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**Divided in Diversity:
National Legal Scholarship(s) and the
European Convention of Human Rights**

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Abstract

The present article looks at the history and features of legal academic discourse on the European Convention of Human Rights (ECHR). It first establishes that people from inside the Convention system have been the first ones to posit ECHR law as a worthwhile object of study within academic arenas. It then compares French and Italian legal scholarship devoted to the ECHR and evidences that whereas the former is mostly due to human rights law specialists (among which both international and domestic lawyers), the latter was until recently mostly the result of studies by international lawyers. The paper then formulates some hypotheses as to the impact of the academic profile of ECHR law specialists in both countries on the discourse they actually produce, and suggests that this relationship may account for a greater receptivity of French legal audiences to the notion of the ECHR as a constitutional justice system / vector of a European public order compared to the Italian ones. However, the paper also insists that there is a very different understanding of the allegedly 'constitutional' dimension of the ECHR system according to whether the rationale is used by domestic lawyers or by insiders of the Convention system and/or international legal scholarship.

Keywords

European Convention of Human Rights – Legal scholarship – France – Italy – constitutional European public order

In 2005 when he quit his job as Registrar of the European Court of Human Rights (ECtHR), Paul Mahoney –who had started working at the Registry in 1974- thanked many people, among which a “small group of academics” who had, according to him, “contributed to transforming the study of the ECHR” from an “esoteric specialty of international law’ into ‘a major subject of national law’” (Mahoney, 2005). By many aspects, this way of putting things is quite interesting and I shall insist in particular on two of these. First and foremost, it underlines the role academics play in the actual promotion of a number of legal instruments—here the European Convention of Human Rights (ECHR). This is all the more important that this particular role is often overlooked (see however Loiselle, 2000; Girard & Henneute-Vauchez, 2005; Henneute-Vauchez, 2007), for the temptation is high in the field of legal studies to only associate the importance of a given legal text (convention, statute, declaration, resolution, contract...) to its normative rank. Secondly, such a perspective is all the more interesting when applied to the ECHR that the Convention is a good example of at least partial disconnection between its legal/technical strength and the importance it is said to have, thus a good observation point for hypothesized scholarly inputs in the construction of legal objects.

Indeed, we all know that it is correct to describe the ECHR as an international convention the violation of which may be affirmed by a declaratory judgment. However, and despite its admittedly uniqueness and overall success as a human rights protection device, the ECHR is not all strength. Its incorporation in national legal orders, although it now is the case in all countries, is not a legal obligation¹; the European Court’s judgments are non executory and the question whether the obligatory dimension of the Convention extends to its interpretation by the Court is also, at best, highly disputed in national arenas². In other words, a strictly legal/technical analysis certainly pictures an important Convention (not least because an actual Court is attached to it) but not an absolutely authoritative, integrated and binding normative system, for the countries’ ways out are numerous. There thus is an only small overlap –and maybe even an actual gap- between such considerations and a quite dominant tune that has become quite pervading in ECHR law discourse. Has literature about the Court and the Convention not developed lately that very commonly refers to a system of “constitutional justice” (Frowein, 1992; Alkema, 2000; Greer, 2006; de Wet 2006)? Has the Court herself not referred to the Convention as being the foundation of a “constitutional public order”³? Have judges of the Court themselves not qualified the ECtHR as a constitutional court –not least several of its former presidents (Wildhaber 2000; Ryssdal, 1991) who have been both clear and active in saying such an idea had their preference? Really, it is no longer uncommon to see such a constitutionalist paradigm applied to the ECHR (Krisch, 2008); this, of course, is an important element, because for many a contemporary jurist, “constitutional” remains the highest grounds in terms of legal importance. Because of the narrowness of the overlap between what the ECHR is and what it is often said to be, it is quite easy to argue that there is much more than law to the importance

* This is a revised version of a paper originally presented at the Conference “The European Legal Field-Le champ juridique européen” organized by Bruno de Witte and Antoine Vauchez with the Robert Schuman Centre and the Academy of European Law (European University Institute, 25-26 September 2008). Thanks to the participants of the conference for useful comments. I also wish to mention that the research presented here is only a part of a wider project subsidized by the French ministry of Justice (Mission de recherche Droit & Justice) and involving other scholars, of which I act as a scientific coordinator. For more information on the general project, please visit: <http://www.shennettevauchez.com/node/4#ECHR>

1 The European Court itself has always stood to the position according to which albeit more favorable, incorporation was not compulsory; see: ECtHR, 6 feb. 1976, *Case of Swedish Engine Drivers’ Union v. Sweden*, §50.

2 Emblematic in this respect are the many examples of national judges taking sides for solutions prompted by the ECtHR but at the same time refusing to admit that their choice is linked to the legal authority of ECHR case law. For a French example, see recently the manner in which the Council of State rejoined the European Court’s position on the contrast between the French « anti-perruche » law and the convention (C.E., 24 fév. 2006, *Levenez*), only after the *commissaire de gouvernement* made sure to remind the high court that “il vous serait, certes, théoriquement, possible de ne pas suivre la Cour européenne dans l’interprétation qu’elle a retenue” (concl. T. Olson, *JCP A*, 2006, n°12, p. 1074).

3 ECtHR, 23 march 1995, *Loizidou v. Turkey*; see also 30 june 2005, *Bosphorus v. Ireland*.

given to the ECHR in scholarly legal discourse(s). In other words, it were only for legal (technical) analyses the ECHR probably would not be considered to be as so major as it is.

On such premises, the hypothesis underlying this paper is that academics have played a role in promoting the ECHR and thus that they account for a part of this gap between a technically *relative* importance of the ECHR and a scholarly allegedly *constitutional* one. I thus aim at assessing the input of scholars in various countries in establishing the ECHR as a major tool on the European legal scenery.

There is a second way in which Mahoney's insight is stimulating. He insists in his speech on the transformation of the ECHR from an international to a national legal entity. This nicely echoes some works such as those of Mikael Madsen who shows the manner in which the ECHR has had to be "nationalized" (ie. seized as a relevant instrument by a variety of legal actors at the national scales) in order to really become an important legal tool on the more globally European scale (Madsen 2005, 2007). Such analyses as to the "nationalization" of the ECHR as an instrument could interestingly be tested against the detailed investigation into who, within national academic circles, has been paying attention to the ECHR in the beginning and today. Globally speaking, there is little doubt as to the accuracy of the picture drawn by Mahoney: there has been a shift, an evolution from a [initial] situation in which international lawyers only researched and commented on the ECHR to one in which domestic ones mostly now do so. There is a strong case for the interest in sharpening the analysis however, given the quite strong and deeply embedded different cultures and paradigms of international and domestic lawyers on the one hand, and of lawyers from the different countries in which the ECHR plays a role on the other hand. It would be interesting to grasp the variations in discourse on one single object –the ECHR– that can be related to the institutional/academic position of their authors. Therefore, another ambition of the paper is to show which academics have been paying attention to the ECHR and in what respect their identity and background (both scientific and national) have influenced their actual perception of the Convention. Obviously, such findings could contribute to shedding new light on the currently quite acute debate over the Convention system and its own identity: either an international jurisdiction before which human rights violations are to be litigated on case by case basis or a constitutional instrument at the European scale (Stone and Keller, 2008, 16) –for this debate can well be said to only match (and maybe be one of the outcomes) the structure of academic circles in European countries.

In this article, I shall focus on French and Italian academic literature on the ECHR. The main results of my investigations into the identity, field of specialization, and professional background of those who have been the main authors on and students of the ECHR since the 1950s in those two countries are threefold.

1. The law of the ECHR is not primarily an academic body of law. For a long time indeed (and it would be worth refining this first finding as to its hypothetical present-day accuracy), insiders (eg. people working within the Convention system) have played a crucial role in producing a discourse on the Convention in academic circles.
2. The academic construction of ECHR law varies quite significantly between France and Italy. In the latter country where a very strong tradition of international law jurisprudence preexists, international lawyers remain the key conveyors of academic interest in the Convention. In France the initial configuration is quite different, for the 1960s and 1970s are most of all a decade of consolidation for human rights law in general (throughout, notably, the institutionalization of the course of *Libertés Publiques* in law faculties nationwide⁴) and therefore, the Convention arises interest in that particular field composed of both international law and domestic law specialists. It is thus interesting to formulate a first set of hypotheses as to the influence of such varying academic positions and the actual substance of the legal analyses produced on the Convention.

4 The course of *Libertés Publiques* first appeared in Law faculties in 1954 but it becomes compulsory as of 1962.

3. Differences in scholarly analysis of the ECHR are also to be analyzed according to the different national backgrounds they emanate from. To be sure, pre-existing national debates as well as the general structures of public debate of human rights (HR)-related issues also weigh on the manner in which law professors do (or do not, or do only eventually) speak of the ECHR. Therefore, it is important to ask how academic interest in HR has expressed itself from country to country –if at all? Had other groups (legal professions, religious/political associations of various forms....) pre-positioned themselves on the topic of human rights law and human rights protection? I hypothesize in this research the fact that all these elements weigh on the relationship between the legal academia and the ECHR.

However, at this stage, I have investigated this last insight much more superficially than the prior two. For that reason, I might refer to elements related to the national structures of the HR debate in a scattered manner –but I will not do so systematically. I will therefore focus first on the ECHR law as initially commented upon by experts (“Convention people”) much more than by academics. I will then turn to comparing the French and the Italian profiles and discourses of those academics who have eventually paid interest to the Convention in both these countries.

1. Law of the ECHR: a law of experts

When researching the history, main steps and modalities of academic interest in the ECHR, the first striking conclusion one is led to is that for a long time, the main authors on the ECHR were “Convention people”⁵. By this arguably inelegant expression, I wish to refer to those who have been active members of the Convention system –regardless of the exact nature of their involvement: members of the European Commission of Human Rights (EComHR), judges of the Court but also critical proportions of the secretaries of the Commission, members of the Registry, administrators at the Council of Europe’s Human Rights directorate... (all those who institutionally belong to the Convention system) are all taken into account. Among these “Convention people”, there are some law professors of course: especially at the Commission and the Court many appointees have been (and still are) academics. But this is not the case for most of those who engaged early on in making the ECHR known in academic circles. In other words, one can say that at first, the law of the ECHR was not a law of professors but a law of experts. When one focuses on France and Italy, this conclusion may be drawn from the following data.

After Italy had been represented at the Commission by F.M. Dominedo⁶ from 1954 to 1960 –eg. during the most “dormant years” of the Convention system- it is prof. G. Sperduti (1912-1993) who was appointed in 1960. He remained a member for 33 years until 1993 and served as a vice-president to the Commission from 1975 onwards. A professor of international law, Sperduti had been the Italian representative in many international commissions⁷. Also, on a theoretical standpoint, he was somehow predisposed to his functions at Strasbourg, for he had developed a particular interest in the topic of the individual from an international law perspective. This had been the subject of one of his monographs⁸, and he had also taught a course on the subject at the Hague Academy of International Law in 1956. During his time at the Commission, Sperduti published extensively on human rights law in general and

5 This is striking in so far as ECHR not uncommonly is perceived as a ‘law of professors’ as opposed to one of practitioners. This probably has to do with the high proportion of academics within the European Court and Commission since the very beginning. As it will be shown here however, academic interest in the ECHR is not immediate.

6 Born in 1903, Dominedo was a professor of international private law but had also been a member of the Italian constituent assembly. Later an MP and member of the Italian Gvt in 1950, he is also at the time of his appointment a member of the Council of Europe’s Assembly.

7 He has been the Italian Government’s agent at the UN Tribunal in Erythrea (1953-54), an adjunct member of the *Commissione Arbitrale sui beni diritti ed interessi in Germania*, etc.

8 See his *L’individuo nel diritto internazionale*, Milano, 1950.

ECHR law in particular, in major Italian and foreign legal journals (he himself was a co-editor of the Italian *Rivista di Diritto Internazionale*). He also was the president of the *Comitato per i diritti umani* of the *Società Italiana Organizzazione Internazionale* thus a promoter of human rights within internationalists' circles⁹. In particular, he was judicially involved in securing an extensive interpretation of the concept of "civil rights and obligations" (art. 6) and often promoted this stance in his academic writing¹⁰.

His successor B. Conforti, also a professor of international law at the University of Naples Federico II, acted in a much similar manner. A specialist of United Nations¹¹, Conforti had developed a somewhat fragmented theory of international law both in monographs¹² and courses at the Hague Academy of International Law¹³, in which a principle of specialty applied to some branches of international law –and protected it, from the perspective of internal legal orders, from being overruled by subsequent legislation¹⁴. Subsequent to his appointment at the Commission and later on at the Court (after the entry into force of protocol n°11 in 1998), he also wrote important pieces on the ECHR¹⁵ and notably edited the Italian extensive commentary of the Convention¹⁶.

Their homologue at the Court, G. Ballardore Pallieri was also an academic. At the time of his appointment at in 1959, he was a professor of international law¹⁷ as well as the dean of the Università del Sacro Cuore of Milan. However, he engaged much less in academic writing about the ECHR. He commented the Rules of the Court in the *Rivista di Diritto Internazionale* in 1960, as well as the Court's first case in the same review a year later¹⁸; but I have found no other trace of publications by Ballardore Pallieri on the topic of the ECHR. The same can be said of Carlo Russo, the next Italian judge at the Court¹⁹. It is less surprising in this latter case for Russo was not an academic anyway (a lawyer in practice since 1942, Russo had been an MP for many years and twice a member of the Government). It is only after his experience as an ECHR judge that he was appointed as a professor of international protection of human rights²⁰ at the University of Milan Bicocca; in 2006 some of the

9 There now exists a "G. Sperduti" prize for works in the field of human rights awarded by the SIOI's *Comitato per i diritti umani*.

10 See for example his "La recherche d'une méthode appropriée aux fins de détermination de la notion de droits et obligations à caractère civil", *Riv. Dir. Internaz.*, 1989, p. 761.

11 Among which the following references: *Le Nazione Unite: lezioni di organizzazione internazionali*, Padova, Cedam, 1975 ; *Le Nazione Unite*, Padova, Cedam, 1979 ; *The Law and Practice of the United Nations*, Kluwer, 1996, last edition Martinus Nijhoff 2005.

12 See his *Lezioni di diritto internazionale*, Naples, Editoriale Scientifica, 1982 ; last edition 2002 (see pp. 320sq).

13 See *Recueil des cours de l'Académie de droit international de La Haye*, 1988 vol. 212 and also an updated version : *International law and the role of domestic legal systems*, Dordrecht/Boston: Martinus Nijhoff, 1993.

14 See in particular "La 'specialità' dei trattati internazionali eseguiti nell'ordine interno", in *Studi in onore di G. Ballardore Pallieri*, Milano: Vita e Pensiero, 1978, 187, 189: "il procedimento dell'ordine di esecuzione dato con legge ordinaria conferisce natura speciale alle norme del trattato e le rende pertanto immodificabili da leggi successive". It is important to notice that this "specialty thesis" has been developed with particular reference to EC law.

15 Among which: "Principio di sussidiarietà e CEDU", *Rivista Internazionale dei Diritti dell'Uomo*, 1994-1, p. 42; *Enforcing International Human Rights in Domestic Courts* (with F. Francioni), Dordrecht: M. Nijhoff, 1997; "Quelques réflexions sur les rapports de la Convention européenne des droits de l'homme avec d'autres conventions", in M. De Salvia, ed., *The Birth of Human Rights law. Studies in honor of C. Norgaard*, Baden-Baden: Nomos, 1998 ; « Il ruolo della Corte di Strasburgo », in *Convegno in occasione del 50° anniversario della CEDU in onore di Paolo Barile*, Roma: Accademia dei Lincei, 2001; "Corte europea dei diritti dell'uomo", in *Enc. Dir.*, agg. VI, Milano, 2002 (with G. Raimondi).

16 See B. Conforti, G. Raimondi, S. Bartole, *Commentario alla CEDU*, Padova: Cedam, 2001.

17 See his *Diritto internazionale Pubblico*, Milano: Giuffrè, 1962. Note that he also published a *Diritto Costituzionale*, Milano: Giuffrè in 1976.

18 "Il regolamento della CEDU", *Diritto Internazionale*, 1960, p. 126 ; "La prima sentenza della Corte europea dei diritti dell'uomo", *Diritto Internazionale*, 1961, p. 87.

19 Ballardore dies in 1980, after serving at the Court for 21 years.

20 In 2005, he appears as "professore di tutela internazionale dei diritti dell'uomo, Università di Milano-Bicocca".

courses he had taught were published in a book²¹. He served in Strasbourg until the “new court” took over in 1998 –at what stage B. Conforti was nominated and stayed in office until 2001, when V. Zagrebelsky (1940-) was nominated. Again, it is interesting to see that Zagrebelsky’s career had developed mostly within the judiciary²²; he was a judge at the national *Corte di Cassazione* by the time of his appointment at the ECtHR. Interestingly, his list of publications consists mainly of monographic studies and articles on the judiciary prior to his arrival in Strasbourg, and then shifts to pieces on the ECHR²³.

This relatively small record of publications emanating from Italian members of either the Commission or the Court strongly contrasts with that that comes from other Italian members of the Strasbourg system. Early on, people like Giuseppe Guarneri, an administrator and the Human Rights Directorate of the Council of Europe as of 1965, appeared as a quite active promoter of interest and knowledge about the Convention, in terms of publications in law journals in which he writes several articles about human rights (HR) in Europe²⁴. The same can be said of G.M. Palmieri, administrator at the Commission’s secretariat as of 1976, who also writes often about the Commission’s activities and decisions in important Italian law journals; he even is the commentator of the first decision of the European Court condemning Italy in 1980²⁵. Both Guarneri and Palmieri later become professors within the Italian academia, as well as members of the *Consiglio Direttivo of the Istituto Internazionale di Studi sui Diritti dell’Uomo* founded by prof. G. Gerin at the University of Trieste²⁶ in 1984.

However, the emblem of this promotion of the ECHR within academic circles by non-academic actors of the Convention system unquestionably is Michele de Salvia. A member of the Commission’s secretariat as of 1965, de Salvia has a long career in Strasbourg. He becomes *Administrateur principal* in 1973, head of a division in 1984, *Adjoint au secrétaire* in 1990 and eventually, the Commission’s *Secrétaire* in 1997. As all students of ECHR law know very well, de Salvia has written extensively about the Convention system. Besides an impressive number of articles, he has written two books on the ECHR itself²⁷ (one of which is well known in Italy for being one of the only digests of ECHR case-law²⁸) and edited another one in honor of Carl Norgaard (the president of the Commission from 1981 to 1995). But most of all, he was one of the most active members of the *Rivista Internazionale dei Diritti dell’Uomo* (RIDU); after many years on its Scientific Board, he rejoins the Editorial

21 See: *La CEDU e la giurisprudenza di Strasburgo*, Milano : Giuffrè, 2006.

22 Although he was appointed assistant lecturer (1965-70) and later professor (*libero docente*, 1970) in criminal law at the University of Turin, he was successively deputy public prosecutor, judge, judge of the *Corte di Cassazione* and member of the *Consiglio Superiore della Magistratura* between 1966 and 2001.

23 Among which: “Corte, convenzione europea dei diritti dell’uomo e sistema europeo di protezione dei diritti fondamentali”, in *La Corte costituzionale compie 50 anni, Foro Italiano*, 2006; “Questions autour de Broniowski”, in *Liber Amicorum Luzius Wildhaber*, Kehl: Engel, 2007; (with M. de Salvia), *Diritti dell’uomo e Libertà Fondamentali. La giurisprudenza della Corte europea dei diritti dell’uomo e della Corte di giustizia delle Comunità europee*, Milano: Giuffrè, 2006.

24 See “L’applicazione della CEDU e l’azione del Consiglio d’Europa”, *Rivista di diritto internazionale*, 1968, p. 347; “La protection des droits de l’homme et des libertés fondamentales dans le cadre européen”, *Rivista di Diritto Europeo*, 1970.

25 See “Commissione europea dei diritti dell’uomo: le sessione 5-15 dicembre 1977 e 27 feb. – 2 marzo 1978”, in *Rivista di Diritto Europeo*, 1978, p. 376; “La sentenza della Corte europea dei diritti dell’uomo sul caso Artico”, *Rivista di Diritti Europeo*, 1980, p. 345 ; “L’esperienza italiana in tema di ricorsi individuali alla ComEDU”, *Riv. Dir. INternaz.*, 1980, p. 45 : “L’abuso del ricorso individuale dinanzi alla ComEDU”, in *Studi in onore di G. Sperduti*, Milano: Giuffrè, 1984, p. 246.

26 The IISDU of Trieste is a relatively important association of the Italian HR scene founded in 1984 by prof. G. Gerin (University of Trieste). Its links with the Convention system are tenuous enough for no less than 4 of its *Comitato Scientifico*’s members to be former “Convention people” –at the highest levels since these include: J.A. Salcedo, F. Matscher, N. Valticos, G. Ress, all (ex)judges of the Court (not to mention the fact that R.-J. Dupuy, a former member of the European Commission, also was a member of the IISDU).

27 *La CEDU*, Napoli: Editoriale Scientifica, 3rd edition, 2001; as well as (with J.-C. Soyser) *La Convention européenne des droits de l’homme: mode d’emploi*, Paris: Ed. Librairies Techniques, 1987.

28 *Compendium della CEDU. Le linee guida della giurisprudenza relative alla CEDU*, Napoli: Editoriale Scientifica, 2000.

Board²⁹ in 1999 and publishes innumerable contributions to the journal. In print from 1988 to 2003, the RIDU was one of the only law journals in Italy to pay such close attention to HR law –and ECHR law in particular³⁰. I will come back to the RIDU in a little while; but as far as de Salvia goes, it is also worth noting that he eventually was appointed as a professor at the *Università del Sacro Cuore* in Milan, and launched the *JuraHominis* association (2001)³¹, the Italian section of the International Commission of jurists. In sum, there is a strikingly strong investment of ECHR people in promoting the ECHR in Italian academic circles, that seriously competes with—and actually, although it is difficult to quantitatively assess the influence of such writings, beats—academic scholarship on the subject.

National backgrounds to interest in ECHR law: Catholic groups and human rights in Italy

As I said I would from time to time allow myself to refer to the influence of national pre-existing configurations in terms of who is interested in human rights (even allowing myself to do so in a much disorganized fashion!) I would like to stress something important at this stage with respect to Italy. Working on the emergence of interest within academic settings towards the ECHR in Italy necessarily leads one to have a glimpse at the crucial role catholic groups, actors and arenas have played in this respect. Let us take for example the *Università del Sacro Cuore of Milan*: I have mentioned it three times already, for Ballardore Pallieri had been a professor there prior to his appointment at the European Court of Human Rights, because it published the RIDU to which de Salvia's contribution has been so crucial and also because the latter was eventually appointed there as a professor of International law of HR protection. It could also be stressed that it is this University's publishing house who published one of the first in-depth assessments of the ECHR's introduction within the Italian legal order³². However, I wish to stress the extent to which this "pole" around that Catholic university, constituted of a number of people and a relatively important journal, played a crucial (unequaled) role in establishing the ECHR's importance vis-à-vis the Italian national audience. Notably, it has done so by succeeding in associating to its enterprise numerous prestigious names from within the Convention system itself. By the time the review quit, in 2003, no less than four judges of the Court were members of its *Consiglio Scientifico*: J.-P. Costa (nowadays the ECtHR's president), F. Matscher, B. Conforti, C. Russo -a council that otherwise counted among its members most of the academics³³ who had played a role in making the ECHR a worthwhile subject³⁴. Additionally, this proximity between the Court and this "pole" was not only acquired through the years; it actually existed from the RIDU's debut. The first issue is quite telling in that respect, for the very first text that is published is a "letter" sent by Rolv Ryssdal himself (then president of the Court), publicly saying his satisfaction at the birth of the first Italian tool really dedicated to increasing the knowledge about the ECHR and the Court's case-law. Such proximity with the Court ensured the regular contribution of others of its members; emblematic in that respect is the issue of the year 2000 (n.2), in which M. de Salvia only authors an introduction to a collection of articles by L. Wildhaber, B. Conforti, J.-P. Costa, A. Kovler. At any rate, occasional contributions of Strasbourg people are easy to identify (L. Loucaides in 2002, S. Trechsel (then president of the Commission) in 1997, L.-E. Pettiti in 1992, J. Frowein (then vice-president of the Court) in 1992; Eissen in 1992, Sperduti (as a vice-president of the Commission) in 1991....

29 Together with Adriano Bausola, Angela Giarda and Giovanni Maria Ubertazzi.

30 It actually was the only one until the creation, in 1990, of *I diritti dell'uomo. Cronache e Battaglie*, a HR activist journal launched by the *Unione Forense per la Tutela dei Diritti dell'Uomo*, an association created in 1969 by Avv. Mario Lana, a former student of P. Calamandrei. Lana had become a lawyer in 1956 and soon after created a law firm together with Lelio Basso and Luciano Ventura, specialized in helping developing countries and East european countries defend their interests.

31 See: <http://www.jurahominis.it/missione%203.htm> (last visited nov. 19th, 2008). Although several visits to the website seem to indicate that the association is not very active, it did organize a conference in November 2004 on the execution of ECtHR sentences at the Milan *Palazzo di Giustizia*.

32 G. Biscottini, *La Convenzione europea dei diritti dell'uomo nell'applicazione giurisprudenziale in Italia*, Milano : Giuffrè, 1981.

33 Among which I include: B. Nascimbene, P. Pittaro, M. Chiavario, G. Conso, G. Gaja...

34 Not to mention the fact that many earlier members of the *Consiglio Scientifico* also had been judges at the ECtHR : J. Cremona, L.-E. Pettiti, Juan Antonio Carrillo Salcedo.

A very similar statement could be made with respect to French literature on the ECHR, for the academics who were amongst the pioneers in terms of paying attention to ECHR law were actually also insiders, ie. the ones who were directly involved in the Convention system. Emblematic in that respect is René Cassin (1887-1976)³⁵, who served as a judge at the Court from 1959 to 1980 -and actually served as its president (1965-1969). Actually in the French case, the list of promoters from the inside pretty much stops there since France's late ratification of the Convention (1973) accounts for the absence of any French member of the Commission prior to that date³⁶. The first French member of the Commission was thus René-Jean Dupuy (1918-1997), a renowned professor of international law appointed in 1973 who however was not a human rights law specialist per se. He had, however, published a study of the Commission in the *Annuaire Français de Droit International* in 1957³⁷. Research needs to be pursued in a more systematic manner for the followers of Cassin and Dupuy both at the Commission (Jean-Claude Soyer) and at the Court (Louis-Edmond Pettiti, Jean-Paul Costa); it can however at the present stage be said that all of these figures have been key promoters of the ECHR as an object of legal scholarship in a variety of academic arenas albeit Soyer (a professor of criminal law) was the only academic among them.

But besides these French insiders to the Convention system (of which only some were academics), the main authors on the Convention system to publish and intervene in French academic arenas were, then again, people who were actively involved in it. Karel Vasak (1929-), a secretary at the HR Directorate of the Council of Europe as of 1959, publishes on the topic as early as in the 1960s. In 1962 already, he launches a chronicle of the EComHR's case-law in the *Journal du Droit International*³⁸ and presents the Convention organs in French Legal encyclopedia³⁹. In 1964, he publishes a much noticed monograph on the Convention⁴⁰. Human rights law in general (universal⁴¹ as well as regional systems) are the constant focus of his publications. Vasak unquestionably is one of the forerunners of interest in the ECHR within French academic arenas. Additionally, he becomes the first *Secrétaire Général* of the *Institut International des Droits de l'Homme* when it is created in 1968, hence the continuation of his crucial role at the intersection of the Convention system and academic arenas, for he gets to act as the editor in chief of the Institute's journal, the *Revue des droits de l'homme* (see below). Marc-André Eissen (1929-1996) who joins the Registry as early as 1965 and eventually becomes the ECtHR's Registrar is another very telling example in this respect. At the very end of the 1950s (at that time Eissen is a secretary at the Human Rights Directorate of the Council of Europe), Eissen starts publishing regularly on the ECHR, notably in the French *Annuaire Français de Droit International*. He describes the first steps of both the Commission and the Court⁴², and even is the one to comment on the latter's very first Court's decision in the *Lawless* case⁴³. Besides other

35 Among many publications, see: "La Cour européenne des droits de l'homme", *L'annuaire européen*, 1960 ; "Vers une conception universelle des droits de l'homme", in *Les droits de l'homme et l'éducation*, PUF, 1961 ; "La protection internationale des droits de l'homme", *Encyclopedia Universalis*, 1964, p. 377 ; "Les dimensions internationales de l'attitude de la France devant la Convention", *JDH*, 1970, p. 731.

36 A French senator, G. Pernot, has actually been nominated to be part of the Commission from the very beginning, as an observer. As is later reported, he had been given assurances by the government that ratification was only a matter of time. However, tired of waiting, he quit attending; see K. Vasak, *Journal des Droits de l'Homme*, 1970, vol. III, n°4, p. 558.

37 See his "La Commission européenne des droits de l'homme", *Annuaire Français de Droit International*, 1957, p. 449.

38 The chronicle appears in issues of the journal in 1962, 1964 and 1967.

39 See: "Commission et Cour européennes des droits de l'homme", *Jurisclasseur droit international*, fasc. 155, Paris, Ed. techniques 1961, new edition 1969; and "Le Conseil de l'Europe", *Jurisclasseur droit international*, 1965.

40 *La convention européenne des droits de l'homme*, LGDJ, 1964.

41 As of 1978, after heading the Legal Affairs Division of the Council of Europe for about 6 years, Vasak becomes the Head of Legal Affairs and Peace Division at the Unesco.

42 See: "La CEDH, de la Convention au Règlement", *AFDI* 1959, p. 618 ; "Le nouveau règlement intérieur de la Commission européenne des droits de l'homme", *AFDI*, 1960, p. 774.

43 "Le premier arrêt de la Cour européenne des droits de l'homme", *AFDI*, 1960, p. 44.

articles both in the *Annuaire* and elsewhere, Eissen writes the first significant study on French judges and the Convention⁴⁴, and later rejoins with Gérard Cohen-Jonathan to widen the approach⁴⁵. His publications on the ECHR are impressively numerous. P.-H. Imbert (1945-), an international law professor who however very soon left the academia and rejoined the HR Directorate in 1976⁴⁶, also publishes important pieces in the 1980s⁴⁷. Above all, he co-authors the article by article commentary of the Convention, together with L.-E. Pettiti and E. Decaux⁴⁸ - a study that has become an inescapable reference in French legal scholarship on the topic. Less prominent members of the French delegation in Strasbourg, also are involved in publishing on the ECHR in legal academic arenas; it is the case for example of C. Ravaut of the Commission's secretariat who publishes a first appraisal of the right of individual petition after 5 years⁴⁹. In varying proportions (the publications list of the first two outweigh that of many ECHR specialists), these French "Convention people" have produced a massive body of literature on the ECHR, the Court's and the Commission's case-law, the procedure, etc.

Therefore, France or Italy be the viewpoint, the Convention people in Strasbourg appear to be prominent actors of the imposition of the ECHR as a relevant subject in a variety of academic arenas: conferences, law journals, etc. –at least in these "early" years, from the very late 1950s to the 1970s. This strongly contrasts with the fact that at the same time, academics are only slowly starting to pay interest to the subject in both these countries (see *infra*). Not to mention the fact that this small census of publications by "Convention people" is actually very incomplete, for it has been constituted mostly from the viewpoint of Italian and French law journals⁵⁰, whereas most of the individuals who have been mentioned publish in a variety of other national settings. In that respect their activism is much greater than what the elements I have mentioned may lead to think.

There are at least two other elements that are worth keeping in mind when reflecting upon the relationships between legal academics and the ECHR. First of all there seems to have been – unsurprisingly- a strong sense of a common enterprise and community among these "Convention people". If one only looks at the list of contributors to volumes that are edited in those early years in the honor of one or another of them, it is striking to see how little a world and also how relatively closed towards the academia it remains. Let us take the example of the volume in honor of Polys Modinos. Once the head of the Council of Europe's human rights directorate (1954-1959), Modinos

44 *La Convention Européenne des droits de l'homme dans la jurisprudence française 1974-1982*, ENM, 1983.

45 *Droits de l'homme en France. Dix ans d'application de la CEDH devant les juridictions judiciaires françaises*, Kehl, Engel, 1985.

46 Imbert eventually becomes the Head of the Human Rights Division from 1999 to 2005.

47 See notably his: "Les réserves à la Convention européenne des droits de l'homme", *Revue générale de droit international public*, 1983, p. 580.

48 E. Decaux, P.-H. Imbert, L.-E. Pettiti, *La Convention européenne des droits de l'homme. Commentaire article par article*, Paris : Economica : 1995 ; 2nd edition in 1999.

49 "Le droit de recours individuel devant la ComEDH: une tentative de bilan des recours dirigés contre la France depuis le 2 octobre 1981", *GP*, 1985, n°130-131.

50 Various sources have been used for constituting the data on which this article is based. I have naturally build my own bibliographies (French and Italian) the way researchers always do. Further, I have listed all relevant publications on the ECHR in a number of journals for both France and Italy (for Italy: *Rivista di diritto internazionale* (1980-present), *Diritto Pubblico Comparato ed Europeo* (1999-2003), *Rivista internazionale dei Diritti dell'Uomo* (entire collection), *Giurisprudenza Costituzionale* (1980-present) For France: *Revue Générale de Droit International Public* (1980-auj.), *Annuaire Français de Droit International* (collection entière)) and extensively glanced into others (civil law and European law mostly). As far as Italy goes, I have in addition used the Italian DOGI database (for the years 2006-2008) as well as the *Dizionario Bibliografico delle riviste giuridiche italiane* (especially for the early years 1957-1961). I also complemented those findings by the bibliography on the ECHR that was published in 1986 (Mazzi, 2006) and have benefitted from precious advice given by prof. A. Bultrini from the University of Florence. As far as France goes, I have also relied on the information collected in Pinto, 2007. Generally speaking, many authors whom I have been focusing on having had volumes published in their honor, it has also been useful to rely on the list of publications that is generally established in those. Obviously, this (data)base will be extended in the continuation of the project.

was elected as the Court's Registrar in 1959. In 1961 however, he was appointed *Secrétaire Général Adjoint* of the Council of Europe. In 1968, a volume in his honor is edited by the French international law editor Pedone, under the patronage of a group of 18 personalities among which no less than 8 are at the time or will become in a near future directly linked to the Convention system. Furthermore, among the 32 contributors to the volume, another 15 are also "Convention people".

An illustration of the "Convention world": the volume in the honor of P. Modinos, Paris, 1968

Comité de patronage (out of a total of 17 names): René Cassin (president of the Court), Sir Samuel Hoare (president of the experts' committee on human rights at the Council of Europe), Sture Petren (judge at the ICJ as of 1966 but also president of the European Commission of Human Rights from 1962 to 1967), Henri Rolin (vice-president and soon to become president of the European Court), Peter Smithers (Secrétaire Général of the Council of Europe), Max Sorensen (president of the Commission since 1967), Sir Humphrey Waldock (president of the Commission of International Law of the UN and former president (1955-1962) of the European Commission of Human Rights), and Karel Vasak (Chief of division at the Council of Europe, and a co-founder in 1968 of the Institut International des Droits de l'Homme in Strasbourg).

Contributors (out of a total of 32 names): Constantin Th. Eustathiades (a vice president of the Commission elected in 1955), Heribert Golsong (at the Registry since 1960, Registrar of the Court as of 1963), Marc-André Eissen (Directorate of HR as of 1955, elected at the Registry in 1965), W. J. Ganshof van der Meersch (an ad hoc judge at the ICJ from 1960-1968, and a founder of the first course of ECHR law at the University of Brussels, as well as a co-founder, together with Cassin and Vasak, of the Institut International des Droits de l'Homme in Strasbourg, he will become a judge at the ECtHR in 1973), A.B. McNulty (Secretary of the Commission), Sture Petren (see above), Frede Castberg (member of the Commission), A. H. Robertson (Chief of the Council of Europe's directorate of HR in the early 1960s), Jacques Velu (administrator at the HR Directorate in 1962), Max Sorensen (see above), Nicolas Valticos (International Bureau of Labor, to become a judge at the European Court in 1986), Karel Vasak (see above), H. Wiebringhaus (Council of Europe), René Cassin (see above) and Peter Smithers (see above).

In other words, this volume is only one indication of the quite tight links that unite a relatively small group of people who have stabilized themselves, by the end of the 1960s, as major actors of the protection of human rights at the European scale. Quite notably, this group is composed in majority of non-academics.

Another good example of this "Convention world" is the *Revue des droits de l'homme* launched in Paris in 1968 and headed by a typical trio composed of René Cassin (former president of the Court, now a member of the French Constitutional Council), Polys Modinos and Karel Vasak⁵¹ who serves as the journal's editor. The Honorary Committee, the Editorial board as well as the Scientific Committee of the journal all show how strong a Convention world is constituting itself at the time, around the idea and project to speak an expert word on human rights law.

51 Here again, the takeover of Convention people over the journal is beyond question, for the Comité de patronage welcomes : C.Th. Eustathiades (VP of the ComEDH in 1955), Lord McNair (first president of the ECtHR), S. Petren (president of the ComEDH), A. Verdross (judge at the ECtHR), Sir H. Waldock (president of the ComEDH)... whereas the Scientific Committee is composed notably of J. Cremona (judge at the Court), J. Fawcett (president of the ComEDH), A.B. McNulty (Secretary of the ComEDH), L.-E. Pettiti (to become a judge at the Court in 1980), and the Editorial Board of: M.-A. Eissen (Registrar), W.J. Ganshof van der Meersch (soon to become a judge at the Court), H. Golsong (Registrar), A.H. Robertson (HR Directorate) and G. Sperduti (president of the ComEDH).

Another locus of the consolidating “Convention world”: *La revue des droits de l’homme*, Paris, 1968-1979

Honorary Committee (out of a total of 28 members): F. Castberg (at the time a norwegian professor and president of the curatorium of the Hague Academy of International Law, but soon to become a member of the EComHR), C. Eustathiades (a vice-president of the EComHR), Lord McNair (former president of the ECtHR), H. Mosler (judge at the ECtHR), S. Petren (former president of the EComHR), A. Susterhenn (member of the EComHR), A. Verdross (judge at the ECtHR), and Sir H. Waldock (vice president of the EComHR).

Editorial Board (out of a total of 18 members): R. Cassin (chair) F. Ermacora (member of the EComHR), W.J. Ganshof van der Meersch (then a professor at the University of Brussels, but soon to become a judge at the ECtHR), H. Golsong (then head of the Legal division of the Council of Europe, but soon to become DEV), A.H. Robertson (head of the directorate of Human Rights at the Council of Europe), M. Sorensen (president of the EComHR) and G. Sperduti (member of the EComHR who will serve as its vice president as of 1975). Scientific Committee (out of a total of 29 members): J. Cremona (DEV), J. Fawcett (member of the EComHR), A.B. McNulty (secretary to the EComHR), L.-E. Pettiti (then a barrister and president of the *Association des juristes européens*, to become a judge at the ECtHR in 1980).

Also, there are some leads as to the fact that the existence of such a coherent and somewhat autonomous from legal academia group of Convention people is not only of historical interest, for by many aspects, it still seems to be the case. Certainly, this would need to be further investigated; however, since it has become common to celebrate retiring judges of the Court and the Commission, but also Registrars, throughout the otherwise very academic tradition of editing a volume in their honor, valuable information is easily accessible and shows that there still exists a “Convention world” that speaks an expert word on ECHR law in a rather monopolistic fashion. Take for example the *Studies in honor of Gérard Wiarda* (former president of the Court) published in 1988: amongst the total of 66 contributors, no less than 51 are authored by people who have worked at Strasbourg – Convention people. And similar observations can be made almost every time such volumes are published.

Volume in the honor of: importing and adapting an academic tradition

Such volumes have been edited in the honor of:

G. Balladore Pallieri (Milano: Vita e Pensiero, 1978)

René Cassin (Paris: Pedone, 1969-1972 4 vol.)

René-Jean Dupuy (Paris: Pedone, 1991)

Marc-André Eissen (Paris: LGDJ, 1995)

J.W. Ganshof van der Meersch (

P. Modinos (Paris: Pedone, 1968)

L.-E. Pettiti, (Bruxelles: Bruylant, 1999)

Henri Rolin, (Paris: Pedone, 1964)

Rolv Ryssdal (Köln: Heymanns, 2000)

Nicolas Valticos (Paris: Pedone, 1999)

Karel Vasak (Bruxelles: Bruylant, 1999)

Alfred Verdross (München: Fink, 1971)

Gérard Wiarda (Köln: Heymanns, 1988)

Luzius Wildhaber (Zurich: Dike, 2007)

Particularly striking in this respect in the recent volume in honor of judge Loukis Loucaides by judges Tulkens, Kovler and Spielmann. Entitled *Judge Loukis Loucaides. An alternative vision of the jurisprudence of the European Court of Human Rights – A Collection of Separate Opinions 1998-2007* (Martinus Nijhoff, 2008), it appears as a completely internal initiative, with texts only by the editors, president J.-P. Costa, vice-presidents C. Rozakis and N. Bratza and former Registrar M. de Salvia.

Secondly, there are some elements that lead to thinking that this group of Convention people were quite happy to maintain this relative autonomy towards legal academics. For one thing, the well-known international conferences that have been organized from 1960 onwards on the ECHR are

interesting to look at in the details⁵², given the contrast between the strong importance they generally are awarded in legal scholarship and the rather weak participation of academics to those events. For sure, these conferences have been taking place from a very early date. In 1960 during the first one, the Convention was only ten years old; the Commission had only started operating five years prior and the Court itself had only come into office a year prior –not to mention that it had not at the time rendered a single decision. Quite logically then, academic attention and participation to the conference is minimal. Also of interest is the fact that often these conferences have been organized only marginally by academics. Concretely, this means that most often it is the Council of Europe itself who acts as the main organizer, only sometimes joined by a University (ex. the 2nd conference in 1965 in Vienna or the 3rd one in 1970 in Brussels) –and other times not (ex. the 4th conference in 1975 in Rome, for which the Italian Ministry of Foreign Affairs is the co-organizer; the 5th one in 1980 in Germany, co-organized by the Gvt of the Federal Republic). These conferences are often described, notably in the Yearbook of the European Court of Human Rights, as events aimed at the world of the Convention both in Strasbourg and in the States (national judges and lawyers) as much as towards the academia (see for example description of the 1965 Vienna conference: “there were nearly two hundred participants, including members of the Commission and Court of Human Rights, judges of national courts, university professors, representatives of various international organizations and other persons interested in the Convention”⁵³).

Additionally, the position of the Convention people towards a developing academic interest towards the ECHR is, initially at least, ambivalent. The creation of the *Institut International des Droits de l'Homme* is not, paradoxically, enthusiastically supported by the Council of Europe from the outset. As early as November 1960, the Council of Europe’s Human Rights Directorate was submitting the project of creating such an Institute but then minutes of debates that took place in 1962 indicate that it somewhat recoils, arguing that such a creation is “complex”⁵⁴ and that diffusion of information and knowledge on the Council of Europe’s human rights activities and on the Convention system should be provided by the Council of Europe itself⁵⁵. However, as is well known, Cassin’s being awarded the Nobel prize for Peace in 1968 will accelerate the process, if only because he instructed that a large amount of the money that went with the prize actually be used to found the IIDH⁵⁶.

Besides its mission to encourage and support the development of various teaching programs devoted to HR law, the IIDH immediately launches an annual session of its own. It must not come to a surprise at this stage of the present investigation to establish that many Convention people are asked to intervene in those sessions. In this respect, the fact that Karel Vasak was the first Secretary General of this Institute certainly played a role in transforming the structure into an interface between the academic and the Convention worlds. To be sure, as time went by, the Institute has become more and more closely associated with the academia, and many law professors who have not been directly involved in the Convention system have presided it over the years⁵⁷. It thus would be erroneous to suggest that there is something like a competition between the IIDH and the academic world of legal

52 Since the initial 1960 Conference, the Council of Europe has organized an international conference on the ECHR every five years ; at least until the 8th in Budapest in 1995.

53 *Yearbook of the European Court of Human Rights*, 1966, p. 84.

54 Also, a 1969 issue of the *Revue des droits de l'homme* mentions an early proposal towards the creation of such an Institute by P. Modinos, but says it encountered financial obstacles ; see *Revue des droits de l'homme*, 1969, vol. II, n°1, p. 4.

55 *Yearbook of the European Court of Human Rights* 1962, p. 49.

56 From then on, it seems that the IIDH has been strongly supported by the Council of Europe, as the Committee of Minister’s Recommendation 96(1984) shows by which it encourages states to make financial contributions to the Institute (text of the recommendation in *Yearbook of the European Court of Human Rights*, 1984, p. 42).

57 This is the case for example of Gérard Cohen-Jonathan. To this day, the president is another French law professor, Jean Waline. Secretary Generals have been: professor J.-F. Flauss, A.C. Kiss (1980-1991) but also Pierre Lambert...

scholarship⁵⁸. However, the idea according to which a structure like the IIDH, in that it is closely (genetically) linked to the Convention world, has something to teach to academics in terms of how human rights law in general and ECHR law in particular ought to be taught, still is present. This undisputedly was the case at the time of the creation of the Institute: rather than signing the once-for-all acceptance by the “Convention people” that information and discussion about human rights at the European scale was to become a freely ‘non-Convention world’ (academic) issue, it was designed as a monitoring tool for the then burgeoning university courses on human rights law⁵⁹. In its second issue, the *Revue des Droits de l’Homme* describes the IIDH’s objectives as including the promotion of courses related to human rights law, to be reached by making HR law specialists ‘available’ to Universities –and gives the example of a conference held at the University of Strasbourg in November 1968 that was made possible by the IIDH. Ten years later, Karel Vasak gets involved in publishing several volumes dealing with the best ways to teach human rights law in universities⁶⁰ –thus making this a significant aspect of the IIDH’s activities –as echoed nowadays by the institutionalization, within the Institute, of the *CiedhU –the Centre international pour l’enseignement des droits de l’homme dans les universités*⁶¹.

This role of the IIDH in terms of advising universities as to how HR law should be taught can also be traced back to the Council of Europe itself. In the early 1980s there are discussions within the Convention organs as to how ECHR law should be taught in law schools. As one reads in the 1980 edition of the Yearbook of the European Court of Human rights: “A skeleton syllabus for the teaching of human rights in law faculties is currently being drawn up and will be finalized following a meeting with law professors and educationalists in may 1981”⁶². A year later, the meeting still seems not to have taken place, but the project becomes more specific, for the same Yearbook then reads: “The purpose of the skeleton syllabus is to provide inspiration and information. It will be suitably structured for adaptation in the light of specific characteristics of university programs in Member states. It will serve principally for the teaching of HR as a specific course or in the framework of courses of domestic law (constitution and administrative law, penal law, etc.), international law and international relations. It will thus pinpoint the main areas of study and provide useful information on each of them”⁶³. Additionally, it would be necessary to trace back the various initiatives of the Council of Europe (and maybe the IIDH) directed towards the world of legal practice –besides these that aim at the academia. For indeed, there is an even stronger likelihood there that the Convention world would claim better expertise than the one possibly provided for by legal academics. It so happens that in a very recent issue of the *Human Rights Law Journal*, former Registrar Mahoney strongly advocated the creation of a “European Judicial Training Institute on Human Rights”, to be placed ‘under the aegis of the European Court of Human Rights’⁶⁴, thus seemingly indicating that vocational training of judges

58 Recently, the IIDH has created the René Cassin prize, meant to be awarded to doctoral dissertations related to human rights. In 2006, the prize was awarded to F. Marchadier, with a special distinction for F. Jacquemot.

59 In its second issue, the *Revue des droits de l’homme* mentions as already existing the course of Libertés publiques in France, and the course of humanitarian law in Switzerland.

60 K. Vasak, *Les dimensions internationales des droits de l’homme : manuel destiné à l’enseignement des droits de l’homme dans les universités*, Paris : UNESCO, 1978. See also his *Human Rights Studies in Universities*, Paris : Unesco, 1973. And see (with A. Kohl, H. Petzold) : *La CEDH. Documents et jurisprudence. Recueil pour les étudiants en droit international des droits de l’homme*, IIDH, date ?

61 This structure has been directed by J.-B. Marie between 1981 and 1999, a former IIDH Secretary General (1992-99), doctor in law (specialist of international law ; his dissertation was published in 1975 by Pedone with a foreword by R. Cassin); its current president is professor Olivier de Schutter.

62 *Yearbook of the European Court of Human Rights*, 1980, p. 75.

63 *Yearbook of the European Court of Human Rights*, 1981, p. 92.

64 P. Mahoney, “A European Judicial Training Institute on Human Rights”, *HRLJ*, 2006, vol. 27, n°5-8, p. 169: “the proposed Institute would contribute to giving national judges the proper skills for ensuring the judicial protection of human rights in their own country thereby reinforcing the subsidiary character of the Convention machinery”.

at least would be better ensured by an institution emanating directly from the Convention system than by academic programs.

In other words, and to sum up this first part of my presentation, I would like to stress the idea that for quite some time, Convention people have been so active in terms of promoting the ECHR that they were taking up much of the then limited space that a number of academic arenas were ready to devote to the Convention. Arguably, this probably has to do –at least for the first decades of the Convention system- with an issue of information (and case-law) accessibility. Given the fact that ECHR law was not initially as easily accessed as it is today, it must be taken into account that this situation inevitably led “Convention people” to being key actors in the very dissemination of ECHR law⁶⁵. However, this quasi-monopoly they long enjoyed over the legal commentary of ECHR law accounts as at least a partial explanation of the relatively slow motion in which law professors have moved towards this new object –a subject I will now turn to by focusing on Italy and France and two case-studies.

2. The academic construction of ECHR law

When one focuses on the biographies and academic backgrounds of those academics who appear as ECHR specialists, it is only possible to confirm Mahoney’s statement that initially, the ECHR was perceived as a matter of international law. Also, it is quite undisputable that the national dimension of the ECHR is more reflected today than it used to be throughout the fact that domestic lawyers (specialists of criminal law, civil law, family law, constitutional law, administrative law....) do nowadays pay interest to the Convention. However, the banal statement that the ECHR has shifted from being an esoteric specialty of international law to a major aspect of national law needs to be sharpened.

In the first place, it would be interesting to understand when the shift operated –and why? Arguably, the ECHR has always had a national dimension if only because the whole Convention system has been thought of as subsidiary to the national protection of Convention rights from the very beginning, this meaning in theory that national judges and actors were always thought of as the primary implementers of the Convention. Consequently, the ECHR was susceptible of being applied by national judges and/or influence legislative norms as of its ratification by contracting parties. Yet several countries did indeed ratify the Convention early on –such is the case of Italy for example (1955). In other words, a strictly legal analysis of ECHR law could well have led to its appearing to be interesting and relevant to domestic lawyers much earlier that it generally has been the case. Secondly, how major a topic of national law the ECHR has become still needs to be assessed. It is interesting in that respect to once again look precisely at who studies the ECHR and knows it in detail, what amount of space legal journals and other academic arenas actually award Convention law, its real status and place in legal curricula in law schools, legal practice, etc.

I wish to try addressing those two questions by focusing first on people, and trying to identify the academic background of those who have contributed to transforming the ECHR into a worthwhile subject of study in academic circles, and then by trying to establish links between these academics and their profile and the discourse on the Convention they eventually produce. As far as the two countries I have chosen to focus on are concerned, the assertion according to which it was initially mainly if not only internationalists who paid interest to the ECHR is true. Although I can not elaborate much on this at this stage however, I would like to say that the preliminary results of similar investigations conducted on other countries by other members of the research team⁶⁶ seem to indicate that in some countries –and notably those who have ratified the Convention much more recently, ie. at a stage at

65 This point was made by prof. M. Cremona during the discussions at the European Legal Field conference (see above *).

66 See above *.

which the Convention is expected already to be highly integrated into national legal orders-, the picture is quite different⁶⁷.

People

In Italy, great academics of international law have led the ball –and they have done so early on, from the 1960s onwards. The list of internationalists who have paid attention to the ECHR is rather long: F. Capotorti (Bari, 4 publications on the subject from 1966 to 1980, speaker at the 1965 2nd International Conference on the ECHR in Vienna), A. Cassese (Firenze, 7 publications from 1963 to 1974), F. Durante (2 publications in 1958 and 1981), G. Gaja (3 publications from 1967 to 1978), U. Leanza (1 publication in 1967-68), M.-L. Padelletti (10 publications from 2000 to 2008), P. Pirrone (4 publications from 1997 to 2005), P. Pustorino (3 publications from 1995 to 2001), Quadri (1968), R. Sapienza (6 publications from 1981 to 2001), M.-R. Saulle (4 publications from 1976 to 1994), V. Starace (3 publications from 1975 to 2001), C. Zanghi' (17 publications from 1967 to 2006 and a speaker at the 4th International Conference on the ECHR in Rome in 1975)... Also, internationalists are the ones who author the greatest number of monographs devoted to the ECHR: the 1981 study by G. Biscottini⁶⁸ or the 1989 one by V. Gremientieri⁶⁹ are emblematic in that respect⁷⁰. And this list does not take into account the professors of international law who have also been active parts of the Strasbourg system. B. Conforti (already mentioned: a member of the Commission and then of the Court) co-edited with G. Raimondi (agent of the Italian Government European Court of Human Rights proceedings in the mid-1990s) and constitutionalist S. Bartole a thorough commentary of the ECHR⁷¹. A. Bultrini, an administrator of the Commission as of the late 1990s and now a professor at the University of Florence, is also an internationalist who has authored many studies on the ECHR⁷²... These form the successive generations of internationalists who have contributed to enhancing the interest paid to the ECHR.

In terms of domestic law, interest towards the ECHR has arisen much slower. Undoubtedly, criminal lawyers present a specific profile in this respect. Given the fact that for the longest time, the ECHR pretty much started and ended in its article 6 for all Italy knew, specialists of procedure and penal law in general have been –almost forcefully after Italy started being condemned in 1980⁷³- at the forefront of explaining, commenting and writing on the ECHR. There thus is a very long list of Italian publications about the ECHR written by criminal law specialists. But this should be seen as a partly mechanical effect of Strasbourg case-law: the declaration by the Court that a given body of law in a given country is in violation with Convention obligations generally leads to an increased interest of lawyers in the particular field towards the Convention. This however does not necessarily attest the existence of a genuine interest of –here- Italian academics vis-à-vis the ECHR, as demonstrates *inter alia* the fact that many of the commentaries that have been written on, say, the length of judicial proceedings and the ECHR have been authored by scholars who have not pursued interest in the

67 The picture also is different in countries in which there is no constitutional review, such as the Netherlands, for this quite logically favored a massively 'constitutional' appraisal of the Convention. This point was made by profs. B. de Witte and M. Claes during the European Legal Field conference (see above *).

68 G. Biscottini, *La Convenzione europa dei diritti dell'uomo nell'applicazione giurisprudenziale in Italia*, Milano : Giuffré, 1981.

69 V. Gremientieri (a cura di), *L'Italia e la Cedu*, Milano : Giuffré, 1989.

70 See also, V. Starace, *La Cedu e l'ordinamento italiano*, Bari: Levante, 1992.

71 B. Conforti, G. Raimondi, S. Bartole, *Commentario alla Cedu*, Padova : Cedam, 2001.

72 "La Cedu. Considerazioni introduttive", *Il Corriere Giuridico*, 1999, p. 642 ; « Cedu », in *Dig. Disc. Pubbl.*, Torino: Utet, 2002, p. 148; "Il meccanismo di protezione dei diritti fondamentali istituito dalla Cedu », in B. Nascimbene, *La Cedu : profili ed effetti nell'ordinamento italiano*, 2002, p. 3; *La pluralità dei meccanismi di tutela dei diritti in Europa*, Torino: 2004.

73 ECtHR, 13 may 1980, *Artico v. Italy*, case 6694/74.

Convention. This analysis seems reinforced by the fact that other branches of Italian domestic law who were not concerned by Strasbourg case-law full heartedly ignored it until recently. For example, administrative lawyers seem not to have been very mobilized about the ECHR –one of the first actual monographs on Italian administrative law⁷⁴ and the Convention was only published in 2007⁷⁵ (moreover, it is a comparative study). The same could be said about civil law, and prof. Rescigno, a member of the Accademia dei Lincei, curtly notes at the very beginning of the 2000s that the influence of the ECHR on Italian private law “has [only] been scarce”⁷⁶. This relatively weak interest domestic lawyers have paid, until recently, to the Convention contrasts all the more with the recent rise of publications and studies on the subject by constitutionalists.

Before I give further details on this aspect of contemporary Italian scholarship, I must make it clear that there is a strong case, in Italian law more than, say, in French law, for constitutionalist studies of the ECHR to blossom. For indeed, the Italian constitution is very imprecise as to the modalities by which treaties in general (and for that matter, the ECHR) are to be inserted within the national legal order. Accordingly, several theses⁷⁷ have been developed by different authors as to the modalities and rank at which the ECHR is to be regarded or not as national law –and notably, as to whether a piece of legislation posterior to the Convention is to be considered wrongful for that matter. Regardless of the fact that because of much procrastination in positive law⁷⁸, all of these approaches may claim various degrees of actual support in Italian case-law, it is very interesting to see that, at the very least, Italian scholars have proved very imaginative in terms of promoting the idea that there was a necessary link between the ECHR and constitutional law. It must be acknowledged that this idea is actually not so recent and also that it does not necessarily emanate from constitutionalists. As a matter of fact, it is interesting to see that the rare non internationalist scholars who were interested in the ECHR were the ones to initiate this idea according to which the ECHR was a matter of constitutional relevance. For example, a comprehensive initial chapter of M. Cahivario’s 1969 forerunner study of the Convention⁷⁹ and its probable incidence on the Italian criminal system was entirely devoted to demonstrating that the Italian constitution itself dictated that interest be paid to the ECHR as more than a mere international convention of ordinary legislative normative rank. However, it is a recent evolution for purely constitutionalist approaches to develop about the ECHR –and in critical numbers. The main

74 There is, however, a rather regular ECHR law chronicle in the *Giornale di diritto amministrativo*.

75 S. Mirate, *Giustizia Amministrativa e Ceduo: l’altro diritto europeo in Italia, Francia e Inghilterra*, Napoli, Jovene, 2007.

76 « CEDU e diritto privato », Accademia dei Lincei, Studi in onore di P. Barile, Roma, 2001.

77 The four main thesis are the following: a. the ECHR only retains the value of the norm that actually inserted into Italian law, that is the law of 1955 –hence legislative value; b. the ECHR has a special value because of its object and/or sources and hence it may prevail over even posterior national legislation; c. since the rights guaranteed by the ECHR coincide with those protected by the ECJ, their respect is a constitutional obligation in virtue of art. 11C, quite the same way EC law is to be respected; d. [Since 2001] the ECHR enjoys constitutional protection via art. 117C.

78 To start with, Italy is one of the countries in which the direct applicability of the ECHR has been difficult to establish. It is only after the Polo Castro decision of 1988 by the *Corte di Cassazione* that this has been established. As to the actual normative rank of the Convention, things have also long remained quite obscure. A traditional and mechanical lecture of constitutional provisions indicates that international conventions acquire within the Italian legal order the normative rank of the norm that has introduced them (dualist system). As far as the ECHR goes, it was “introduced” by an ordinary law in 1955, hence its incapacity to bind posterior legislative acts. This state of affairs has soon proved unsatisfactory to many Italian scholars and judges. Some have thus started to argue that the ECHR was of a “special nature” that gave it particular strength of resistance towards potentially contrary posterior pieces of legislation (see Constitutional Court, sent. 10/1993 and various other judicial decisions, such as Corte d’Appello Firenze, 2006). After the 2001 constitutional amendment that inserted art. 117 (according to which...), others have argued that the ECHR became a matter of constitutional law –and could thus be considered to prevail over all national legislation (both anterior and posterior). The recent decisions by the Constitutional court (sent. 348 and 349 of 2007) may however clarify the debate, for it has established that the ECHR was to be taken into account in the process of constitutional review albeit only by the Constitutional court itself.

79 M. Chiavario, *La Convenzione nel sistema delle fonte normative in materia penale*, Milano : Giuffrè, 1969. More precisely, Chiavario argues that art. 10.2 of the Italian Constitution.

constitutionalists involved in this task are: P. Barile (1970s-19080s), F. Cocozza (1990s), M. Luciani (1990s), S. Bartole (2000s), P. Carrozza (2000s), F. Donati (2000s), A. Guazzarotti (2000s), L. Montanari (2000s), A. Pace (1990s), D. Tega (2000s)... Undisputedly, this constitutionalist interest in the ECHR is a quite recent phenomenon.

As far as France goes⁸⁰, the picture is both similar and different. Similar in so far as internationalists have been the ones to initially pay attention to the ECHR –even though generally speaking they have done so quite significantly later than their Italian colleagues⁸¹. However, if I stick to my initial hypothesis according to which early interest towards the ECHR in given academic arenas is highly dependent on the actual publishing activism of Convention people, it probably is relevant at this stage to recall that France did not count a member of the European Commission of Human Rights⁸² before ratification of the Convention by France (1973) and René-Jean Dupuy was appointed. Moreover, not only was French internationalists’ interest in the ECHR belated in comparison to the Italian ones’, it was also more visible in internationalists’ arenas than the result of actual mobilization of lawyers specialists of international law. In other words, international law journals may have been the first ones to consider the ECHR as a relevant topic, they did not necessarily consider it was a matter for international law specialists only⁸³. Again, this probably has to do with the fact that by the end of the 1960s already in France, and certainly in the 1970s onwards, human rights law had already consolidated as a branch of law, and was thus well institutionally recognized –much thanks to the generalization nationwide of the course of *Libertés Publiques* in legal curricula after 1962. As a result, a growing group of law professors who specialized in human rights started existing quite early on in France, and quite logically some of them became interested in the ECHR –but then not (necessarily) from the point of view of international law.

The *Annuaire Français de Droit International*⁸⁴ is the first major French law journal to have chosen to pay attention to the ECHR ; it was followed, as far as international law arenas go, by the *Journal du droit international* and more marginally by the *Revue générale de droit international public*. In the late 1950s, H. Wiebringhaus, a member of the Council of Europe, publishes two articles introducing the French readers to the Convention system⁸⁵. M.-A. Eissen while still at the HR Directorate also publishes a number of articles in the *Annuaire* between 1959 and 1963⁸⁶, introducing

80 The basis for the information presented here has been collected in part by S. Pinto, 2007.

81 In this, I can only explain Vasak’s statement in 1969 as to the predominately French nationality of ECHR legal scholarship but some kind of (unlikely?) chauvinism; see Vasak, *Revue des droits de l’homme*, 1970, vol. III, n°4, p. 559: “Les premiers articles d’importance qui lui ont été consacrés [to the ECHR], lui donnant ainsi une sorte d’honorabilité et de crédibilité scientifiques, ont eu pour auteurs des universitaires français et l’on retiendra surtout l’étude du professeur René-Jean Dupuy, toujours actuelle. Le premier cours d’ensemble sur la Convention a été donné à la faculté de droit de Paris en 1960-1961 par le professeur Roger Pinto et la doctrine de la Convention reste toujours d’abord française [he cites profs. Pelloux and Monconduit], mais elle est de plus en plus talonnée par la doctrine allemande, voire américaine...”.

82 In the very early years, a French senator was appointed as an observer, but as it became clear as time went by that ratification was not raking high on the French political agenda, he stopped attending and was not replaced.

83 It would actually be necessary to investigate the role of the course of “International organizations” that was also an important element of the curriculum in law schools, for at least in the 1960s it seems to have been on of the arenas in which interest for the ECHR blossomed. Notably, prof. R. Pinto of the University of Paris, is recalled as one that paid much interest to the Convention while he taught that class and published his book *Organisations européennes* (1re ed. 1963; 2ème ed. 1965). See necrology by P. Tavernier, in *Bulletin du CREDHO*, déc. 2005, n°15, p. 106.

84 The AFDI is launched in 1955, under the “haut patronage” of, among others: G. Berlia, R. Cassin (then VP of the ECtHR, R. Pinto, P. Reuter, Ch. Rousseau...

85 H. Wiebringhaus, “Travaux et jurisprudence de la Commission européenne des droits de l’homme entre le 5 juillet 1955 et le 5 juillet 1958 », *AFDI*, 1958, p. 495 ; « La règle de l’épuisement des voies de recours internes dans la jurisprudence de la Commission européenne des droits de l’homme », *AFDI*, 1959, p. 685.

86 See his “La Cour européenne des droits de l’homme, de la Convention au Règlement”, *AFDI*, 1959, p. 618; “Le nouveau Règlement de la Commission européenne des droits de l’homme”, *AFDI*, 1960, p. 774; “La jurisprudence de la Commission européenne des droits de l’homme”, *AFDI* 1963, p. 722.

the French audience to the basics of the Convention system –as I recalled earlier, he is the one who commented on the very first Court decision in the Lawless case⁸⁷. It is only a couple of years later that a French professor, Robert Pelloux (1907-1989⁸⁸), took over the mission of writing on ECHR law. He commented on the De Becker case in 1962, Use of languages in education in Belgium one in 1967 and 1968, the Delcourt one in 1971, the Ringeisen one in 1974 and eventually, by the end 1970s until 1984 he published annually on ECHR case law. Interestingly, Pelloux is not a specialist of international law⁸⁹. Rather he has the profile of a human rights / civil liberties specialist. One of Pelloux's famous pieces is a thorough article published in 1947 in the French *Revue du droit public* about the preamble of the 1946 Constitution –a very significant text in terms of human rights law for it is the first –and only- constitutional proclamation of economic and social rights in France. He also regularly edited a series entitled “Essais sur les droits de l’homme en Europe”: one volume in 1959, a second one in 1961 and the third one in 1966 more specifically focusing on the issue of admissibility of individual petitions to the European Commission of Human Rights⁹⁰. Some of his other works show an interest in political theory⁹¹. In other words, Pelloux was somehow predisposed to an interest in ECHR law⁹², for he already priorly mostly focused on human rights. Granted, Pelloux's chronicle at the *AFDI* was passed on in 1985 to a true internationalist, Vincent Coussirat-Coustère⁹³, who published an annual chronicle on ECHR law from 1986 to 1997. By the end of the 1970s, it seems that the *AFDI* was fully convinced of the importance of ECHR law, for this chronicle is paralleled by another one devoted specifically to the European Commission's activities, under the responsibility of two other internationalists profs. G. Cohen-Jonathan⁹⁴ and J.-P. Jacqué⁹⁵ (from 1975 to 1989).

However, the other great locus of French literature and commentary of ECHR law, the *Journal du Droit International* also eventually –eg. lately: in 1978 only- decided that the ECHR law was worth of interest; but somehow it did not seem to find any confirmed international law specialist for being in charge. Young professor Patrice Rolland was thus asked to take responsibility for commenting on

87 “Le premier arrêt de la Cour européenne des droits de l’homme”, *AFDI*, 1960, p. 444.

88 Pelloux is a professor at the University of Lyon, and then the president of the Institut d’Etudes Politiques of Lyon.

89 His doctoral thesis dealt with an administrative law issue ; see : *La notion de domanialité publique depuis la fin de l’ancien droit*, Paris : Dalloz, 1932.

90 R. Pelloux, dir., *Essais sur les droits de l’homme*, 3ème série: *Etude de la jurisprudence relative à la recevabilité des requêtes individuelles devant la Commission Européenne des Droits de l’Homme*, LGDJ/Giapichelli, 1966 [A.M. Nay-Cadoux, a doctoral student of Pelloux's].

91 See for instance his *Libéralisme, Traditionalisme et Décentralisation*, Armand Colin, 1952 ; as well as he famous *Le Citoyen devant l’Etat*, first published in 1963 (4ème ed., PUF, Coll. Que sais-je ?, 1972).

92 For additional relevant references, see his “Précédents et caractères généraux de la Convention européenne”, in *La protection internationale des droits de l’homme dans le cadre européen*, Paris: Dalloz, 1961, p. 59; “La Cour européenne des droits de l’homme”, *Etudes et documents du Conseil d’Etat*, 1970, p. 83; “Le contentieux de l’indemnité devant la Cour européenne des droits de l’homme”, *Mélanges Stassinopoulos*, Paris: LGDJ, 1974, p. 398.

93 See: *La contribution des organisations internationales au respect des obligations conventionnelles des Etats*, PhD, University Paris II, 1979; other publications include monographies on the ICJ and arbitration in international law. He has supervised several thesis (including doctoral thesis) on human rights law and the ECHR.

94 Cohen-Jonathan also started his academic career as an internationalist (doctorate in 1966 in international public law). As of 1972 however, his list of publications shows an interest for human rights law (see for example “Droits de l’homme et multiplicité des systèmes européens de protection internationale”, *Revue des droits de l’homme*, 1972, p. 615; “Droits de l’homme et Communautés Européennes”, in *Recueil d’études en hommage à Charles Eisenmann*, Paris: Ed. Cujas, 1977). The permanent shift towards ECHR law seems to occur in the second half of the 1980s. In 1985, he co-edits with M.-A. Eissen the volume *Dix ans d’application de la CEDH devant le juge judiciaire LIEU*: Engel and in 1989 he authors a monography on the subject (*La Convention européenne des droits de l’homme*, Aix: PUAM). After that a very high percentage of his publications have to do with the ECHR –and they are very numerous, to this day.

95 Jacqué, *Eléments pour une théorie de l’acte juridique en droit international public*, Paris: LGDJ, 1972.

ECHR case law⁹⁶. In a certain sense similarly to Pelloux, Rolland is a HR specialist. His doctoral dissertation was devoted to the concept of moral freedom⁹⁷ and most of his publications deal with human rights protection and procedures, be it at the domestic or international levels⁹⁸. He thus wrote a chronicle on the ECtHR's case law every two years from 1978 to 1982, and was rejoined as of 1985 by Paul Tavernier, a true internationalist whose focus on human rights soon however makes him appear as one of the leading French ECHR specialists⁹⁹ although retaining a general international law identity¹⁰⁰. Together, they publish a yearly chronicle from 1985 to 1990 –after which date Rolland is replaced by E. Decaux, another internationalist¹⁰¹. And as far as the *RGDIP* goes –the other major French journal of international law, comparable in prestige and audience to the Italian *Rivista di Diritto Internazionale*-, it has had an only marginal and scattered interest in the ECHR. An article is published in 1964 on regional protection of human rights¹⁰², and some cases such as the Ireland v. United Kingdom one of 1978 were commented upon (note: this particular case denotes the very “international law” approach of the Convention for it is one of the rare interstate cases). It seems only to be well into the 1980s¹⁰³, notably with an in-depth article by P.-H. Imbert¹⁰⁴ and another one by F. Sudre¹⁰⁵, that the review devotes substantive space to the issue. Also of interest is the obituaries the journal devotes to key actors of the Convention system. When A. Verdross dies in 1980, his obituary by the *RGDIP*'s editor in chief Ch. Rousseau¹⁰⁶ only evoked the great international law scholar but does not say a word of his time and role at the ECtHR. In the same issue, a note is also devoted to the memory of G. Balladore Pallieri. In this latter case, his years as member and president of the ECtHR (21 years!) are only incidentally evoked in one sentence¹⁰⁷. A little later, upon Sir H. Waldock's death, the journal salutes his memory quite the same way, passing really rapidly of the Strasbourg part of his career¹⁰⁸. It is only on the occasion of the obituary in the memory of Sir G. Fitzmaurice that the

96 This is how P. Rolland himself told the story ; cf. his words at the ‘*Rencontres interdisciplinaires autour de la CEDH*’ workshop, June 2007, University of Paris 12.

97 P. Rolland, *La liberté morale et l'ordre public*, LGDJ, 1976 (dir. : P. Weil).

98 See for example : « La nouvelle procédure d'examen des communications concernant les violations des droits de l'homme à l'UNESCO », *Revue internationale des sciences administratives*, 1980, p. 266.

99 Not least because he was the founder of the CREDHO (Centre de recherches et d'étude sur les droits de l'homme et le droit humanitaire) at the University of Rouen, later transported to the University of Paris 11 (Sceaux), a very active centre on human rights law who held an annual conference on France and the ECHR for the past 12 years.

100 Ongoing publications on humanitarian law as well as international criminal justice systems.

101 See : *Le principe de la réciprocité des actes juridiques et des obligations internationales*, PhD, University Paris II, 1978 ; published Paris : LGDJ, 1980. Although Decaux always retains a general international law identity, some of his publications on the ECHR are of importance, such as : (with T. Hubert), *Droit international des droits de l'homme*, 1990 ; (with L.-E. Pettiti and P.-H. Imbert), *La Convention européenne des droits de l'homme. Commentaire article par article*, Paris : Economica : 1995 (2nd edition, 1999). Additionally, Decaux has been the supervisor of many doctoral dissertations on ECHR law (notably M. Eudes, *La pratique judiciaire interne de la CEDH*, Paris: Pedone, 2005; M. Boumghar, *Une approche de la notion de principe dans le système de la CEDH*, PhD., University Paris II, 2006).

102 G. Guyomar, « Les Nations Unies et les organisations régionales dans la protection des droits de l'homme », *RGDIP*

103 Perhaps it is of interest to note that as of 1983, prof. P.-M. Dupuy joins the editorial board of the journal, together with Ch. Vallée. An internationalist but also a son of France's first member of the EComHR (R.-J. Dupuy), it can be hypothesized that Dupuy was more likely to be acquainted with and sensitive to human rights law –and ECHR law in particular.

104 P.-H. Imbert, “Les réserves à la CEDH devant la Commission de Strasbourg”, *RGDIP*, 1983, n°3, p. 580. On the same topic, but somewhat later, see also G. Cohen-Jonathan, “Les réserves à la CEDH”, *RGDIP*, 1989, n°2, p. 273.

105 F. Sudre, “La notion de peines et traitements inhumains et dégradants dans la jurisprudence de la Commission et de la Cour européenne des droits de l'homme”, 1984 ; “La 1re affaire française devant la Cour européenne des droits de l'homme”, 1987, p. 533.

106 Ch. Rousseau, “In memoriam A. Verdross”, *RGDIP*, 1981, n°1, p. 247.

107 Ch. Rousseau, “In memoriam G. Balladore Pallieri”, *RGDIP*, 1981, n°1, p. 249.

108 *RGDIP*, 1981, n°4, p. 946.

recollection pays some interest to the ECHR, notably by recalling some of his most famous dissenting opinions¹⁰⁹.

Generally speaking then, one can say that French academic journals of international law have moved on to the ECHR much later than their Italian counterparts. Also, they have done so throughout the involvement of scholars who were not necessarily strictly speaking international law specialists. This actually puts us on the tracks of what could be seen as a major difference between French and Italian scholarship on the ECHR eg., the fact that whereas the matter has remained mostly an internationalist concern in the latter system it soon accompanied a specific movement within French academia of autonomization of HR law specialists. Many of them do come from a background of international law; it is the case of Gérard Cohen-Jonathan¹¹⁰, Frédéric Sudre¹¹¹, or Paul Tavernier¹¹². But others do not and, added to the former, they contribute in the late 1970s / 1980s to forming a quite important group of scholars mostly interested in HR law. Professors like Patrice Rolland (mentioned above), Mireille Delmas-Marty¹¹³, Jean-François Flauss¹¹⁴... soon become leading experts of ECHR law. Since, as we have seen, they are not international law specialists nor is the number of possible publication arenas very high (as I have explained, by the early 1980s, some international law journals have opened their columns to ECHR matters –but not massively), they pretty much have to incite publication arenas that do not pre-exist. Maybe this explains in part their often relatively entrepreneurial course of action. Some examples are interesting to look at from close-up at this stage.

The fate of Cohen-Jonathan's chronicle in the Belgian review *Cahiers de droit européen* is illustrative of the rarity and scattered dimension of potential publication venues on the ECHR. First, because, the journal in question is Belgian and not French. Although I cannot claim to have original information in this respect, it is not forbidden to formulate the hypothesis according to which this chronicle being published in a Belgian journal means that either no other (French) journal offered him to write such a chronicle at the time or he did not convince any other (French) journal that it would be worthwhile to actually publish one. It is also worth noting that ECHR law clearly does not rank on the top of the journal's editorial board priority list. Despite the fact that the inaugural issue in 1965 presented the journal as one that would pay [equal] attention to EC law and to the activities of the Council of Europe, the editors themselves acknowledge in the fifth anniversary issue in 1970 that

109 *RGDIP*, 1982, n°4, p. 848.

110 Doctoral thesis: *Les concessions en droit international public*, Strasbourg, 1966, dir. Ch. Rousseau.

111 Doctoral thesis: *L'OMCI, institution spécialisée des Nations Unies*, 1973.

112 Doctoral thesis: *Le problème de l'application dans le temps des actes et règles en droit international public*, 1970, dir. : P. Reuter.

113 Born in 1941, Mireille Delmas-Marty becomes a professor in private law and criminal science in 1970. In the 1970s and 1980s, her works focus for the most part on criminal law issues. However, her interest in identifying basic common principles to a variety of legal systems (see for example *Vers des principes directeurs internationaux de droit pénal. Criminalité économique et atteintes à la dignité de la personne*, Paris : MSH, 1995-2001 (7 vol.)) has favored her interest in both legal theory (*Le flou du droit*, Paris : Presses universitaires de France, 1986) and fundamental rights –in particular ECHR rights (“La ‘matière pénale’ au sens de la CEDH comme flou du droit pénal”, *RSC*, 1987, n°4, p. 819; “Vers une autre logique juridique: à propos de la jurisprudence de la Cour européenne des droits de l’homme”, *Recueil Dalloz*, 1988, p. 221; “La jurisprudence de la Cour européenne des droits de l’homme et la logique floue”, *Rev. droit pénitentiaire et criminel*, 1992, p. 1031). Her combined interpretation of ECHR law and fuzzy logic as a new relevant theoretical paradigm have led her to strongly support the notion that a task of legal scholarship was to search for common principles –a *ius commune*. See notably in this respect: “Réinventer le droit commun”, *Recueil Dalloz*, 1995, p. 1; “Vers un droit pénal européen commun”, *Archives de Politique Criminelle*, 1997, n°19, p. 7; *Pour un droit commun*, Paris : Seuil, 1994).

114 Initially a specialist of administrative law (see : *Les questions préjudicielles et le principe de la séparation des autorités administratives et judiciaires*, PhD, University of Strasbourg, 1976 ; supervision J. Waline), Flauss now is one of the French ECHR specialists. Since the early 1990s, almost all of his publications have to do with the ECHR ; notably, the series started out with a strong and clear agenda : assert the emergence of a European public order throughout the ECHR (see : “Les droits de l’homme comme éléments d’une constitution et de l’ordre européen”, *Vorträge, Reden und Berichte aus dem Europa-Institut*, Universität des Saarlandes: 1992, vol. 4 n°264).

insufficient attention had been paid to the latter –but they also promise that an annual chronicle of the European Commission’s most important decisions will soon be launched. It will take another eight years for the chronicle to actually be put together though, not to mention the fact that Cohen-Jonathan’s chronicle will never exactly be “annual” (save for the first three first years): after regular publication in 1978, 1979 and 1980, it only appears in the 1982, 1986 and 1988 issues. It then disappeared until lately being taken over in 1997¹¹⁵. If I take this example as a further illustration of a quite long-lasting only lukewarm interest in ECHR law of French law journals, then the quite entrepreneurial dimension of some professors who were eager to foster such interest appears in an interesting light, for it partially explains itself by the absence of “natural” locus for publications: these needed to be created. Hence the multiplication of conferences and conference proceedings (the Sudre profile) or the strategic dimension of appointments as Chief Editor in law journals (the Delmas-Marty profile).

This latter example of M. Delmas-Marty is indeed quite interesting, for there is an obvious correlation between the fact that in 1984 she becomes an editor of the *Revue de Science Criminelle* and the launching of a new pluriannual “International Chronicle” on human rights. The chronicle is written by a “Convention person”, L.-E. Pettiti, from 1984 to 1988, (sometimes with the collaboration of P.-H. Teitgen). Afterwards, French scholar Florence Massias, to whom judge Françoise Tulkens is often associated, is in charge of the chronicle until most recently, prof. J.-P. Marguénaud (the leading civil law ECHR specialist in France) has taken over¹¹⁶. It is interesting to see how strong the idea according to which the commentary of ECHR law is best done by Convention people remains: L.-E. Pettiti was the French judge at the European Court of Human Rights since 1980, P.-H. Teitgen is one of the Convention’s “founding fathers” and F. Tulkens has been a prominent judge of the Court since 1998. However, this important chronicle soon posited the *Revue de science criminelle* as one of the major *loci* of human rights law in the French landscape of law journals –and it most likely has exerted a mainstreaming effect on equivalent journals and incited them to launch their own ECHR chronicles¹¹⁷.

Frédéric Sudre’s involvement in promoting the ECHR as a valuable object of study is also very exemplary in that respect. After himself starting off his ECHR interest in a traditional internationalists’ arena such as the *Revue Générale de droit International Public*¹¹⁸, he publishes a monograph in 1989 entitled *Droit international et européen des droits de l’homme*¹¹⁹ (one of its kind at the time) that positions him as the international and European HR law specialist. Besides this individual initiative, he multiplies collective activities and books devoted to the ECHR. In 1989, he organized the ‘Conseil Constitutionnel et Cour européenne des droits de l’homme : Droits et Libertés en Europe’ conference in Montpellier –of which the proceedings were turned into a well-known book¹²⁰ shortly after. In 1993, he organized another one entitled ‘Le droit français et la CEDH 1974-1992’, also published as a book¹²¹. In parallel, Sudre had an intense and successful activity in convincing a number of law journals of the importance of creating chronicles of ECHR law. He thus started one in the *Revue Française de Droit Administratif* in 1991¹²², in the *Revue universelle des droits de l’homme* in 1992¹²³,

115 By Prof. Joel Andriantsimbazovina ; for more information, see below.

116 Together with his junior colleague Damien Roets.

117 The *Revue trimestrielle de droit civil* has a ECHR law chronicle since 1996 held by Jean-Pierre Marguénaud. It is biannual.

118 See above.

119 Paris : Presses universitaires de France, 1989 ; the monograph has just undergone its 9th edition in 2008.

120 F. Sudre, D. Rousseau, *Conseil Constitutionnel et Cour européenne des droits de l’homme. Droits et Libertés en Europe*, Paris : STH, 1990.

121 F. Sudre, et al., *Le droit français et la CEDH 1974-1992*, Kehl : Engel, 1994.

122 This first chronicle is launched with the collaboration of his colleague H. Labayle and also interestingly with that of V. Berger, a member of the ECtHR’s Registry. As of 1997, Berger steps out and profs. J. Andriantsimbazovina and L. Sermet are associated to the chronicle.

another one in *La Semaine juridique* in 1996 as well as another one in the *Revue du droit public* in 1999¹²⁴. By the end of the 1990s, this ECHR activism reached its peak with the publication of the proceedings of the important 1998 conference on the interpretation of the ECHR¹²⁵, the development of comparative studies on fundamental rights' protection by the ECJ and the ECtHR¹²⁶ and eventually in the early 2000s, the launching of the digest of ECHR case law¹²⁷. Not to mention on the one hand the various research reports, conferences and books Sudre has edited or co-edited on specific aspects of ECHR law¹²⁸ and on the other hand the now numerous PhD dissertations he has supervised on ECHR law¹²⁹—plus all the strictly academic initiatives, such as the launching of specific courses and diplomas in European Human Rights Law, an area I have not had time to investigate to this day.

In other words, one can say there is a specifically HR/ECHR law specialists community within the French academia—a profile I have not met in the Italian one. Many foundations of such a community thus having been established in the 1980s, the 1990s are the decade of their (massive) strengthening. This strengthening decade will be a period of time during which this relatively small group of scholars who have been paying interest to ECHR law in the 1980s actually manage to raise the interest of many colleagues of domestic law. As a matter of fact, in France, it is mostly administrative law specialists who have become interested in ECHR law (as opposed to what I have recalled has happened in Italy: the mobilization of constitutionalists), and have contributed to “nationalizing” ECHR law by arguing that it exerts a strong influence over domestic law and/or that it should do so. S. Braconnier¹³⁰, J. Andriantsimbazovina¹³¹, L. Potvin-Solis¹³², L. Sermet¹³³ etc. Later on, some private lawyers joined the trend, but in more marginal proportions (J.-P. Marguénaud¹³⁴, A. Debet¹³⁵).

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123 The chronicle is published annually from 1992 to 1998, by F. Sudre and colleagues.

124 The chronicle still runs to this day.

125 F. Sudre, dir., *L'interprétation de la Convention européenne des droits de l'homme*, Bruylant, 1998.

126 F. Sudre, dir., *Droit communautaire des droits fondamentaux : recueil des décisions de la Cour de Justice des Communautés Européennes*, Bruxelles : Bruylant, 1999 ; now F. Sudre, R. Tinière dir., *Droit communautaire des droits fondamentaux : recueil des décisions de la Cour de Justice des Communautés Européennes*, Bruxelles, Bruylant, 2008. See also F. Sudre, H. Labayle, dir., *Réalité et perspectives du droit communautaire des droits fondamentaux*, Bruxelles : Bruylant, 2000.

127 F. Sudre, J. Andriantsimbazovina, J.-P. Marguénaud, M. Levinet, A. Gouttenoire, *Les grands arrêts de la Cour européenne des droits de l'homme*, Paris, Presses universitaires de France, 2003 -5th edition currently under way.

128 See : F. Sudre, dir., *Le droit au respect de la vie privée au sens de la CEDH* (Bruxelles : Bruylant, 2005) ; F. Sudre, I. Pingel, dir., *Le ministère public et les exigences du procès équitable* (Bruxelles : Bruylant, 2003) ; F. Sudre, C. Picheral, *La diffusion du modèle européen de procès équitable* (Paris : La Documentation Française, 2003) ; F. Sudre, C. Picheral, dir., *L'extension des garanties du procès équitable hors les juridictions ordinaires : les contraintes européennes* (Rapport de recherche, Mission de recherche Droit & Justice, 2002) ; F. Sudre, dir., *Le droit au respect de la vie familiale au sens de la CEDH* (Bruxelles : Bruylant, 2002) ; F. Sudre, B. Peyrot, *L'état des requêtes introduites contre la France devant la Commission européenne des droits de l'homme*, 2 oct. ; 1981-31 déc. 1992 (Rapport, Université Montpellier I, 1993).

129 See : B. Maurer, *Le principe du respect de la dignité humaine et la Convention européenne des droits de l'homme* (Paris : La Documentation Française, 1999) ; C. Picheral, *L'Ordre public européen : droit communautaire et droit européen des droits de l'homme* (Paris : La Documentation Française, 2001) ; F. Rivière, *Les opinions séparées des juges à la Cour européenne des droits de l'homme* (Bruxelles : Bruylant, 2004) ; P. Muzny, *La technique de proportionnalité et le juge de la CEDH : essai sur un instrument nécessaire dans une société démocratique* (Paris – Aix : PUAM, 2005) ; L. Milano, *Le droit à un tribunal au sens de la CEDH* (Paris : Dalloz, 2006) ; K. Grabarczyk, *Les principes généraux dans la jurisprudence de la Cour européenne des droits de l'homme* (Paris-Aix : PUAM, 2008) ; F. Jacquemot, *Le standard européen de société démocratique*, Presses de l'Université Montpellier 1, 2006.

130 *Jurisprudence de la CEDH et droit administratif français*, PhD, University of Poitiers, 1995; published Bruxelles: Bruylant, 1997. His other publications mostly have to do with administrative law issues, such as public services and public procurement. However, he was one of the first legal scholars to successfully manage a career within the legal academia after having focused on ECHR law at the doctoral level.

131 *L'autorité des décisions de justice constitutionnelle et européenne sur le juge administratif français*, LGDJ, 1998. Andriantsimbazovina also is a prominent figure of this first generation of jurists whose research interests have had to do with the ECHR from the outset of their career—except that he (unlike Braconnier, above) has stuck to ECHR law after securing his first career steps.

Discourses

Why is it interesting to identify such evolutions in the dominant legal paradigms applied to the ECHR, from that of international law to that of domestic law? Mostly because of the interesting elements that can be drawn from the fact that internationalists and domestic lawyers do not say the same thing about the same object. This apparently simplistic statement needs to be examined from closer-up angles.

Trying to link scholars' identity and their discourse helps us keep at a distance the idea according to which something like a juridical ontology of human rights would exist –for indeed, once such variance has been observed in the legal discourses produced on one single object (the ECHR) depending on whether they emanate from international or internal law specialists and/or from France or Italy, it becomes much more difficult to hypothesize that ECHR law or ECHR rights have a fixed essence. I will not insist on this aspect here but however wish to stress how crucial an issue it is. Indeed, the development of ECHR law may well have comforted trends of legal scholarship that were otherwise involved in promoting the idea according to which human rights can be apprehended as purely legal objects –or the other way around, the idea that there are such things as legal « right answers » to human rights questions or issues. Emblematic in this respect are the words of R. Cassin in an early issue of the above-mentioned *Journal des Droits de l'Homme*: “nous voulons apporter la preuve que les droits de l'homme sont une science”¹³⁶. Obviously if one single object (the ECHR) is “described” (so) differently in France and in Italy, by internationalists and domestic lawyers (etc.), such viewpoints become more difficult to convincingly ground. This in turn also encourages the adoption of critical stances towards the idea that something like a *ius commune* at the European scale could somehow be derived from the process of consolidating HR protection in Europe –an idea that has been promoted over the years by many of the actors referenced in this paper, both Convention people and legal academics¹³⁷.

Second, it also underlines the idea according to which law professors, or legal scholarship, produce very “situated” studies and theories –or, the other way around, their scholarly production (the questions they choose to address as well as the general orientations they take) is critically influenced or oriented

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132 *L'effet des jurisprudences européennes sur la jurisprudence du Conseil d'Etat français*, LGDJ, 1999. Similarly to Andriantsimbazovina, Potvin-Solis has not addressed ECHR as such but rather the issue of the interaction between national and ECHR law from an administrative law perspective. She also has continued working on the ECHR and has recently co-edited (with F. Lichère), *Le dialogue entre juges européens et nationaux: incantation ou réalité?*, Bruxelles: Bruylant, 2004.

133 *CEDH et contentieux administratif français*, Economica, 1999. Similarly, Sermet belongs to this generation of scholars who have approached ECHR law from the viewpoint of its interaction with French law. He now is one of the ECHR authoritative scholars in France. See recently his: “L'obscur claret de la notion prédominante d'arrêt pilote”, *RGDIP*, 2007, n°4, p. 863.

134 See J.-P. Marguénaud, dir., *CEDH et droit privé: l'influence de la jurisprudence européenne des droits de l'homme sur le droit privé français* (Paris: La Documentation Française, 2001). Like Decaux, Sudre and others, Marguénaud is starting to have students defend PhD dissertations on ECHR law. See for example: F. Marchadier, *Les objectifs généraux du droit international privé à l'épreuve de la CEDH* (Limoges, 2005; published Bruxelles: Bruylant, 2006) and B. Moutel, *L'effet horizontal de la Convention européenne des droits de l'homme en droit privé français. Essai sur la diffusion de la CEDH dans les rapports entre personnes privées* (Limoges, 2006).

135 *L'Influence de la CEDH sur le droit civil*, Dalloz, 2002.

136 R. Cassin, *Revue des droits de l'homme*, 1970, vol. III, n°4, p. 555. For further references on the technicization of HR law and its tendency to correlative depoliticization, see notably M. Madsen (2005) and M. Koksenniemi (1999).

137 See for example: M. de Salvia, “L'élaboration d'un ‘ius comune’ des droits de l'homme et des libertés fondamentales dans la perspective de l'unité européenne: l'oeuvre accomplie par la Commission et la Cour européenne des droits de l'homme”, in F. Matscher, H. Petzold, eds., *Protecting Human Rights: the European Dimension. Studies in honor of Gérard Wiarda*, Köln: Heymanns, 1988, p. 555. See also M. Delmas-Marty, “Le rôle du juge européen dans la renaissance du jus commune: Signification et limites », in *Protecting Human Rights: the European Perspective. Studies in honor of Rolv Ryssdal, op. cit.*, p. 397. See also quite similarly, J. Frowein, “Fundamental Rights as a vehicle for Legal Integration in Europe”, in M. Cappelletti, J. Weiler, M. Seccombe, 1985.

by the particular legal/technical issues of a given legal order as well as by more general -and, in a sense, political- aims. Let me take some examples at this stage.

There is a case to be made for the idea that if Italian legal scholarship has remained quite hermetic (more, in any case, than its French counterpart) to the idea that the ECHR is part of a ‘European public order’, this might have to do with the much international law-oriented approach that has prevailed in this country. As is well known, internationalists are not necessarily at ease with notions such as ‘public order’ or ‘jus cogens’¹³⁸. And maybe not surprisingly in this respect, there is only little insistence in Italian legal scholarship on the notion of “objective” obligations¹³⁹ that would derive from the Convention. One must not be blinded by the recent interest of Italian constitutionalists for the ECHR, because what they really value favorably is not the idea that the ECHR would somehow become a (transnational) “constitution” (eg. something that would possibly entertain relations with the notions of public order) but quite differently, the notion that ‘constitutional’ (*erga omnes*) authority of the European Court of Human Rights’ case law is to be ‘controlled’ and therefore ‘awarded’ only by the national constitutional court¹⁴⁰. In other words, what Italian constitutionalists praise is not necessarily the transnational constitutionalism some seek to bestow the ECHR with but rather a much more traditional and national approach to the very notion of constitutionalism; words and things...

In parallel, French legal scholarship’s much more pronounced inclination towards the idea of the ECHR as an element of a European public order¹⁴¹ could well be seen as a quite logical consequence of the fact that mostly domestic lawyers or HR specialists have paid attention to the Convention. Yet domestic lawyers (quite notably administrative lawyers who, as has been established, happen to be the ones who have paid greater attention to the ECHR) are very familiar with the concept of public order¹⁴². Furthermore, as far as HR specialists go, there is a strong case to be made for the fact that in large numbers, they have been/are believers¹⁴³ in the notion of a sort of *ius commune* that they thought the Convention could somehow either favor or embody. In other words, one could well work out the hypothesis according to which a constitutional/public order paradigm was more likely to be successful in French settings because of the fact that it depends on concepts that were familiar to the lawyers who were studying the Convention and/or matches the normative albeit implicit goals many a HR law scholar pursues.

The rising interest of constitutionalists or, more generally, the increasingly common application of a constitutionalist paradigm in studies devoted to the ECHR is quite interesting to turn back to after these elements have been presented –and here I come to a last set of reasons for which I believe it is worthwhile to try to investigate and refine the idea that scholars from international law of HR law specializations do not say the same thing about the ECHR. We all know that over the past years, the

138 On the uneasiness, see H. Ruiz-Fabri, 2001.

139 This contrasts strongly with the French scholarly discourse on the ECHR, which insists heavily on this ; see for example Sudre 2005.

140 See in this respect the recent 2007 clarifying decisions by the Italian Constitutional Court (sent. 348 and 349).

141 See among other references : G. Cohen-Jonathan, ‘Responsabilité pour atteinte aux droits de l’homme’, in Société Française pour le Droit International, *La responsabilité dans le système international* (Paris: Pedone, 1991), p. 110 ; J.-F. Flauss, ‘Les droits de l’homme comme éléments d’une constitution et d’un ordre public européen’, *Les Petites Affiches*, 1993, n°52, p. 10 ; F. Sudre, ‘Existe-t-il un ordre public européen ?’, in P. Tavernier, dir., *Quelle Europe pour les droits de l’homme* (Bruxelles : Bruylant, 1996) and ‘L’ordre public en droit européen’, in M.-J. Redor, dir., *L’ordre public : ordre public ou ordres publics* (Bruxelles : Bruylant, 2001) ; C. Picheral, *L’ordre public européen : droit européen et droit communautaire des droits de l’homme* (Paris : La Documentation Française, 2001) ; J. Andriantsimbazovina, « L’élaboration progressive d’un ordre public européen », *Cahiers de droit européen*, 2000, as well as the other titles of his chronicle that almost all refer to the notions of public order or *ius commune*.

142 Albeit, arguably, the concept does not have the same sense according to whether it is used in the ambit of administrative law or by the Convention organs –but this is a whole separate issue.

143 I use this specific term as a way of echoing M.-B. Dembour’s very stimulating discussion of the human rights credo and its influence on HR law and legal scholarship; see Dembour 2006.

Convention system has been more and more referred to as a constitutional system: the Court is said to be (or to ought to be, depending on authors) a constitutional court, the Convention is increasingly viewed as a constitutional text, the whole Strasbourg system is presented as a one seeking constitutional justice -and this is all presented as quite normal in a world otherwise likely and sometimes enthusiastically analyzed as a world in which Constitutions are no longer linked to (nation) states but to transnational legal orders¹⁴⁴, and the word “constitutional” no longer related to hierarchies of norms but used to designate issues of general interest¹⁴⁵. On this last point, I would like to make two remarks.

First, I would like to insist here again on the importance there is to closely scrutinize the actual involvement of those I have called “Convention people” in the promotion and widespreading of this rationale¹⁴⁶. Pretty much the same way people directly involved in the Convention system have, in my understanding, played a crucial role in making the ECHR worthy of interest in academic circles at early stages, I find that they today play a significant role in imposing this “constitutional” agenda. Readers of ECHR law literature have probably often noticed that leading figures such as Rolv Ryssdal (president of the Court from 1985 to 1998)¹⁴⁷, Luzius Wildhaber (subsequent president of the Court from 1998 to 2007), or Paul Mahoney (Registrar of the Court from 2001 to 2005¹⁴⁸), etc... are or have been strong promoters of the relevance of the constitutionalist paradigm when applied to the ECHR, and/or of the constitutional future of the European Court. But what is really striking when one looks closely at the literature, is that it can actually be hypothesized that these people would by many means have originated this discourse altogether¹⁴⁹ –as opposed to merely supported it¹⁵⁰. To be sure, some academics -among which E. Alkema, E. de Wet or S. Greer¹⁵¹- have at this stage joined the choir. It nonetheless remains true that this is only recent; therefore, for quite some time, “Convention people” may well have been the only ones to frame things according to that vocabulary. Then again, what does this -maybe- teach us? It can probably be argued that active actors of a given system generally speaking have a higher proportion of empirical motives for sustaining the positions they do than, say, academics. In that respect, it is of interest to ascertain that this “constitutionalist” discourse applied to

144 Weiler and Wind, 2003; Weiler 1999.

145 For such acceptations and discussions of constitutionalism, see Greer 2006, Helfer 2008.

146 Although I cannot say more on this topic at this stage, there are some leads to the idea according to which authors from inside the Convention system had also played a role in earlier spreading the word that the Convention was to be viewed as an element of “ordre public”. For instance, W.J. Ganshof van der Meersch, who will be elected at the ECtHR in 1973 (and later serve as a VP to the Court under the presidency of much involved in promoting the constitutionalist paradigm R. Ryssdal) starts writing about the ECHR as ordre public in 1968. See notably: “L’ordre public et les droits de l’homme », in *Journal des Tribunaux*, 1968, p. 658 ; and “La CEDH a-t-elle dans le cadre du droit interne une valeur d’ordre public?”, in *Les droits de l’homme en droit interne et en droit international*, 2ème colloque du Conseil de l’Europe sur la CEDH, Vienne, 1965, PUBruxelles, 1968, p. 155 ; as well as, later on : “La référence au droit interne des Etats contractants”, *RIDC*, 1980, p. 319.

147 See for example R. Ryssdal (1991), p. 9 “The typical issue brought before the Commission and the Court is more of a constitutional nature: it embraces the age-long and sensitive problem of the balance to be struck between the general interest of the Community and the protection of the individual’s fundamental rights”.

148 Mahoney however had been working at the Council of Europe since 1974 as an administrator, and was the deputy registrar since 1995.

149 It would be interesting to track down more precisely the actual genesis of this constitutional paradigm applied to the Convention. Similarly, the “public order” one seems to be quite inextricably linked to actors from inside the Convention system –notably to W. Ganshof van der Meersch (arguably, even before he joined the Court). To be sure, he devoted his presentation at the 2nd International Conference on the ECHR held in Vienna in 1965 to the topic, strongly supporting the idea that national judges should apply the Convention *proprio motu*.

150 At any rate, some internationalists such as B. Conforti (also successively a member of both the Commission and the Court) do consider that the “internationalist” view of the Convention is clearly marginal within the Court; see Conforti, 2001, p. 233: “la tutela dei diritti umani è parte integrante del diritto internazionale... In realtà la tesi che si tratta di materie diverse non manca di avere sostenitori in seno alla stessa Corte –e qui non vorrei scendere al pettengolezzo- dove i giuristi internazionalisti sono talvolta guardati con diffidenza e proprio... ».

151 Greer, 2006 ;. See also de Wat, 2006; Alkema, 2000.

the ECHR originated after the iron curtain was torn down, at a moment in which a crude light was shed on the highly political origins of the Convention. Indeed, the mainly political and Cold war weapon dimension of the ECHR was put to the light in the late 1980s/early 1990s in a manner in which it had not been since it was signed in Rome in 1950¹⁵² -and in a manner much at odds with the “juridification of HR” process it had purported to lead to ever since¹⁵³. In this respect, there is a strong case for something like an ‘identity crisis’ to be diagnosed with regards to the Court and the Convention system as a whole, for if its primary aim is no longer to defend liberal democracies against socialism, then it however needs to be redefined. In that respect, the plea for a “constitutional” future of the ECHR may be viewed as a tentative answer to that crisis. Also, this constitutionalist paradigm only grew stronger as challenges to the sustainability of the Convention system became greater pursuant to the successive enlargements of the Council of Europe and the exponential multiplication of individual petitions. To be sure, very pragmatic interrogations (is there a future for a court who faces 54.000 new petitions each year and only delivers 1735 judgments?¹⁵⁴) do lie at the underpinnings of many a “constitutionalist” conceptualization of the system’s future. Then again, these elements are worth keeping in mind, for these are questions of identity (what the ECHR politically stands for) and of pragmatism (to what extent can overflow of the docket lead to redefining the *raison d’être* of an international jurisdiction) that strongly contrast with the very theoretical and conceptual formulation they take (constitutional versus international justice). This tends to support the idea according to which some theoretical answers are at risk of falling short of actually resolving the real issues at stake –and thus, to a daunting interrogation: is there not a fundamental misunderstanding in all this “constitutionalist” talk about the Convention?

To be sure, much of the literature on the role of law and judicial constructions (especially at the European scale) on political integration processes is very stimulating and often convincing. Conversely, there is a strong case for processes of integration through law¹⁵⁵, and this may well result, among other things, in the validity of concepts such as beyond-state constitutionalism. In that respect, it might be heuristically worthwhile to apply some or all of those schemes to the Convention system, given the fact they have produced some interesting results at the level of the EU. However, there are high risks of generating severe misunderstandings in doing so. At least, this is an idea (or a fear) that necessarily crosses the mind of one who investigates the perception of the ECHR in national legal scholarship, for indeed, as this article has tentatively demonstrated, when domestic/constitutional lawyers pay attention to the ECHR, it does not mean they pledge to the notion of *transnational* constitutionalism. As a matter of fact, the findings of the present research establish that if Italian constitutionalists do pay interest in the Convention, their constitutionalist lense remains very national and certainly not post-national or transnational; whereas French constitutionalists hardly are interested in the Convention that remains a matter for international or HR law specialists -the latter arguably developing ideas of the ECHR as the foundation of a European public order but in an arguably militant fashion (the scholarly input). In other words, what one sees in both French and Italian law in relation to the ECHR and French and Italian scholarly discourse on the ECHR is that the idea of the Convention as a post- or beyond-State constitution is not only very remote; it is actually challenged and criticized. In France and Italy as in many other countries of the Council of Europe, the real “constitutional” critical factor in establishing the ECHR as an important and relevant legal tool is national. Very often, the Convention’s importance in a given legal order has to do with the fact that it has national constitutional support: either in the formal sense of having been precisely qualified as a constitutional or however supra-legislative norm, either in the more substantial sense of being

152 Madsen 2007 ; Greer 2006.

153 On the relationships between the ECHR as an emblem of the juridification of HR and as a diplomatic/political tool, see notably M. Rask Madsen, 2007.

154 These are the figures for the year 2007 as mentioned in the Court’s 2007 Annual Report. Note that in addition to the 1735 2007 judgments, there have been 27.057 decisions (inadmissibility or radiation).

155 Cappelletti, Weiler, Seccombe and Frowein, 1985.

perceived and analyzed as an element of public order (thus, in a way, endowed with a notion of primacy generally associated with constitutional norms). To say it in Laurence Helfer's words, "the consequences of this appellation [Constitutional court] are muddled, however, by the multiplicity of meanings associated with constitutional courts and constitutional review"¹⁵⁶. Indeed, the use of such semantics in much of the "international" scholarship on the ECHR does not clarify which of the many conceptual meanings they refer to (are we talking about the mere testing of "the validity of legislation against higher-order rules protecting individual rights"¹⁵⁷, or of "a method of judicial decision making"¹⁵⁸ or even of a more general method for "socializing domestic institutions to the democratic and rule of law values that the ECHR embodies"¹⁵⁹?). Nor is it clear whether this constitutional talk about the ECHR keeps in mind the importance of national cultures¹⁶⁰, approaches and actors of constitutional law.

156 Helfer, 2008, p. 138.

157 This would probably resemble what Stone and Keller (2008) refer to, since they write that: "It is undeniable that in the 21st century, the Convention and the Court perform *functions* that are comparable to those performed by national constitutions and national constitutional courts in Europe" [emphasis added].

158 Cp. Greer, 166 who defines constitutional justice as the "identification, condemnation and resolution of [Convention] violations... which are serious for the applicant, for the respondent state... or for Europe as a whole". Basically and in other words, he opposes a concept of "constitutional justice" to case-by-case jurisprudence and [solely] individual relief.

159 Helfer 2008 referring to works of Cameron 1995 and Harmsen 2001.

160 Let us think in particular of the variety of perceptions of judicial legitimacy ; Lasser, 2004.

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Note: this is a list of general references and does not include the French and Italian references that have actually been the object of the research. These are mentioned for some of them in the footnotes and complete bibliographical listings are on file with the author.

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