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COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS /
COMITÉ D'EXPERTS SUR LE SYSTÈME DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME
(DH-SYSC)

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DRAFTING GROUP ON THE PLACE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE EUROPEAN AND INTERNATIONAL LEGAL ORDER /
GROUPE DE RÉDACTION SUR LA PLACE DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME DANS L'ORDRE JURIDIQUE EUROPÉEN ET INTERNATIONAL
(DH-SYSC-II)

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Notes of the presentation on Theme 2 – The challenge of the interaction between the Convention and other international human rights instruments to which the Council of Europe member States are parties

Notes de l'intervention sur le Thème 2 – Le défi de l'interaction entre la Convention et d'autres instruments internationaux des droits de l'homme auxquels les États membres du Conseil de l'Europe sont parties

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The place of the European Convention on Human Rights in the European and international legal order (DH-SYSC-II)
(25-28 September 2018)

Theme 2: Challenge of the interaction between the Convention and other international human rights instruments to which the Council of Europe member States are parties

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This note aims to initiate a discussion on the interaction between the ECHR and other international instruments to which the Council of Europe member States are parties. After setting the scene with some introductory remarks, a first series of observations address normative and jurisprudential interactions between the universal and the regional (European) human rights system, then turns to discuss some aspects of procedure, before offering some concluding remarks on addressing potential challenges of this interaction.

Introduction:
1. Universalism and regionalism
-diversity in geographical space and participation
-diversity in substantive rights or scope of rights
-diversity in institutional/procedural framework/multiplicity of fora for adjudicating rights

2. Challenges
-complexity for States arising from multiple obligations
-interpretation of substantive rights
-coexistence

I. Normative and Jurisprudential interactions between universal and regional human rights institutions

There is an ever-increasing institutional framework of international mechanisms operating in the field of human rights law. This proliferation of institutions and mechanisms, both on a universal and regional level, is a positive development for the global advancement of human rights. At the same time, this proliferation, both within the United Nations system itself, and on a regional level, is seen as a challenge to the coherence of the international human rights system as a whole. The question then arising is how to address challenges arising from the interaction of various human rights instruments.

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A. The UN human rights framework

1. Currently, within in the UN framework, there are ten human rights treaties and an equal number of supervisory bodies, which have been created to monitor and supervise State compliance with their obligations under the respective treaties. Following the adoption of the Universal Declaration of Human Rights, the ICCPR was adopted in 1966 and came into force in 1976 and was the first human rights treaty (along with the ICESCR, also adopted in 1966), of universal character, covering a wide *gamme* of civil and political rights. Today, we speak of a treaty body 'system', which includes specialized UN treaties covering specific areas of human rights. The UN system itself is facing similar challenges arising out of the proliferation of mechanisms within the UN and is currently undergoing a review process aiming to strengthen and enhance its effective functioning[1].

The International Covenant on Civil and Political Rights, which is the most comprehensive treaty (in terms of rights covered) provides a wide range of rights, from the right to life, the prohibition of discrimination, civil and political rights, right to a fair trial, rights of minorities, etc. As an instrument of universal application, the ICCPR, along with the ICESCR, and the other UN treaties covering specific areas, co-exist with other important human rights instruments, all directed to the effective guarantee of human rights. Very many States members of the Council of Europe are parties to the ICCPR (and other UN treaties); similarly, many States parties to other regional instruments (where such instruments exist), such as the Inter-American Convention of Human Rights and the African Charter of Human Rights and Rights of Peoples, are parties to UN treaties.

Turning specifically to the normative interactions between UN instruments and the ECHR, a comparison of the ICCPR and the ECHR shows that the two instruments both cover a similar, but not identical set of rights. For example, the ICCPR Covenant has a larger number of rights than the ECHR, which may not be derogated from, even in times of national emergency. The Covenant also contains some rights that do not figure in the ECHR, such as minority rights or rights of aliens. As Judge Rosalyn Higgins (a former member of the HRC) has remarked, it cannot reasonably be said that a State which is a party to the ECHR and allows individuals to bring claims to the European Court of Human rights, has no need thereby to allow the right of individual application under the Covenant, since in fact, the substantive rights covered by these two instruments do not coincide[2]. So there is room, in fact, for a complementarity in the relations between universal human rights instruments and the ECHR.

2. The HRC (like the other UN treaty bodies) performs three main functions: a) it conducts a periodic State reporting procedure and formulates concluding observations on State reports; b) it adopts General Comments by which specific rights or cross-cutting issues are clarified, in view of the Committee's developed jurisprudence and practice; c) it hears 'communications' by individuals claiming alleged violations of their rights by a State Party (which has accepted the procedure through acceptance of the relevant Optional Protocol) and pronounces findings ('views') determining whether or not an individual's rights were violated in a specific case. Through these functions, to a large extent similar in all the UN human rights

[1] UN GA Resolution 68/268 (9 April 2014) on strengthening and enhancing the effective functioning of the human rights treaty bodies system.
[2] R. Higgins, "Ten years of the Human Rights Committee: some thoughts upon parting", *European Human Rights Law Review*, 1996/6, pp. 570-582.

treaty bodies, these bodies play a role both in interpreting the normative content of the respective instruments and in giving concrete meaning to individual rights and State obligations.
While the interpretation and application of human rights standards occurs throughout all of the functions of the UN treaty bodies, this preliminary paper focuses on the quasi-judicial function of judicial interpretation" by the HRC[3]. The ICCPR's provisions are mainly interpreted in views rendered on individual communications, where the Committee acts as a *quasi*-judicial organ. In its General Comment 33 (paragraph 11), the HRC has described this function in the following way:

"While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions".

The outcomes of these procedures, or other 'pronouncements' (including concluding observations and General Comments) are not binding; however, they are far from void of legal significance. As Sir Nigel Rodley has remarked, "the legal impact might be less direct, but the formal status of such pronouncements does not dispose of the matter…[Treaty bodies] may contribute to community expectations of appropriate State behaviour under human rights treaty obligations"[4].

The HRC has developed an important body of jurisprudence defining specific rights and obligations of States in concrete situations, reaching findings of breach or non-breach of Covenant provisions by the State concerned and recommending an appropriate remedy. The views of the HRC have received the most attention as a source of normative development. The typical structure of judicial reasoning of the views consists of the application of the Covenant provisions to specific factual circumstances, and an assessment in order to arrive to a conclusion as to whether the facts in question reveal a violation or violations of the Covenant.

[3] On interpretation by UN treaty bodies, indicatively, B. Schlütter, "Aspects of Human Rights Interpretation by the UN Treaty Bodies", *in* H. Keller & G. Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy*, CUP, 2012, pp. 261-318, K. Mechlem, "Treaty Bodies and the Interpretation of Human Rights", 42 *Vanderbilt J'l of Trans'l Law*, 2009, pp. 905-947.

[4] Sir Nigel Rodley, "The Role and Impact of Treaty Bodies", *in* D. Shelton (ed.), *The Oxford Handbook of International Human Rights*, p. 640. This can also be evidenced in the way that pronouncements of treaty bodies have been addressed by courts, such as the ICJ: in the *Wall* advisory opinion, for example, the ICJ invoked the practice of the HRC that considered the jurisdictional reach of the ICCPR to extend extraterritorially; the Court cited the HRC's 'constant practice', both in earlier views under the Optional Protocol and in concluding observations to support its own interpretation of the extraterritorial applicability of the Covenant, *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, §§109-111. In the subsequent *Diallo* case, the ICJ elaborated of its view of the significance of the HRC's 'jurisprudence': "since it was created, the HRC has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications, which may be submitted to it in respect of States Parties to the OPI, and in the form of its General Comments. Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant to that of the HRC, it believes it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of the Covenant. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals and the States obliged to comply with treaty obligations are entitled ", *Diallo*, §66.

B. Interpreting human rights: convergences or divergences

1. Common methods of interpretation

It is interesting to remark a common feature in the interpretative approach of human rights instruments as 'living instruments'[5].
The HRC resorts to general rules of interpretation, though it does not always refer to the 1969 Vienna Convention on the Law of Treaties in an explicit manner. In particular, one approach, which is similar to the approach adopted by the European Court of Human Rights, is the application of evolutionary interpretation[6].
In *Judge v. Canada* (2002), the HCR recognized that 'the protection of human rights evolves' and considered that "the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions", adding that 'a review of the scope of application of the rights protected in the Covenant may be required "if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised"[7]. The case addressed the issue of whether a State which had abolished the death penalty, violated article 6 of the Covenant by extraditing an individual to a country which had not abolished the death penalty. In its finding of a violation in this case, the Committee changed its previous jurisprudence where it had held that extradition to a country where the death penalty was not abolished, was not a violation of article 6. Here the HRC interpreted article 6 of the Covenant, on the right to life both literally and contextually, but also looked to State practice to support its change of jurisprudence. The Committee considered that the change it its interpretation was supported by the change in circumstances and the broadening international consensus in favour of abolishing the death penalty, which was, moreover, also reflected in Canada's practice:

"The HRC is mindful of the fact the [previous] jurisprudence was established some ten years ago, and that, since then, there has been a broadening international consensus in favour of abolition of the death penalty, and in States which have retained the death penalty, a broadening consensus not to carry it out"…The State Party has itself recognized the need to amend its domestic legislation…"[8].

A similar approach can be found in conscientious objection cases (convictions for refusal to perform military service): in *Yoon & Choi v. Republic of Korea* (2007), the authors brought a case before the HRC claiming that the absence of domestic legislation, providing for alternatives to military service, constituted a violation of the right to freedom of conscience and religion under article 18. Here, the HRC reversed its earlier jurisprudence according to which this article does not preclude a right of conscientious objection, taking note of the practice of State parties to the Covenant that had introduced alternatives to compulsory military service.[9]

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[5] This part draws from the research conducted in the framework the International Law Association's Study Group on The Content and Evolution of Rules of Interpretation: see P. Pazartzis & P. Mercouris, "The UN Human Rights Committee, other UN Human Rights Treaty Bodies and Treaty Interpretation", and G. Ulfstein, "The European Court of Human Rights"; also, see the ILA *Interim Report, 19-24 August 2018*, available at: www.ila-hq.org.
[6] See E. Bjorge, *The Evolutionary Interpretation of Treaties*, Oxford, OUP, 2014.
[7] *Judge v. Canada*, Communication no. 829/1998, Views 5 August 2002.
[8] Ibid., §10.3.
[9] *Yoon & Choi v. Republic of Korea*, Communications nos. 1321/2004, 1322/2004, Views 23 January 2007, §8.4: "The Committee also notes, in relation to relevant State practice, that an increasing number of those States parties to the Covenant which have retained compulsory military service have

Other interpretative methods are for example, the *pro homine* interpretation of human rights, which is often resorted to, both by universal and regional human rights organs[10].

2. Jurisprudential convergences or divergences

International human rights instruments, both universal and regional operate in different environments and in different institutional settings. Under these circumstances, a complete convergence in the interpretation of substantive rights is not possible, even if interpretative methods are similar. To an extent, the jurisprudence of the HRC and the ECHR is 'mutually reinforcing'. While the reciprocal influence or cross-fertilization is not always evident, and sometimes not envisageable due to differences in the formulation of substantive rights, there is evidence to suggest that the HRC is informed of the case-law of the ECHR (and of other bodies) and vice-versa. Due to the structure of the views of the HRC, this is not always apparent, but one can find references to ECHR case law in communications (mostly brought up in the arguments either of the author or the State, or in the separate opinions of Committee members). The HRC is also aware of jurisprudential developments of other bodies, including the ECHR, when adopting General Comments. On its part, the ECHR has often referred to the case-law of the HRC[11].

Some recent cases demonstrate the challenges of the interplay between universal instruments and the ECHR, where there might be differences arising from differing interpretations or even divergences in similar issues:

a) Dublin' cases (non-refoulement): both the ECHR and the HRC (more recently) have been dealing with non-refoulement cases, in particular in cases concerning Dublin procedures (which present many similarities, as to facts and legal issues involved). Which standards are applied? Potential inconsistencies in the applicable standards?

See for example *Jasin v. Denmark*, Communication no. 2360/2014, View adopted 22 July 2015, para 8.3:
"The Committee recalls its general comment No. 31, in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The Committee has also indicated that the risk must be personal and that the threshold for providing

introduced alternatives to compulsory military service, and considers that the State party has failed to show what special disadvantage would be involved for it if the rights of the authors' under article 18 would be fully respected".

[10] For a discussion on the ECHR's interpretation of the substantive rights protected under the European Convention, see A. Seibert-Fohr, "The Effect of Subsequent Practice on the European Convention on Human Rights: Considerations from a General International Law Perspective", in A. van Aaken/I. Motoc (eds.), *The ECHR and General International Law*, Oxford, OUP (forthcoming), available at: ssrn.com/abstract=3036820.

[11] For a discussion of this cross-fertilisation, with examples of case law drawn from universal and regional mechanisms, see L. Hennebel, "Les références croisées entre les juridictions internationales des droits de l'homme", in P. Martens *et als.*, *Le dialogue des juges*, Bruxelles, Brylant, 2007 (electronic copy available at: ssrn.com/abstract=1819764), H. Tigroudja, "Le renvoi aux décisions des comités conventionnels des Nations Unies dans la pratique des organes régionaux de protection des droits de l'homme", in E. Decaux & O. de Frouville (dirs.), *La dynamique du système des traités de l'ONU en matière des droits de l'homme*, Paris, Pedone, 2015, pp. 137-149.

substantial grounds to establish that a real risk of irreparable harm exists was high. The Committee recalls that, generally speaking, it is for the organs of the States parties to the Covenant to review or evaluate facts and evidence in order to determine whether such risk exists."

b) *F.A c. France*, ("Baby Loup" case), Communication 2662/2015, View adopted 10 August 2018

This is an interesting recent case, where the HRC adopted a position, which diverges from the ECHR's jurisprudence with regards to head-scarves. This case concerned the rights of a childcare center employee who was fired for violating the center's policy against earing the 'Islamic veil'. The HRC, focusing on the absence of a legitimate aim and lack of proportionality of the action taken against the claimant, found a violation of the claimant's freedom to manifest her religion, as well as a violation of non-discrimination on the basis of gender and religion (articles 18 and 26 of the ICCPR).

II. Procedural interactions

A further area to be explored are procedural interactions: while universal and regional human rights institutions each operate under a specific institutional setting, which includes rules concerning their procedures, it would be interesting to identify issues of concern (ex. forum-shopping), or, on the other hand, 'best practices'. Some examples:

1. Admissibility: Under UN human rights treaties, a case is inadmissible if it is currently before another human rights body (art. 5.2.a of OP1). Some European States have entered reservations to the Optional Protocol I of the ICCPR, according to which a case may not be taken before the HRC if it has already been before the ECHR. There are focal points in the registries of both organs, which collaborate in exchanging information, so there is usually no particular problem. This does not necessarily prevent a case, which has been declared inadmissible by the ECHR to be brought before the Committee. Several cases that have been found inadmissible by the ECHR have been declared admissible by the HRC. Sometimes, the succinct reasoning of the ECHR is not sufficient to explain why a case has been declared inadmissible.

2. Interim/provisional measures: standards for deciding to grant such measures

3. Remedies/reparations and supervision of judgments/follow-up procedures

Concluding remarks

The challenges faced from the interactions between universal and European human rights instruments are a part of broader challenges arising from the proliferation of human rights institutions and mechanisms, and should not necessarily be seen as a 'threat' to the advancement of human rights on a global level, both international and

domestic. There are many ways to address such challenges in a constructive manner. Informal ‘judicial dialogues’ and exchanges between various organs are a practice, which should be continued. For example, the ECHR hosted a meeting in 2015, allowing exchanges between different international and regional human rights bodies. In 2016, the UN HRC hosted a meeting with members of the ECHR in Geneva; the HRC has also met with judges of the IACHR in San Jose. Such exchanges are important, as they generate fruitful discussions on specific areas of concern, jurisprudence or working methods. Further avenues can also be explored to strengthen interactions between universal and regional mechanisms in a positive manner.