies the Europe of human rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome in 1950 proclaims a certain number of rights guaranteed to everyone, whatever their nationality, even if they are not nationals of a State party to the Convention. Among these rights: the right to life, the prohibition of torture and inhuman or degrading treatment, the right to liberty and security.

The Convention includes a compulsory international protection mechanism which allows any person, after exhaustion of domestic remedies, to seize the European Court of Human Rights. This allowed him to develop constructive case law. For example, it has inferred from Article 3, which prohibits torture and inhuman and degrading treatment, the prohibition for States to return an alien to a country where he would be at risk of being subjected to such treatment. The inability of a detainee to receive medical treatment is considered to be inhuman and degrading treatment or even a violation of his right to life. The Court also gradually recognized that a State could not criminalize homosexuality in the name of the protection of morality.

The Treaty on European Union, in its drafting resulting from the Treaty of Amsterdam, included respect for human rights among the founding principles of the European Union. It includes an article 13 providing for the possibility for the Council to take the necessary measures to combat any discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation. On the basis of this provision, several directives have been adopted which affect the laws of the Member States.

What can we take away about all these developments? First, the slowness. The Treaty of Versailles provided for the establishment of a special tribunal to try Wilhelm II. It could not be put in place, the Netherlands having refused to deliver him, despite pressing requests from French leader Clemenceau. One must wait for the end of the Second World War, after a twenty-year armistice, as Marshal Foch had anticipated.

Then, the extreme gravity of the crimes at the origin of these international jurisdictions: the massacres of civilian populations by the millions during the Second World War, the genocides of Yugoslavia, Rwanda and Cambodia. We must also note the fragmented nature of these international jurisdictions. As we have seen, many are only competent in specific cases. As for the International Criminal Court, its jurisdiction is limited by the States which accept it. Among those who reject it or who postpone their membership, there must be States whose population is equivalent to a good part of the world population.

We also observe that in practice, the accused States are southern States and never the great powers. There are, however, positive points. It is probably in Europe that judicial protection of human rights is best ensured. The jurisprudence of the Court of Strasbourg is fundamental in this respect. In addition, hope comes from the repetitive nature of the jurisdictions of these jurisdictions. It reflects the convergence of States with regard to the definition of genocide and crimes against humanity. The example of France shows the penetration of national courts by international law.

CONCLUSION: FOR THE CONTEXTUALIZATION OF HUMAN RIGHTS

In the second part of this text, there was a lot of developments about legal norms. It is a specialty of the jurists. I'm not saying it's useless. The anthropologists follow another methodology, which seems deeper to me. They are sensitive to practices and representations. They wondered what exactly human rights meant for ordinary people, who were neither lawyers nor members of the United Nations. For example, they rely more on proverbs than international Declarations. Some african examples: A proverb from Burundi: "*We cannot force everyone to act the same way*". From Nigeria: "*If you don't want to be the victim of abuse, don't do it yourself*." From *Mogo*, in the Congo: "*Whether a human being is a man or a woman, whether rich or poor, there is no fundamental difference between human beings. All are born to a woman and eventually die*." This is the kind of data that the anthropologists will seek to gather, as I tried to summarize in the first part of this communication. They will find out what men do with standards, who produces them and why, how they understand them, when and why they invoke them. This is too the work of historians of law.

More broadly, we come back to the old debate concerning the history of political and legal ideas. How autonomous are they from social reality, how can they possibly influence it?

For my part, I think that religions and human rights may fall from Heaven and the United Nations, but that their message depends closely on the specific social and economic conditions, culture and history of societies to which they claim to apply. It is also the point of view of chinese jurists of our time[18] and this message has evolved throughout history. It can only be understood if it is reinterpreted.

Finally, I think that we should not fall back into 19th century evolutionism. The West is not at the forefront of progress, the stages of which should necessarily

18 See Norbert ROULAND, *Ciels au-delà du Ciel, La Chine et les Chinois : croiser nos regards*, Paris, Pacifica, 2022. One chapter is about human rights in China. A review of this book will be soon published in a brazilian Academic Journal by Pr. George SARMENTO.

be the same for all societies. It is also very likely that the generations that will follow us will wonder how we were able to tolerate certain violations of what they would then call human rights, assuming that this concept still exists, which is not necessarily proven. Other forms of universalism or differentialism will certainly arise.