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STEERING COMMITTEE FOR HUMAN RIGHTS (CDDH)

Draft chapters of the future CDDH Report on the place of the European Convention on Human Rights in the European and international legal order

provisionally adopted by the CDDH
at its 91st meeting (18–21 June 2019)

Preliminary note:

1. At its 91th meeting (18–21 June 2019), the CDDH provisionally adopted the following draft chapters of its future *Report on the place of the European Convention on Human Rights in the European and international legal order*, as prepared by the Drafting Group on the place of the European Convention on Human Rights in the European and international legal order (DH-SYSC-II)[1]:

- Chapter of Theme 1, subtheme i): Methodology of interpretation by the European Court of Human Rights and its approach to international law ;

[1] See CDDH(2019)R91, § …

- Chapter of Theme 1, subtheme iii): Interaction between the resolutions of the Security Council and the European Convention on Human Rights;
- Chapter of Theme 1, subtheme iv): Interaction between international humanitarian law and the European Convention on Human Rights; and
- Chapter of 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.

2. In these draft chapters, certain paragraphs are yet to be examined and consolidated by the DH-SYSC-II at the occasion of the final adoption of the future report and have thus not been provisionally adopted yet. These paragraphs are §§ 29 and 35 of Theme 1 subtheme i), § 13 of Theme 1 subtheme iv) and §§ 32 and 65 of Theme 2.

3. As regards the compilation of the different chapters into one coherent draft Report, which is to be discussed by the DH-SYSC-II at its 7th, last meeting in September 2019, it was agreed that the Secretariat should draft an introduction, including, *inter alia*, the terms of reference of the Group, the background to the work and the methodology used to elaborate the text. It should further draft an executive summary and a conclusion, based on the text of the draft chapters. Furthermore, the Rapporteurs have been invited to send to the Secretariat any update, in accordance with what has been agreed upon at the moment of provisional adoption, as a result of new judgments or decisions.[2]

[2] See DH-SYSC-II(2019)R6, § 10.

Chapter of Theme 1, subtheme i):

Methodology of interpretation by the European Court of Human Rights and its approach to international law

INTRODUCTION

1. The object of the present chapter is to analyse the way in which the European Court of Human Rights (the ECtHR / the Court) interpreted the European Convention on Human Rights (ECHR) and compare this with the rules of international law on treaty interpretation, notably contained in the Vienna Convention on the law of treaties (VCLT).

2. For the sake of clarity, it may be helpful to keep in mind the following definitions:

3. **Legal interpretation** is an act of attributing and then communicating the meaning of a word or group of words or sentences in a legal text.

4. **Treaty interpretation** is the activity of giving meaning to a treaty or provisions of a treaty.

5. **Authentic interpretation** is the interpretation given by the law-maker or treaty – makers (parties to the treaty).

6. **Authoritative treaty interpretation** is a process of attributing meaning of the treaty provisions by an entity authorized for that purpose by the parties of the treaty. According to well-known words of the Permanent Court of International Justice,[1] "it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it" (Question of Jaworzina, Advisory Opinion of 6 December 1923, PCIJ Series B, No. 8, at 37).

7. **Judicial interpretation** is an activity through which international courts give meaning to a treaty in the context of a particular case.

I. THE VIENNA CONVENTION ON THE LAW OF TREATIES

1. Vienna Convention on the law of treaties

8. The rules of interpretation have been codified in the Vienna Convention on the law of treaties (VCLT) of 1969. The VCLT contains three articles on the interpretation of international treaties.

> "**Article 31 General Rule of Interpretation**
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> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

[1] The Permanent Court of International Justice was subsequently replaced by the International Court of Justice.

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33 Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

9. In other words the approach offered by the VCLT requires the following. Firstly the interpreter shall try to interpret the provisions of the treaties in "good faith," in accordance with the "ordinary meaning" of the "terms" or text of the treaty, in their "context," and in light of the treaty's "object and purpose." Secondly the "preparatory work of the treaty and the circumstances of its conclusion" are only secondary sources of interpretation to confirm meaning deduced by the interpreter or in case the meaning of the treaty remains unclear or leads to an absurd result. Article 33 provides that in principle all authentic language versions of a treaty shall be equally authoritative.

2. Legal status of Articles 31 to 33 of the VCLT

10. Firstly, it should be noted that strictly speaking the VCLT applies only to treaties concluded between states (bilateral; or multilateral).

11. Secondly, as Article 4 of the VCLT states, "[w]ithout prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties

which are concluded by States after the entry into force of the present Convention with regard to such States."

12. According to the ICJ approach the Vienna Convention's rules of interpretation could be applicable even in a dispute where one or even both disputants are not parties to the VCLT (ICJ Case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*, Decision of 13 December 1999, para. 18) 'inasmuch as it reflects customary international law'. In the same vein, the ECtHR applies the VCLT rules of interpretation to the ECHR in spite of the fact that the ECHR had been signed and came into force before the VCLT.

13. Other international courts and tribunals have also acknowledged the customary character of these rules - the International Tribunal for the Law of the Sea, the Appellate Body of the WTO, the Inter-American Court of Human Rights, the Court of Justice of the European Union, and tribunals established by the International Centre for Settlement of Investment Disputes. The Vienna Convention rules apply, as a matter of principle, to all international courts and tribunals, irrespective of their institutional set-up, competence or geographical location. It should be noted that the VCLT does not make any distinction between human rights treaties and other international treaties, being equally applicable to all international treaties.

14. At the same time, the VCLT does not provide any guidance on how these rules of interpretation (recourse to the text, context and object and purpose of the treaty) shall be applied in order to achieve a sufficient result – separately or cumulatively, in what order – as listed on the VCLT or at discretion of the interpreter. The VCLT remains silent about any hierarchical structure between the elements of the General Rule and their exhaustive character. This may leave some room for discussion about the weight to be given to the different elements of the VCLT rules and some degree of leeway for the courts and tribunals to prioritise between them.

II. THE EUROPEAN COURT OF HUMAN RIGHTS' PERSPECTIVE

1. The reception of the VCLT (*Golder* judgment)

15. Under the terms of Article 32 of the ECHR, the Court's jurisdiction extends to all matters concerning the interpretation and application of the ECHR and the protocols thereto. In spite of the fact that the ECHR provides the Court with the right to interpret the provisions of the ECHR, the ECHR itself provides no guidance on how the Court should do it. From the perspective of public international law and having in mind that the ECHR is a multilateral international treaty it might be presumed that its interpretation shall be made in accordance with the VCLT rules of interpretation as reflecting customary international law.

16. It should be borne in mind that an important feature of the ECHR's rights is that most of the provisions of the ECHR were deliberately drafted in a very abstract form, and their application in a concrete case before the Court will necessarily require a process of interpretation.

17. The ECtHR expressly relies upon the VCLT rules of interpretation in construing the substantive rights of the ECHR and its provisions concerning the Court's competences and jurisdiction. In terms of the frequency of the reference by the Court to the VCLT rules, it should be mentioned that:

1) According to the calculations made by one commentator, by 2010 the VCLT has been cited in no more than 60 out of more than 10,000 judgments delivered by the Court;[2]
2) As noted in the academic literature the Court in its earlier years seems to be more inclined to refer to the VCLT rules than more recently.[3]

18. In its *Golder* judgment of 1975, the Court noted that:

> "29. That Convention [VCLT] has not yet entered into force and it specifies, at Article 4, that it will not be retroactive, but its Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion. In this respect, for the interpretation of the European Convention account is to be taken of those Articles subject, where appropriate, to "any relevant rules of the organization" - the Council of Europe - within which it has been adopted (Article 5 of the Vienna Convention)."

2. The VCLT's rules of interpretation in the jurisprudence of the ECtHR

(a) Object and purpose of the ECHR (Article 31 § 1 VCLT)

19. In setting out the aims of its interpretative approach, the Court has constantly relied on the special purpose and character of the ECHR as a human rights treaty and its preamble, which indicates such aims.

20. In the *Golder* judgment, the Court held that "as stated in Article 31 para. 2 of the Vienna Convention, the preamble to a treaty forms an integral part of the context. Furthermore, the preamble is generally very useful for the determination of the "object" and "purpose" of the instrument to be construed".

21. Looking at the ECHR as a treaty distinct from other international treaties, the Court observed in the *Ireland v. the United Kingdom* judgment (1978):

> "Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble benefit from a 'collective enforcement'."

22. In the *Soering* case the Court turned to the special character of the ECHR:

> "87. In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective."

23. In another judgment the Court relied on the "general spirit of the Convention" finding that "any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals

[2] G. Letsas, Strasbourg's Interpretive Ethic: Lessons for the International Lawyer / European Journal of international law, 2010 vol. 21 No. 3, 509–541.
[3] See, for instance, Magdalena Forowicz, The Reception of International Law in the European Court of Human Rights, 2010, p. 25.

and values of a democratic society" (*Kjeldsen, Busk Madsen and Pedersen* judgment of 7 December 1976).

(b) Subsequent agreement and subsequent practice (Article 31 § 3 (a) and (b) VCLT)

24. The subsequent practice of the States Parties to the ECHR plays a very important role in the Court's interpretative approach to the ECHR. The Court relied on and referred to the subsequent practice in two ways:

1) as a confirmation of the existence of tacit agreement between the States Parties to the ECHR regarding interpretation of certain provisions of the ECHR and

2) as one of the confirmation of the "European consensus" which according to the Court emerged in the course of the implementation of the rights under the ECHR.

25. The ECHR held in *Loizidou v. Turkey* that its interpretation was "confirmed by the subsequent practice of the Contracting Parties", i.e. "the evidence of a practice denoting practically universal agreement amongst Contracting Parties that Articles 25 and 46 (...) of the Convention do not permit territorial or substantive restrictions".

26. The string of cases starting from *Soering* is also a remarkable example of the jurisprudence of the Court showing how the Court invoked the subsequent practice. In these cases, the Court referred to subsequent practice in national penal policy, in the form of a generalized abolition of capital punishment, stating that it could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 (art. 2-1) (*Soering*, para. 103).

27. In its *Al-Saadoon and Mufdhi v. the United Kingdom* judgment (2010) the Court came to the conclusion that the number of States prohibiting death penalty taken together with "consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances" (para. 120).

28. In its judgment in the case of *Cruz Varas and others v. Sweden* (1991) the Court took a more cautious approach noting that:

"Subsequent practice could be taken as establishing the agreement of Contracting States regarding the interpretation of a Convention provision (see… Article 31 § 3 (b) of the Vienna Convention of 23 May 1969 on the Law of Treaties) but not to create new rights and obligations which were not included in the Convention at the outset."

29. It is important to note that the Court often referred to the subsequent practice of not all but only some of the States Parties of the ECHR, even on occasion considering contrary practice, of a relatively small number of States. [add references if this paragraph is to be retained][4]

30. In its recent *Hassan v. the United Kingdom* judgment the Court again confirms this approach[5] stating:

[4] The DH-SYSC-II decided that this paragraph was to be re-discussed at a later stage in the light of the following comment by Greece: This paragraph does not seem to be sufficiently substantiated in the text.

[5] DH-SYSC-II: This formulation is to be verified depending on the formulation of paragraph 29.

> "101. There has been no subsequent agreement between the High Contracting Parties as to the interpretation of Article 5 in situations of international armed conflict. However, in respect of the criterion set out in Article 31 § 3(b) of the Vienna Convention (see paragraph 34 above), the Court has previously stated that a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention".

31. The Court's approach could be compared with views of the International Law Commission (ILC) and other international courts and tribunals.

32. As the ILC explains in the Commentaries to its original draft of the VCLT, subsequent practice requires that the parties as a whole to a treaty, not just some of them, accept this interpretation in such a way as to evidence their agreement.[6]

33. The ICJ in its *Namibia* and *Wall* Advisory Opinions considered subsequent practice as tacit consent of the UN members through acquiescence, presuming the absence of direct and repeated objections.

34. The WTO Appellate Body acknowledged in the *EC—Chicken Cuts* report that "not each and every party must have engaged in a particular practice for it to qualify as a 'common' and 'concordant' practice", requiring active participation in subsequent practice of the majority of WTO members complimented by the tacit acquiescence of the remaining part of WTO membership.

[35. At the same time the WTO Appellate Body seems not ready to accept for the purpose of interpretation as a sufficient practice the conduct of even a significant majority of the parties of WTO where there is contrary practice by a small portion of WTO member states (EC—Computer Equipment, WT/DS62/AB/R, p.p. 92—93).[7]]

36. The VCLT rules are now mainly invoked by the Court (ECtHR) in cases when it refers to other treaties or instruments of international law, or general principles of international law, citing Article 31(3) VCLT and seeking to find a support to its intention to depart from the Court previous case law. For instance, in the *Scoppola v Italy (No. 2)* judgment (2009) the Court was willing to depart from its 30-years practice towards *lex mitior* (retrospective application of a law providing for a more lenient penalty enacted after the commission of the relevant criminal offence) and noted that "during that time there have been important developments internationally" referring then to the corresponding provisions of the American Convention on Human Rights, the EU Charter of Fundamental Rights and the case law of the CJEU, the Rome Statute of the International Criminal Court and the case-law of the ICTY.

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[6] See the Draft Articles on the Law of Treaties with commentaries adopted by the International Law Commission at its 18th session, in 1966, and submitted to the General Assembly, published in the Yearbook of the International Law Commission, 1966, Vol. II, pp. 221-222.

[7] The DH-SYSC-II decided that this paragraph was to be re-discussed at a later stage in the light of the following comment by Greece: paras. 92-93 of Report of the WTO Appellate Body in EC-Customs Classification of Certain Computer Equipment (W/DS62/AB/R) seem to be about *prior* practice, or rather the parties of the particular dispute (EC-USA) during the Uruguay Round tariff negotiations ("*The purpose of treaty interpretation is to establish the common intention of the parties to the treaty. To establish this intention, the prior practice of only one of the parties may be relevant, but it is clearly of more limited value than the practice of all parties*").

(c) Relevant rules of international law applicable in relations between the parties (Article 31 § 3 (c) VCLT)

37. In relation to the practical use by the Court for the purpose of interpretation of any relevant rules of international law, it is worth noting that on different occasions the Court has expressly mentioned that the ECHR "has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, Article 31 § 3 (c) of which indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties".

38. According to the Court, the ECHR should so far as possible be interpreted in harmony with other rules of international law of which it forms part (*Al Adsani* Judgment (2001), para. 55). In this case the Court referred to "other areas of public international law" as witnessing a growing recognition of the overriding importance of the prohibition of torture. The Court referred to Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights as well as jurisprudence of other international courts and tribunals.

39. On another occasion, the Court has held that Article 2 of the ECHR should "be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict" (*Varnava and Others v. Turkey*, 2009).

40. Similarly in its *Hassan v. United Kingdom* judgment (2014) the Court held that:

> "102. Turning to the criterion contained in Article 31 § 3(c) of the Vienna Convention (see paragraph 34 above), the Court has made it clear on many occasions that the Convention must be interpreted in harmony with other rules of international law of which it forms part (see paragraph 77 above). This applies no less to international humanitarian law. The four Geneva Conventions of 1949, intended to mitigate the horrors of war, were drafted in parallel to the European Convention on Human Rights and enjoy universal ratification."

41. In its judgment in the case of *Sabeh El Leil v. France* (2011) the Court held that:

> "The Court must therefore be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account."

42. In that case it considered the generally recognized rules of public international law on State immunity and the Convention on Jurisdictional Immunities of States and their Property of 2004.

References to the case law of the ICJ

43. In its *Hassan* judgment the ECtHR pronounced that the Court must endeavor to interpret and apply the ECHR in a manner which is consistent with the framework under international law delineated by the International Court of Justice. In this case the Court referred to the ICJ judgment in the case of *Armed Activities on the Territory of the Congo (DRC v Uganda)* and ICJ Advisory Opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

44. However in the *Loizidou* judgment (preliminary objection) the Court noted that:

> "84. …the context within which the International Court of Justice operates is quite distinct from that of the Convention institutions. The International Court is called on inter alia to examine any legal dispute between States that might occur in any part of the globe with reference to principles of international law. The subject matter of a dispute may relate to any area of international law. In the second place, unlike the Convention institutions, the role of the International Court is not exclusively limited to direct supervisory functions in respect of a law-making treaty such as the Convention.
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> 85. Such a fundamental difference in the role and purpose of the respective tribunals, coupled with the existence of a practice of unconditional acceptance under Articles 25 and 46 (art. 25, art. 46), provides a compelling basis for distinguishing Convention practice from that of the International Court."

45. In the case of *Mamatkulov and Askarov v. Turkey* (2005) the Court stating that "account must be taken of 'any relevant rules of international law applicable in the relations between the parties'", referred to practice of other bodies on applications for interim measures, including the ICJ (citing extensively its *LaGrand* judgment), the Human Rights Committee of the United Nations, the United Nations Committee against Torture and the Inter-American Court of Human Rights.

(d) *Travaux préparatoires* (Article 32 VCLT)

46. The Court has on various occasions invoked the *travaux préparatoires* of the ECHR but never explicitly admitting that it did so because "the meaning of the treaty remains unclear or leads to an absurd result" as mentioned in Article 32 of the VCLT.

47. In *Johnston and Others v. Ireland* (1986) the Court invoked the intentions of the drafters of the ECHR (referring to the Collected Edition of the *Travaux préparatoires*) when giving a restrictive reading of Article 12 of the ECHR:

> "52. ... the *travaux préparatoires* disclose no intention to include in Article 12 (art. 12) any guarantee of a right to have the ties of marriage dissolved by divorce."

48. The decision of the Court in the case of *Banković and Others v. Belgium and Others* presents one of the recent and vivid examples of an "internationalist" approach in the ECtHR jurisprudence. Interpreting Article 1 of the ECHR the Court held that:

> "In any event, the extracts from the *travaux préparatoires* detailed above constitute a clear indication of the intended meaning of Article 1 of the Convention, which cannot be ignored. The Court would emphasize that it is not interpreting Article 1 "solely" in accordance with the *travaux préparatoires* or finding those *travaux* "decisive"; rather this preparatory material constitutes clear confirmatory evidence of the ordinary meaning of Article 1 of the Convention as already identified by the Court (Article 32 of the Vienna Convention 1969)."

49. In its judgment in the case of *Sejdić and Finci v. Bosnia and Herzegovina* (2015), the Court referred to the preparatory work of the drafters of the ECHR and its Protocols:

> "… the *travaux préparatoires* demonstrate (vol. VIII, pp. 46, 50 and 52) that the Contracting Parties took into account the particular position of certain parliaments which included non-elective chambers."

50. In same vein in the *Hirsi Jamaa* judgment (2012) the Court used the *travaux préparatoires* of the ECHR saying:

> "174. The *travaux préparatoires* are not explicit as regards the scope of application and ambit of Article 4 of Protocol No. 4. In any event, the Explanatory Report to Protocol No. 4, drawn up in 1963, reveals that as far as the Committee of Experts was concerned the purpose of Article 4 was to formally prohibit "collective expulsions of aliens of the kind which was a matter of recent history".

51. In its *Sitaropoulos and Giakoumopoulos v. Greece* judgment (2012) the Court again invoked the *travaux préparatoires* as well as the general context of the ECHR in order to interpret Article 3 of Protocol No. 1 to the Convention:

> "63. … However, having regard to the *travaux préparatoires* of Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has held that it also implies individual rights, including the right to vote and the right to stand for election."

52. However, on numerous occasions the Court has held that it cannot rely exclusively on the intention of parties of the ECHR deducing the meaning of certain terms. As mentioned by the Court in its *Loizidou* judgment (1995) "these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago" (*Loizidou v. Turkey* (preliminary objections)).

53. In the recent case of *Magyar Helsinki Bizottság v. Hungary* the *travaux préparatoires* were the subject of considerable discussion, in considering whether Article 10 could be interpreted as encompassing a right of access to information held by public authorities. The Grand Chamber held that in line with Article 32 of the VCLT the *travaux préparatoires* could be a subsidiary means of interpretation in certain cases, but concluded that in the present case they did not have "conclusive relevance" to the question at issue.[8]

(e) Disparities in authentic language versions (Article 33 VCLT)

54. Due to the fact that the ECHR was signed in English and French, both texts being equally authentic, the Court inevitably faces cases where the meaning of the words or terms in the French version differ from the wording in English.

55. In its *Sunday Times* judgment the Court examined the difference between English "prescribed by the law" and French "prévues par la loi". The Court invoking Article 33 para. 4 of the VCLT held that:

> "Thus confronted with versions of a law-making treaty which are equally authentic but not exactly the same, the Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realize the aim and achieve the object of the treaty".

56. It *James and Others v. the United Kingdom* the Court facing the necessity to reconcile the meaning of the English expression "in the public interest" and French "pour cause d'utilité publique" also referred to Article 32 of the VCLT and thus paid regard to the object and purpose of Article 1 of Protocol No. 1.

[8] See on the relevance of the "preparatory work" (*travaux préparatoires)* also the separate opinions of Judge Sicilianos, joined by Judge Raimondi and of Judge Spano, joined by Judge Kjølbro.

57. The Court explicitly invoked Article 33 of the VCLT and relevant case law of the ICJ as well as the drafting history of the ECHR in its *Stoll* judgment (2007) examining the difference in the wording of Article 10(2) of the ECHR in French and English languages.

> "59. The Court does not subscribe to such an interpretation, which it considers unduly restrictive. Given the existence of two texts which, although equally authentic, are not in complete harmony, it deems it appropriate to refer to Article 33 of the 1969 Vienna Convention on the Law of Treaties, the fourth paragraph of which reflects international customary law in relation to the interpretation of treaties authenticated in two or more languages (see the *LaGrand* case, International Court of Justice, 27 June 2001, I.C.J. Reports 2001, § 101)[9]
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> 60. Under paragraph 3 of Article 33, "the terms of the treaty are presumed to have the same meaning in each authentic text". Paragraph 4 states that when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, is to be adopted.
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> 61. The Court accepts that clauses, which allow interference with Convention rights, must be interpreted restrictively. Nevertheless, in the light of paragraph 3 of Article 33 of the Vienna Convention, and in the absence of any indication to the contrary in the drafting history of Article 10, the Court considers it appropriate to adopt an interpretation of the phrase "preventing the disclosure of information received in confidence" which encompasses confidential information disclosed either by a person subject to a duty of confidence or by a third party and, in particular, as in the present case, by a journalist."

3. Other methods of interpretation developed by the ECtHR

58. Starting from 1970s, the Court has gradually developed its own doctrines of interpretation which are not explicitly mentioned, listed or derived from the VCLT rules of interpretation. The doctrine of autonomous concept had been formulated by the Court in its *Engel* judgment in 1976, the 'living instrument' concept appeared in the *Tyrer* judgment in 1978.

59. However, the Court is not alone in resorting to these innovative techniques of interpretation. The two interpretative methods may also be found in other international courts and tribunals' jurisprudence.[10] By way of example, the so-called evolutive or dynamic interpretation was similarly applied by the Inter-American Court of Human Rights.[11] Likewise, the doctrine of autonomous concepts is commonly applied by the CJEU[12] or the Inter-American Court of Human Rights.[13]

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[9] In its *LaGrand* judgment the ICJ recognized that Article 33(4) VCLT reflected customary international law in relation to the interpretation of treaties authenticated in two or more languages.

[10] Even if the ICJ does not apply human rights treaties, it can be noted that it has occasional recourse to the evolutive interpretation approach, see, for instance, *Costa Rica v. Nicaragua and Nicaragua v. Costa Rica*, judgment of 16 December 2015.

[11] See, for example, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador* of 23 August 2013, § 153; *Mapiripán Massacre v. Colombia*, 2005c, § 106 or in its advisory opinion on the interpretation of the American Declaration of the Rights and Duties of Man OC-10/89 of 14 July 1989, Series A No. 10, at para 37. See also LIXINSKI, Lucas. *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*. The European Journal of International Law, Vol. 21, no. 3, 2010.

[12] See, amongst many authorities, C-66/85 *Lawrie-Blum*, ECLI:EU:C:1986:284 as to the autonomous meaning of the notion of „worker" under the EU law.

[13] See *Mapiripán Massacre v. Colombia*, 2005c, § 187 or *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001, § 146.

60. The main idea lying behind these innovations is aptly illustrated in the *Scoppola (2)* judgement:

> "It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement."[14]

61. In applying the evolutive method, the Court often reiterates that:

> "[…] the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies."[15]

62. Although the dynamic interpretation is not expressly mentioned in the VCLT, it could be argued that the special object and purpose of the ECHR, and similarly also any subsequent agreements, subsequent practice or relevant rules of international law applicable in the relations between the parties, might justify the Court's evolutive approach to the ECHR. It may be noted that some judges of the Court have attempted to explain that it is implicitly based on and compatible with the underlying logic of the VCLT's general rules of interpretation.[16] The evolutive approach would enable the Court to take into account the changing conditions in the respondent State and in the States Parties to the ECHR in general and to respond to any emerging consensus as to the standards to be achieved. The same could be said of the Court's emphasis on making rights practical and effective. It is noticeable that in developing these concepts the Court has not expressly sought to derive them from or otherwise to invoke the VCLT rules of interpretation. However, the language used in this context shows that the Court tacitly operated with the general rules of interpretation as enshrined in the VCLT.

63. There are limits on the extent of such dynamic interpretation that are inherent in the VCLT rules on interpretation and the nature of international law itself. In its *Johnston* judgment[17] the Court acknowledged the limits of the evolutionary interpretation as follows:

> "It is true that the Convention and its Protocols must be interpreted in the light of present-day conditions… However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset."

Determining where the balance should be struck is therefore a delicate task, particularly where evolutive interpretation appears to result in the creation of new rights (see for example *Demir and Baykara*, and *Magyar*).

64. Some friction between the VCLT and the Court's evolutive interpretation may therefore potentially occur if the latter goes beyond what is stipulated in Article 31(3)(c) of

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[14] *Scoppola v. Italy (no. 2)*, no. 10249/03, judgment [GC] of 17 September 2009, § 104.

[15] See, among other authorities, *Demir and Baykara v. Turkey*, no. 34503/97, judgment [GC] of 12 November 2008, § 146; *Öcalan v. Turkey*, no. 46221/99, judgment [GC] of 12 May 2005, § 163 and *Selmouni v. France*, no. 25803/94, judgment [GC] of 28 July 1999, § 101.

[16] See concurring opinion of judge Sicilianos, joined by judge Raimondi, in the case of *Magyar Helsinki Bizottság v. Hungary*, no. 18030/11, judgment [GC] of 8 November 2016.

[17] *Johnston and Others v. Ireland*, no. 9697/82, plenary judgment of 18 December 1986, § 53.

the VCLT. While the provision admits that only those rules of international law that are applicable in the relations between all parties to a treaty can be taken into consideration, on occasion the Court appears to have taken a different stance. In the *Demir and Baykara* case,[18] it observed that "in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State". In other words, the Court has considered it sufficient that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.

CONCLUSION: CHALLENGES AND POSSIBLE SOLUTIONS

1. As agreed by the High Contracting Parties and consistently confirmed by the Court the ECHR is a part of public international law and thus should be interpreted in accordance with the VCLT rules of interpretation. At the same time the Court stressed the special character of the ECHR as an instrument for the protection of individual human beings.

2. The rights and freedoms guaranteed by the ECHR are phrased in a general form. There is thus in some situations a need for concretisation in accordance with Articles 31-33 VCLT.

3. The Court has not established a hierarchy between different interpretative approaches, but in the case-law the use of a dynamic approach is noticeable. It also seems that there is some variation in the Court's use of preparatory works of the drafters of the ECHR.

4. The requirement in Article 31(3)(c) of the VCLT that other rules of international law are taken into account when interpreting a treaty, is an important factor in avoiding the risks of fragmentation of international law. As will become clear in the subsequent chapters, it is essential for States Parties that there is clarity and consistency in the Court's case-law when dealing with these issues.

5. The Court has referred to both the subsequent practice of the States Parties to the ECHR (Art 31(3)(b) VCLT) and other rules of international law (Art 31(3)(c) VCLT) as a means of tacit modernisation of the provisions of the ECHR by the States. Where the Court seeks to establish a "European consensus" in this respect, it is important that such consensus is based on an analysis of the practice and specific circumstances of the States Parties in line with the consensual nature of State obligations under international law.

6. In addressing the need to apply the ECHR in present day circumstances and to ensure that the rights are practical and effective, the Court uses dynamic interpretative approaches. However the traditional rules of treaty interpretation and the consensual nature of international law, as well as the need to avoid fragmentation of the latter, place limits on such approaches. It is important therefore that the Court explains its methods of interpretation within these limits and that the outcomes reached are predictable and understandable for the Contracting States in line with the obligations they have undertaken under the ECHR.

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[18] *Demir and Baykara v. Turkey*, no. 34503/97, judgment [GC] of 12 November 2008, §§ 78, 85 and 86; see for several examples of previous cases in which the Court took that stance §§ 78-83 of the judgment.

Chapter of Theme 1, subtheme iii):

Interaction between the resolutions of the Security Council and the European Convention on Human Rights

INTRODUCTION – THE UN CHARTER

1. It is indisputable that the United Nations occupies a central position in the international system, and, correspondingly the Charter of the UN is a central document of the international legal system. The primary aim of the United Nations is the maintenance of peace, but, in its holistic approach to this task, the UN not only seeks to restore peace where conflict has arisen, but it also seeks to prevent conflict and address its causes, including through its work on disarmament, sustainable development, human rights and the development of international law. And, of course, it was the same spirit of reconstruction and recognition of the need to build the foundations of a sustainable peace that led to the establishment of the Council of Europe[1] and the European Convention on Human Rights (ECHR).[2]

2. The Charter system envisages a sophisticated structure of organs, each with its own defined areas of activity and responsibilities, powers, procedures and working methods. And the relationships between the organs and between the organisation and its member States is governed by a complex body of law and practice stemming from the Charter itself. The Charter is therefore the supreme law of the organisation, and given the universal vocation of the UN as the world's central political organisation charged with the maintenance of international peace and security, the Charter is of central significance in the international political and legal systems. In the context of this Report, there are two particularly striking features of the Charter, which are unprecedented in international law and demonstrate the commitment of the member States to ensuring the effectiveness of the UN system in its core role of maintaining international peace and security. The first is the authority given to the Security Council, an organ of 15 member States which operates through a special system of majority voting, and has the power to take decisions which the whole of the membership have a legal obligation to implement (explored in the next section). The second feature is Article 103 of the Charter according to which in case of any conflict between obligations arising on the member States under the Charter and obligations arising under other international agreements, Charter obligations shall prevail.

3. The guarantee of the supremacy of UN obligations over other international obligations contained in Article 103 is unique in the horizontal system of international law that operates between sovereign States. Its special place is reflected in Article 30 of the Vienna Convention on the Law of Treaties. In legal terms it is a vital provision that ensures

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[1] The Statute of the Council of Europe provides:

Article 1

a The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.

b This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.

c Participation in the Council of Europe shall not affect the collaboration of its members in the work of the United Nations and of other international organisations or unions to which they are parties.

d Matters relating to national defence do not fall within the scope of the Council of Europe.

[2] See the preamble to the ECHR:

"Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;" …

that UN obligations are carried out effectively by the member States. States therefore may not invoke other treaty obligations to justify a failure to observe an obligation arising under the UN Charter. Importantly for present purposes obligations arising under mandatory decisions of the Security Council are to be considered as obligations arising under the UN Charter for the purposes of Article 103.[3] Article 103, however, does not provide for a hierarchy among conflicting UN Charter obligations to the extent they exist.

I. THE SECURITY COUNCIL

4. Under Article 24 of the UN Charter, the Security Council is charged with the primary responsibility for the maintenance of international peace and security:

> "1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. (*emphasis added*)
>
> 2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII."

5. The powers of the Security Council are broad, giving it a large measure of freedom of action to determine the most appropriate response to a breach of or threat to the peace. It may use either its powers to seek diplomatic solutions to disputes under Chapter VI of the Charter or its powers of decision to take enforcement action under Chapter VII to address threats to the peace, breaches of the peace and acts of aggression. Decisions of the Council under Chapter VII are legally binding (Article 25) and the Council has the power to determine whether action is to be taken by all or some member States of the UN (Article 48).

6. Following the end of the Cold War, the Security Council has been able to make much more extensive use of its Chapter VII powers than previously. The Charter provides for the Council (a) to decide on measures not involving the use of force, such as economic sanctions[4], and (b) to use military force, albeit that, as a result of political and other factors, in its practice the Council has had to adapt the means by which these powers are exercised. Further, and in order to fulfil its responsibility for the maintenance of international peace and security, the Council has also shown considerable ingenuity in its use of its Chapter VII powers including in ways which are not expressly foreseen in the Charter. Thus, for example, the Council has used these powers to mandate peace operations, to administer territory, to establish international tribunals, to refer situations to the International Criminal Court, and to establish a Compensation Commission. Whilst aspects of the Council's practice have not been without critics (at least as often for what the Council has been unable to do, as for what it has in fact done), the Council remains the central institution of the international system for the maintenance of peace and a unique source of legitimacy.[5]

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[3] See ICJ, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States), Provisional Measures, Order of 14 April 1992, § 42.

[4] See Article 41 of the UN Charter: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

[5] The Security Council's development and expansion of the use of its powers in the immediate post-Cold War era has been observed and discussed in an abundant literature by international lawyers – for some recent

(a) The Security Council and the use of measures not involving the use of force, such as economic sanctions

7. Article 41 of the Charter gives the Council a broad discretion to decide the measures short of the use of force that it considers necessary to give effect to its decisions. These can include, but are not limited to economic sanctions. There is now an extensive body of Council practice where sanctions have been imposed by the Council, which has been developed largely in the post-Cold War period. Sanctions represent an essential tool, which can be used by the Council in response to various threats to international peace and security, importantly as a credible alternative to forcible action. They have been used to support peace processes / peaceful transitions, to deter non-constitutional changes, to constrain terrorism, to protect human rights and to promote non-proliferation. There are currently 14 different UN sanctions regimes in existence.[6]

8. The measures taken will vary according to the nature of the threat and the Council's objective that can range from comprehensive economic and trade sanctions to more targeted measures such as arms embargoes, travel bans, and financial or commodity restrictions. It is comparatively rare for general or comprehensive sanctions to be imposed on all trade with target a country or region, because of the unintended impacts they can have on population of targeted States who have little to do with the threat to the peace in question. The Council's practice has resorted to the use of targeted sanctions against individuals, or against particular goods that will have an impact that the Council intends on the situation. It should be noted that sanctions are intended as temporary measures, whose purpose is to induce the individual to change his or her behaviour and to comply with decisions of the Council, rather than punishment. Where sanctions are imposed against individuals, the Council will accompany such measures with a system of humanitarian exemptions to ameliorate the effect of the sanctions on fundamental aspect of the lives of individuals.

(b) The Security Council and the use of military force

9. The intention of the drafters of the UN Charter was that the Security Council itself should be in a position to use force (Article 42), through the deployment of forces made available to it by the member States under standing agreements (Article 43). However, such agreements with the UN have not been concluded. The Council has therefore had to use the model of authorising States to use force in order to respond to breaches or threats to peace. Such authorisations famously take the form of an authorisation in a resolution adopted under Chapter VII "to take all necessary measures" or "to use all necessary means". This model of authorisation of States to take part in military action was for example adopted in 1990/1991 following Iraq's invasion of Kuwait.

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examples see: R Higgins et al., *Oppenheim's International Law United Nations* (Vol I and II) (2017); I. Johnstone "The Security Council and International Law" in S. von Einsiedal, D Malone, and B Stagno Ugarte (ed.s) *The UN Security Council in the 21st Century* (2016) pp 771-792; M. Mattheson *Council Unbound* (2006). Other works have focused primarily on the legal limitations of the Council's powers and how they can appropriately be given effect: see D Akande "The International Court of Justice and the Security Council: Is there room for Judicial Control of Decisions of Political Organs of the United Nations" (1997) 46 ICLQ 309-43; M Bedjaoui *The New World Order and the Security Council: testing the legality of its acts* (1994); B Fassbender "Quis judicabit? The Security Council, Its powers and Its Legal Control" 11 EJIL 219-20; V Gowland-Debbas (ed) *United Nations Sanctions and International Law* (2001); D Sarooshi *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (1999); A Tzanakoupolous *Disobeying the Security Council* (2011); E de Wet *The Chapter VII Powers of the United Nations Security Council* (2004).

[6] The currently ongoing sanctions regimes have been established by the Security Council in the Central African Republic, the Democratic Republic of Congo, the Democratic People's Republic of Korea, Guinea-Bissau, Iraq, Lebanon, Libya, Mali, Somalia/Eritrea, South Sudan, Sudan and Yemen, as well as against ISIL (Da'esh) / Al-Qaida and the Taliban.

10. There has been a greater willingness among States to deploy troops under a UN command in peacekeeping operations. During the Cold War, when the Security Council was frequently paralysed from authorising the use of force under Article 42, the Security Council was more successful in developing its practice of deploying international troops to maintain a peace, once the warring parties had agreed to suspend fighting. Classically these peacekeeping forces were lightly armed and deployed with the consent of the relevant territorial State(s), and authorised to provide a barrier between opponents and only to use force in self-defence. However over time, and with a greater degree of consensus in the Security Council that is now possible in the post-Cold War era, mandates of some UN peace-keeping missions have developed to include, on occasion, the authorisation of the use of force under Chapter VII, for example to tackle immediate threats to blue helmets or civilian population in the area of the mission's responsibility. Equally, rather than deploying a UN force, the Security Council may authorise a regional organisation or particular member States to carry out post-conflict peace operations, including the possibility of using force.

II. THE CASELAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND SECURITY COUNCIL RESOLUTIONS

(a) The use of measures not involving the use of force, such as economic sanctions

11. The starting point for any discussion of the interaction of UN sanctions and the ECHR is the *Bosphorus* case.[7] This case in fact turned on the relationship between EU law (through which the relevant UN sanctions measure had been transposed and was the domestic legal basis of the respondent State's impugned conduct) and the ECHR, rather than an examination of the relationship of UN law and the ECHR. The key finding in the judgment of the Grand Chamber is that where an international organisation imposes sanctions which require enforcement through the actions of a Contracting Party to the ECHR, then provided that the organisation in question provides "equivalent protection" of fundamental rights to the ECHR, the Contracting Party will not incur liability under the ECHR.

> "155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see *M. & Co.*, cited above, p. 145, an approach with which the parties and the European Commission agreed). By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued (see paragraph 150 above). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.
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> 156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the

[7] *Bosphorus Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland* (2005). The case concerned a Yugoslav-owned aircraft that had been leased by a Turkish company, and was in Ireland for repairs, when in response to the conflict in the former Yugoslavia, the Security Council adopted resolution 820(1993) requiring inter alia States to impound Yugoslav aircraft in their territories. The UNSCR was transposed into EU law, and thus became applicable in Irish law. When Ireland impounded the aircraft the applicant litigated the issue in the Irish courts and then before the European Court of Justice which upheld the Government's actions pursuant to the sanctions resolution.

> Convention when it does no more than implement legal obligations flowing from its membership of the organisation."

12. However subsequent cases, which interestingly involved the implementation of more targeted sanctions, have required a more direct consideration of relevant UN Security Council resolutions. In *Nada* the applicant was subject to a travel ban imposed on him pursuant to the then sanctions regime against the Taliban and Al Qaeda, under UNSCR 1267 (1999) and a number of following resolutions. The particularities of the case were that the applicant lived in an Italian enclave surrounded by Swiss territory, and the effect of the Swiss authorities' decisions, pursuant to the relevant UNSCRs, not to permit him to traverse Swiss territory, effectively confined him to that enclave. As such he claimed, amongst others, to have been denied access to healthcare infringing his rights under Article 8 and without a remedy in Swiss law contrary to Article 13.

13. The European Court of Human Rights (the ECtHR / the Court) rejected a preliminary objection by the Respondent State that the imposition of sanctions was attributable to the UN and therefore not within the "jurisdiction" of the Respondent State, on the basis that the Court sought to confine its consideration to actions of the national authorities in implementing the sanctions. Similarly, when considering the merits the focus of the ECtHR was on national implementation measures rather than considering whether there was a possible conflict between the requirements of the UNSCRs and the ECHR. The ECtHR started by recognising that the travel ban was expressly required under UNSCR 1390(2002), and therefore that the presumption in *Al-Jedda* that the Security Council would only intend to act in conformity with human rights obligations of the member States was rebutted. However, in considering whether the interference with the applicant's Article 8 rights was proportionate, the ECtHR focused entirely on the implementation of the sanctions by the Swiss authorities, finding that they had a degree of latitude "which was admittedly limited but nevertheless real" in how this was done. The ECtHR went on:

> "195 … In this connection, the Court considers in particular that the Swiss authorities did not sufficiently take into account the realities of the case, especially the unique geographical situation of Campione d'Italia, the considerable duration of the measures imposed or the applicant's nationality, age and health. It further finds that the possibility of deciding how the relevant Security Council resolutions were to be implemented in the domestic legal order should have allowed some alleviation of the sanctions regime applicable to the applicant, having regard to those realities, in order to avoid interference with his private and family life, without however circumventing the binding nature of the relevant resolutions or compliance with the sanctions provided for therein.
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> 196. In the light of the Convention's special character as a treaty for the collective enforcement of human rights and fundamental freedoms (see, for example, *Soering*, cited above, § 87, and *Ireland v. the United Kingdom*, 18 January 1978, § 239, Series A no. 25), the Court finds that the respondent State could not validly confine itself to relying on the binding nature of Security Council resolutions, but should have persuaded the Court that it had taken – or at least had attempted to take – all possible measures to adapt the sanctions regime to the applicant's individual situation."

The difficulty picked up by some of the judges in one of the Separate Opinions is how real the "latitude" in national implementation was under the relevant UNSCRs.[8]

[8] See the joint concurring opinion of Judges Bratza, Nicolaou and Yudkivska in the case of *Nada v. Switzerland*.

14. The ECtHR then considered the requirement of a domestic remedy under Article 13 taken in conjunction with its finding in relation to Article 8:

> "212. The Court would further refer to the finding of the CJEC (sic) that "it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations" (see the *Kadi* judgment of the CJEC, § 299, paragraph 86 above). The Court is of the opinion that the same reasoning must be applied, *mutatis mutandis*, to the present case, more specifically to the review by the Swiss authorities of the conformity of the Taliban Ordinance with the Convention. It further finds that there was nothing in the Security Council Resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those Resolutions.
>
> 213. Having regard to the foregoing, the Court finds that the applicant did not have any effective means of obtaining the removal of his name from the list annexed to the Taliban Ordinance and therefore no remedy in respect of the Convention violations that he alleged (see, *mutatis mutandis*, Lord Hope, in the main part of the *Ahmed and others* judgment, §§ 81-82, paragraph 96 above)." (*emphasis added*)

It might be observed at this stage that, given that the inclusion of the applicant's name on the list annexed to the Taliban Ordinance reflected Switzerland's obligations under the relevant UNSCR, taken literally this finding appears to leave the respondent State with a conflict of obligations.[9]

15. Most recently, the ECtHR has considered the interaction of the ECHR and UN sanctions in *Al-Dulimi v. Switzerland*. The case concerned targeted sanctions against named persons associated with the former regime in Iraq following the overthrow of Saddam Hussein in 2003, which required the freezing of assets of named persons and their transfer to the Development Fund for Iraq. When the applicants sought judicial review of their listing before the Swiss Courts, the Federal Court found that whilst certain procedural questions relating to the listings and proposed confiscations could be subject to domestic judicial review, the underlying substantive question of the validity of the inclusion of the applicant's name on the list was a question exclusively for the Security Council, and therefore outside the jurisdiction of the Federal Court.

16. In 2016, the Grand Chamber found the case admissible *ratione personae*, despite the Respondent State's arguments that the impugned acts were acts required by a mandatory decision of the Security Council which, as a matter of international law, had primacy over obligations arising from other international agreements. On the merits, the ECtHR considered whether there was in fact a conflict between the ECHR and the requirements of the relevant Security Council resolution.[10] The ECtHR's starting point was to revert to the presumption that the Security Council did not intend to act contrary to human rights which it had first posited in *Al-Jedda*:

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[9] See the concurring opinion of Judge Malinverni in the case of *Nada v. Switzerland*.

[10] The Chamber had stressed in its judgment of 2013 that its focus was on the Swiss implementing measures, which it sought to address separately from the Security Council resolutions requiring Switzerland to adopt those measures (ibid., §§ 91 and 117). In their dissenting opinion, Judge Lorenzen, joined by Judges Raimondi and Jočienė, regretted that the Chamber has not directly addressed the issue of how the conflict between obligations under the United Nations Charter and under the ECHR, which the Chamber was confronted with, should be resolved.

"140. Consequently, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights (ibid.). In the event of any ambiguity in the terms of a UN Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law (ibid.). Accordingly, where a Security Council resolution does not contain any clear or explicit wording excluding or limiting respect for human rights in the context of the implementation of sanctions against individuals or entities at national level, the Court must always presume that those measures are compatible with the Convention. In other words, in such cases, in a spirit of systemic harmonisation, it will in principle conclude that there is no conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter. …

143. The Court would emphasise, however, that the present case is notably different from the above-cited cases of *Al-Jedda* and *Nada* (together with *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011), in that it does not concern either the essence of the substantive rights affected by the impugned measures or the compatibility of those measures with the requirements of the Convention. The Court's remit here is confined to examining whether or not the applicants enjoyed the guarantees of Article 6 § 1 under its civil head, in other words whether appropriate judicial supervision was available to them (see paragraph 99 above; see, *mutatis mutandis*, *Stichting Mothers of Srebrenica and Others*, cited above, § 137). There was in fact nothing in paragraph 23 or any other provision of Resolution 1483 (2003), or in Resolution 1518 (2003) – understood according to the ordinary meaning of the language used therein – that explicitly prevented the Swiss courts from reviewing, in terms of human rights protection, the measures taken at national level pursuant to the first of those Resolutions (see, *mutatis mutandis*, *Nada*, cited above, § 212). Moreover, the Court does not detect any other legal factor that could legitimise such a restrictive interpretation and thus demonstrate the existence of any such impediment."

17. The ECtHR noted the seriousness of the consequences for the listed persons and the importance of the ECHR for the maintenance of the rule of law and in particular the prohibition of arbitrariness. On these points the Court concluded:

"146. This will necessarily be true, in the implementation of a Security Council resolution, as regards the listing of persons on whom the impugned measures are imposed, at both UN and national levels. As a result, in view of the seriousness of the consequences for the Convention rights of those persons, where a resolution such as that in the present case, namely Resolution 1483, does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided. By limiting that scrutiny to arbitrariness, the Court takes account of the nature and purpose of the measures provided for by the Resolution in question, in order to strike a fair balance between the necessity of ensuring respect for human rights and the imperatives of the protection of international peace and security.

147. In such cases, in the event of a dispute over a decision to add a person to the list or to refuse delisting, the domestic courts must be able to obtain – if need be by a procedure ensuring an appropriate level of confidentiality, depending on the

circumstances – sufficiently precise information in order to exercise the requisite scrutiny in respect of any substantiated and tenable allegation made by listed persons to the effect that their listing is arbitrary. Any inability to access such information is therefore capable of constituting a strong indication that the impugned measure is arbitrary, especially if the lack of access is prolonged, thus continuing to hinder any judicial scrutiny. Accordingly, any State Party whose authorities give legal effect to the addition of a person – whether an individual or a legal entity – to a sanctions list, without first ensuring – or being able to ensure – that the listing is not arbitrary will engage its responsibility under Article 6 of the Convention. …

151. The applicants should, on the contrary, have been afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary. That was not the case, however. … Consequently, the very essence of the applicants' right of access to a court has been impaired."

(b) The use of military force

18. The use of military force pursuant to a Security Council authorisation has been the context of a number of cases before the European Court of Human Rights, and in a few the question of whether the ECHR is applicable has turned on the Court's interpretation of relevant Security Council resolutions.

19. The first was the Grand Chamber Decision in the joined cases of *Behrami and Saramati*, concerning claims against France and Norway, in relation to their participation in KFOR in Kosovo in 2000-2002.[11] It will be recalled that KFOR was a NATO operation, which was mandated by UNSCR 1244(1999) to provide the security presence for the UN Interim Administration of Kosovo (UNMIK). In considering the admissibility of the claim the Grand Chamber carefully examined the mandates and structures of the international presences established by UNSCR 1244, before finding that the impugned actions were in fact attributable to the UN rather than the individual respondent States. This led the Grand Chamber to the conclusion that it did not have jurisdiction *ratione personae* over the acts of the respondent States when they were acting on behalf of the UN pursuant to a Chapter VII mandate. In this respect the Grand Chamber made the following observations about the relationship between the ECHR and the UN acting under Chapter VII of its Charter:

"147. The Court first observes that nine of the twelve original signatory parties to the Convention in 1950 had been members of the UN since 1945 (including the two Respondent States), that the great majority of the current Contracting Parties joined the UN before they signed the Convention and that currently all Contracting Parties are members of the UN. Indeed, one of the aims of this Convention (see its preamble) is the collective enforcement of rights in the Universal Declaration of Human Rights of the General Assembly of the UN. More generally, it is further recalled, as noted at paragraph 122 above, that the Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between its Contracting Parties. The Court has therefore had regard to two complementary provisions of the Charter, Articles 25 and 103, as interpreted by the International Court of Justice (see paragraph 27 above).

[11] The *Behrami* case concerned the death of a child and serious injuries sustained by his brother as a result of playing with unexploded cluster bomb units (CBUs). The Claimants alleged that the French KFOR contingent had failed to mark and/ or defuse the CBUs, despite knowing that the CBUs were present on the site in question. The Claimants therefore invoked Article 2 against France for the alleged inaction of the French troops. The *Saramati* case concerned the detention of the applicant by KFOR for a period of about 6 months. He complained under Articles 5, 5 with 13, and 6.

148. Of even greater significance is the imperative nature of the principle aim of the UN and, consequently, of the powers accorded to the UNSC under Chapter VII to fulfil that aim. In particular, it is evident from the Preamble, Articles 1, 2 and 24 as well as Chapter VII of the Charter that the primary objective of the UN is the maintenance of international peace and security. While it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace (see the Preamble to the Convention), the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force (see paragraphs 18-20 above).

149. In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR.
Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim."

20. In the case of *Al-Jedda*, the ECtHR came to a different conclusion in relation to a UN Chapter VII mandate concerning the stabilisation of Iraq following the US-led military action taken in 2003. The case concerned an internee detained by UK forces and interned during the period 2004-2007. The Grand Chamber rejected the UK's argument that the applicant was not within its jurisdiction. The UK had argued that, following *Behrami*, since its impugned actions were pursuant to a mandate in a Security Council resolution (UNSCR 1546(2004)) under Chapter VII, its actions were attributable to the UN, and therefore not within the jurisdiction of the UK for the purposes of Article 1 of the ECHR. However based on the nature of UN involvement in Iraq, which it found to be different from the UN involvement in Kosovo, the Grand Chamber rejected this and found the internment attributable to the UK.

21. The Grand Chamber then rejected the Respondent State's argument that, in light of the fact that the detention and internment of the applicant were carried out pursuant to a Chapter VII mandate from the Security Council, Article 103 of the UN Charter operated so as to displace the UK's obligations under Article 5 ECHR in favour of the fulfilment of the Security Council mandate. The ECtHR held as follows:

"102. In its approach to the interpretation of Resolution 1546, the Court has reference to the considerations set out in paragraph 76 above. In addition, the Court must have regard to the purposes for which the United Nations was created. As well

as the purpose of maintaining international peace and security, set out in the first sub-paragraph of Article 1 of the Charter of the United Nations, the third sub-paragraph provides that the United Nations was established to "achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms". Article 24 § 2 of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the United Nations". Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law." (*emphasis added*)

22. In line with this approach, the ECtHR then considered the language of the UNSCR 1546(2004) and the letters attached thereto, finding that at most it was potentially permissive of internment. However it concluded as follows:

"109. In conclusion, therefore, the Court considers that United Nations Security Council Resolution 1546, in paragraph 10, authorised the United Kingdom to take measures to contribute to the maintenance of security and stability in Iraq. However, neither Resolution 1546 nor any other United Nations Security Council resolution explicitly or implicitly required the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq in indefinite detention without charge. In these circumstances, in the absence of a binding obligation to use internment, there was no conflict between the United Kingdom's obligations under the Charter of the United Nations and its obligations under Article 5 § 1 of the Convention.

110. In these circumstances, where the provisions of Article 5 § 1 were not displaced and none of the grounds for detention set out in sub-paragraphs (a) to (f) applied, the Court finds that the applicant's detention constituted a violation of Article 5 § 1 of the Convention." (*emphasis added*).

III. CHALLENGES AND POSSIBLE SOLUTIONS

23. The above survey of the ECtHR's decisions demonstrates that the interaction of the ECHR and binding decisions of the UN Security Council raises complex questions in relation to which the ECtHR's caselaw is still recent.

24. In some cases, notably for example in the quotation above from the *Behrami* case, the ECtHR provides a careful appreciation of the legal underpinnings and the context of the work of the Security Council in discharging of its primary responsibility for the maintenance of international peace and security. Whereas, beyond reciting relevant provisions of the UN Charter, this kind of systemic understanding of the Security Council is less apparent in much of the subsequent caselaw. That may in part be explained by the fact that the ECtHR has sought in those subsequent cases to focus its enquiry on the decisions at the national level in implementing the Security Council decisions. However from the perspective of the States

such a separation of national action from its basis in obligations under UNSCRs lies at the heart of the problem and risks leading to a divergence of legal obligations.

25. From the perspective of States, the role of the UN Security Council is fundamental to the maintenance of international peace and security on a global basis, and it is endowed with extraordinary powers to that end. The authority of the Council and the agreement of States to carry out its decisions are vital pillars of the whole system of collective security under the United Nations. This is particularly so as, despite the ingenuity the Council has shown from time to time in the use of its powers, its range of tools to achieve international action to maintain peace still remains relatively limited, and rely for their effectiveness entirely on the active cooperation of States. A proposition that national authorities should be able to subject their observance of binding measures addressed to them by the Security Council to considerations of national or even regional law, clearly has implications for the effective discharge by the Security Council of its responsibility for the maintenance of international peace and security.

26. As is well-known the UN Charter's solution to any conflict between obligations under the Charter and obligations arising under other international agreements, is that the Charter obligations should prevail by virtue of Article 103. And, as is equally well-known, Article 103 is given a special place in international law, as for example recognised in Article 30 of the Vienna Convention on the Law of Treaties. It is established in the jurisprudence of the International Court of Justice that binding decisions of the Security Council are obligations arising under the Charter for the purposes of Article 103.[12]

27. Rather than applying Article 103 to give precedence to obligations under a UNSCR, the ECtHR appears to avoid finding that conflicts have arisen between a ECHR right and an obligation arising under the UN Charter. Referring to Article 24 paragraph 2 of the Charter, the ECtHR has adopted a presumption that Security Council resolutions should be interpreted so as to avoid finding any incompatibility with human rights under the ECHR. This presumption may affect the ability of States to comply with a clear requirement of the SCR, and might impair the Security Council's discretion to take effective measure to maintain peace and security. Such a view would take little account of the international context in which the Security Council adopts measures under Chapter VII, which by definition are situations of a threat to international peace and security, a breach of the peace or an act of aggression.[13] However, the Grand Chamber in *Al-Dulimi* has sought to take into account the nature and purpose of the measures adopted by the Security Council by limiting the required scrutiny (under Article 6 of the ECHR) to arbitrariness (*Al-Dulimi*, § 146).

28. The same considerations of effectiveness are also relevant when considering the applicability of Article 103 to Council decisions authorising the use of force. As the ECtHR has recognised in the *Behrami* decision (see above), in the absence of agreements under Article 43 of the Charter enabling the Security Council itself to take enforcement action, the practice of authorising the use of force has become the only way that in practice the Council can take forcible measures to meet its responsibility to maintain international peace and security. To take a too narrow view of the word "obligations" in Article 103, so as to deny

[12] See *Lockerbie* case, Provisional Measures Order (1992), ICJ Rep 4, at p. 15:
"…39. Whereas both Libya and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention;"…

[13] The ECHR also allows for derogation from certain Convention rights under Article 15 in exceptional circumstances and to a limited extent.

primacy to a Chapter VII authorisation of enforcement action by States simply because there is no mandatory obligation on States to participate in such action, risks undermining the ability of the Security Council to carry out its responsibility under the Charter.[14] Of course, giving primacy to an authorisation does not mean that the use of force is free from legal constraint, which will derive typically from the terms of the authorisation, the framework of international humanitarian law and other rules of international law that can be applied consistent with the effective performance of the authorisation. The interaction of the ECHR with international humanitarian law is considered in the following section of this report.

29. In relation to UN sanctions, the ECtHR has sought to emphasise that its judgments are addressed to actions of the member States implementing Security Council decisions rather than decisions of the Security Council themselves. In this respect a parallel may be drawn with the approach of the CJEU in cases such as *Kadi*,[15] which sought to focus on the EU measures taken to implement the relevant UN sanctions, and which the Strasbourg Court duly cited. The difficulty that such an approach can entail for States is that in relation to sanctions the obligations to freeze assets or impose travels bans etc. are obligations of result imposed by the Security Council. The discretion or latitude left to States by Security Council decisions is likely to be extremely limited on these matters, not least given the Council's concern to ensure consistency and effectiveness in the application of the sanctions.

30. A national judicial review of certain procedural or formal requirements, for example in relation to the identity of listed individuals or the ownership of relevant assets may be consistent with giving effect to a decision of the Council. Whereas the scope for any judicial review of the merits of a listing that is required in a decision of the Council is likely to be much more limited. It may depend on the nature of any remedial measures that may be required. If for example a judicial review resulted in a finding that the basis of a listing was lacking in some respect, it may be that an appropriate remedy – if permissible within the national legal system – would be to mandate the national authorities to seek delisting by the Security Council. However it would be inconsistent with Article 25 and 103 of the UN Charter for a national or regional court to order the de-listing of a person who was listed as a requirement of a Security Council decision.

31. It is important to keep in mind that the Security Council is best-placed to ensure that its decisions are not only soundly based and properly substantiated, but also that appropriate mechanisms and review processes are in place for listing and delisting.[16] Although reaching agreement at the international level is complex, recent years have seen significant developments in the Council's practice in both respects. Member States of the Council, and notably those who are parties to the ECHR, are very much more stringent in ensuring an adequate evidential basis exists to justify listings. Procedures for delisting have also seen some improvements with the appointment of a focal point to which individuals can send delisting requests, and in the case of sanctions against ISIL (Daesh) and Al Qaeda the appointment of an independent and impartial Ombudsperson. Whilst there is room for further improvements, they are likely to be incremental as they depend on reaching agreement

[14] See for example Frowein and Krisch and also Lord Bingham in the *Al-Jedda* case in the House of Lords.

[15] In a judgment of 3 September 2008 delivered in the joint cases of *Kadi and Al Barakaat International Foundation/Conseil* (C-402/05 P and C-415/05 P) the CJEU found that the fact that a Community regulation was limited to implementing Resolution 1390 (2002) of the Security Council of the United Nations did not deprive the Community judicature of the competence to control the validity of that regulation in the light of the general principles of Community law. On the merits the CJEU considered that the impugned regulation had manifestly disregarded the rights of the defence of the appellants, and notably the right to be heard.

[16] The ECtHR noted that the UN sanctions system, and in particular the procedure for the listing of individuals and legal entities and the manner in which delisting requests are handled, had received very serious, reiterated and consistent criticisms so that access to these procedures could not replace appropriate judicial scrutiny (see *Al-Dulimi* Grand Chamber judgement, § 153).

within the Security Council. It is also important that any such improvements are consistent with the competence of the UN Security Council under the UN Charter.

* * *

Chapter of Theme 1, subtheme iv):

Interaction between international humanitarian law and the European Convention on Human Rights

INTRODUCTION

1. One of the areas in which the interaction of different bodies of international law has been most discussed in recent years is that between international human rights law and international humanitarian law (IHL). And it is no surprise that the case law of the Strasbourg Court features prominently in those discussions. However before reviewing the evolving case law of the Court, and considering challenges and possible solutions that may arise from it, it may be useful to frame that discussion with a few introductory words on the nature and application of IHL and the situations in which its interaction with the ECHR might arise.

2. International Humanitarian Law is the body of international customary and treaty based rules that specifically applies in armed conflict.[1] It does not cover internal tensions or disturbances such as isolated acts of violence that do not reach the threshold of an armed conflict. It has its own particular characteristics, but its primary aim is to limit the effects of armed conflict by ensuring that considerations of humanity continue to be weighed against the requirements of military necessity in armed conflict situations.

3. The content of IHL differentiates to some extent between: (a) situations of international armed conflict (IAC) (i.e conflict between two or more States); (b) situations of non-international conflict (NIAC) (conflict between one or more States on the one part and one or more non-State armed groups on the other part, or conflict between two or more non-State armed groups). The law of international armed conflict is also applicable in situations of belligerent occupation (i.e. where the armed forces of one State occupy territory belonging to another State, even if the said occupation meets with no armed resistance).

4. The Geneva Conventions and their Additional Protocols are at the core of IHL. In relation to IHL applicable to international armed conflicts, the most important rules of international law are now codified in the four Geneva Conventions of 1949 and in Additional Protocol 1 of 1977, which have been widely taken up by States. In addition there are a large number of other treaties that make up the corpus of IHL and may apply in a given situation, and customary international law is as well a significant source of the law applicable to IAC. Of particular note for present purposes are the provisions of the Third Geneva Convention on Prisoners of War, the Fourth Geneva Convention on the Protection of Civilians (including in situations of belligerent occupation), and Protocol I which developed the law further on both subjects.

5. By contrast, in relation to non-international armed conflict much of the law remains uncodified, although there are important provisions in conventional law notably Common Article 3 of the Geneva Conventions and Protocol II of 1977. It is therefore often necessary to turn to customary international law to determine the content of the law in a situation of non-international armed conflict. The law is based on the same fundamental principles of necessity, humanity, precaution and proportionality as underlie the law on IAC. Recent years

[1] As such International Humanitarian Law (IHL), sometimes also called the Law of Armed Conflict (LOAC), has traditionally been divided into two branches: “Hague law” which is mainly concerned with how military operations are conducted, and “Geneva law” concerned with the protection of persons directly affected by the conflict.

have seen a development of practice in the development and application of customary international law to situations of NIAC.

6. The development of international criminal law in the last two decades has been particularly significant, following the establishment of a number of international criminal courts and tribunals, including the negotiation of the Rome Statute of the International Criminal Court. These courts and tribunals have produced an extensive jurisprudence in relation to the prosecution of breaches of IHL that can result in individual criminal liability. In that context there has been an observable trend towards applying standards first developed in relation to IAC in the context of NIAC.

7. As noted above, IHL has developed as a body of legal standards applicable to the very specific context of armed conflict, to ensure respect for basic standards of humanity often in a context where ordering principles of society have broken down or are under threat deliberately through organised violence. Given that goal, and the fact that both IHL and international human rights law has significantly developed in the Post WW II period in reaction to the horrors that occurred during the immediately preceding period, it is notable that for a long time the two bodies of law developed in parallel but largely separately.

8. That separation has traditionally been explained by the specificity of the field of application of IHL. IHL applies in situations of armed conflict, governing primarily the conduct of hostilities and the protection of persons hors de combat. By contrast human rights law will apply in principle in times both of peace and conflict. In its first statement on the relationship between these two bodies of law the International Court of Justice said:

> *"The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable* lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself*." (*Legality of the Threat or Use of Nuclear Weapons* (1996), Advisory Opinion of the ICJ, at para 25)

9. In a similar vein in its Advisory Opinion on *The Construction of a Wall in the Occupied Palestinian Territory* the ICJ held:

> *"the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the questions put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as* lex specialis*, international humanitarian law.* " (I.C.J. Reports 2004, p. 178, para. 106).

10. The use of the term *lex specialis* in both of these Advisory Opinions may suggest the displacement of a general obligation by a more specific one, in line with the maxim *lex specialis derogat legi generali*. However in its subsequent decision in *DRC v Uganda*, the ICJ cited the above description of the relationship between the two bodies of law from *The Wall* Advisory Opinion, but without the final sentence referencing the *lex specialis* principle. It went on to find that activities of the Ugandan forces in occupation of DRC territory breached both obligations of both IHL and human rights law that were incumbent upon both Uganda and DRC (including Art 6 and 7 of the ICCPR and Art 4 and 5 of the African Charter). In that context therefore the ICJ seems to have found that both bodies of law could apply to the same situation.

11. To the extent that both bodies of law may overlap, the key issues with respect to the ECHR are likely to include:

- how the right to life in Article 2 ECHR applies in the conduct of hostilities (including for example its interaction with the law on targeting);
- how Article 5 ECHR applies to the detention of prisoners of war or internment;
- how Article 15 ECHR can be invoked in situations of armed conflict;
- how Article 1 of Protocol 1 ECHR applies to persons displaced from their property by conflict;
- how far a Contracting Party has to apply the ECHR in situations of armed conflict beyond its own territory .

I. THE APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS TO SITUATIONS OF ARMED CONFLICT

12. Whilst there have been a considerable number of applications to the Strasbourg Court arising from situations of armed conflict, there are in fact relatively few in which the Court has had to consider the application of IHL and its relationship to the ECHR. There are at least two factors which may be adduced in the explanation of this. Firstly there may well be an unwillingness on the part of States to characterise a situation in their territory as one of non-international armed conflict. As a result a State may not seek to defend its actions before the Strasbourg Court by reference to IHL, but rather seek to rely on the right ultimately to use forcible means to enforce law and order. The second is that it is only in recent years that the Court has been more open to the application of IHL.[2] . A number of stages to that evolution have been identified.

(a) Cases concerning military activity without reference to IHL

13. At the starting point of this evolution, an apparent reluctance on the part of the Court to consider the provisions of IHL has been observed in some of its earlier case-law.[3] For example in the case of *Isayeva v. Russia* (concerning deaths and injuries to IDPs as a result of the military led response to Chechen separatist violence around Grozny) the Court determined the case on the basis of the ECHR alone, despite the applicants' submissions

[2] See, for instance, L.A. Sicilianos, L'articulation entre droit international humanitaire et droits de l'homme dans la jurisprudence de la Cour européenne des droits de l'homme, Revue Suisse de droit international et droit européen, Vol. 27, No. 1, 2017, pp. 3-17; and also W. Schabas, *The European Convention on Human Rights: A Commentary,* (2015) OUP, at pp. 153-158.

[3] See the Contributions of Professor A. Kovler (DH-SYSC-II (2018)10) and Professor S. Touzé (DH-SYSC-II(2018)13). See also G. Gaggioli and R. Kolb, *A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights*, (2007) Israel Yearbook of Human Rights, pp. 115-163.

that the military action contravened IHL, and the Court's own reference to the situation as one of conflict.[4]

(b) Cases in which secondary reference is made to IHL

14. In some cases, the ECtHR has acknowledged provisions of IHL as part of the legal context in which the ECHR applies. In *Varnava v. Turkey* (concerning missing persons following Turkey's military operations in northern Cyprus in 1974), the Court considered the application of Article 2 ECHR against the context of IHL in the following terms:

> *"… Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict (see Loizidou, cited above, § 43). The Court therefore concurs with the reasoning of the Chamber in holding that in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities. This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to wounds, the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so.*
>
> *186. In the present case, the respondent Government have not put forward any materials or concrete information that would show that any of the missing men were found dead or were killed in the conflict zone under their control. Nor is there any other convincing explanation as to what might have happened to them that might counter the applicants' claims that the men disappeared in areas under the respondent Government's exclusive control. In the light of the findings in the fourth inter-State case, which have not been controverted, these disappearances occurred in life-threatening circumstances where the conduct of military operations was accompanied by widespread arrests and killings. Article 2 therefore imposes a continuing obligation on the respondent Government to account for the whereabouts and fate of the missing men in the present case; if warranted, consequent measures for redress could then be effectively adopted*."

(c) Cases which examine IHL, but exclude it

15. In the case of *Sargsyan v Azerbaijan* (concerning a claim by an IDP claiming that his inability to return to his home in a village (Gulistan) at the frontline of the Nagorno-Karabakh conflict was an interference with his right to property (Art. 1 Protocol 1) and his right to respect for his home (Art. 8)), the Court considered whether there was a basis in IHL for the Government's denial of access to his home, in the following passage:

> *230. The Government argued in particular that the refusal to grant any civilian access to Gulistan was justified by the security situation pertaining in and around the village. While referring briefly to their obligations under international humanitarian law, the Government relied mainly on interests of defence and national security and on their obligation under Article 2 of the Convention to protect life against dangers emanating from landmines or military activity.*
>
> *231. The Government have not submitted any detailed argument in respect of their claim that their refusal to grant civilians access to Gulistan was grounded in*

[4] See *Isayeva v. Russia*, no. 57950/00, § 167 and §§ 180 and 184, 24 February 2005; and also *Isayeva and Others v. Russia*, nos. 57947/00 and 2 others, § 157 and § 181, 24 February 2005.

international humanitarian law. The Court observes that international humanitarian law contains rules on forced displacement in occupied territory but does not explicitly address the question of displaced persons' access to home or other property. Article 49 of the Fourth Geneva Convention (see paragraph 95 above) prohibits individual or mass forcible transfers or deportations in or from occupied territory, allowing for the evacuation of a given area only if the security of the population or imperative military reasons so require; in that case, displaced persons have a right to return as soon as hostilities in the area have ceased. However, these rules are not applicable in the present context as they only apply in occupied territory, while Gulistan is situated on the respondent Government's own internationally recognised territory.

232. What is rather of relevance in the present case, is the right of displaced persons to return voluntarily and in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist, which is regarded as a rule of customary international humanitarian law applying to all territory whether "occupied" or "own" (Rule 132 of the ICRC Study on Customary International Humanitarian Law – see paragraph 95 above). However, it may be open to debate whether the reasons for the applicant's displacement have ceased to exist. In sum, the Court observes that international humanitarian law does not appear to provide a conclusive answer to the question whether the Government are justified in refusing the applicant access to Gulistan.

16. The Court went on to find that whilst the applicant's home was in an area of military activity the respondent Government had not done sufficient to take alternative measures to restore his property rights or to provide him with compensation for his loss.

(d) Cases in which IHL has been directly applied by the Court

17. The case in which the Court has considered the relationship between IHL and the Convention in the greatest detail is the case of *Hassan v UK*. The case concerned the detention of the applicant's brother in Iraq, Tarek Hassan, on suspicion of being a combatant or a civilian who constituted a threat to security on 22 or 23 April 2003. He was taken to Camp Bucca, a US-run detention facility in which the UK retained its own compounds. Following his interrogation by both British and US forces the Camp records showed that he was released on or around 2 May. However he did not contact his family on his release and in September 2003 he was found dead in the town of Samara. The applicant brought proceedings alleging that the UK had breached Article 2, 3 and 5 in respect of his brother. However as the claims under Articles 2 and 3 were not established on the facts, it was the claim under Article 5 that became central.

18. In responding, the UK argued first that the Convention did not apply extraterritorially during the active hostilities of an international armed conflict. However in the alternative it also argued that to the extent that the Convention did apply in such circumstances, it had to be applied to take account of IHL, which applied as the *lex specialis,* and might operate to modify or even displace a given provision of the Convention.

19. The Court did not accept the Respondent Government's arguments against the extraterritorial application of the Convention in these circumstances, on the basis that the applicant came within the physical control of UK forces on his detention, and remained under their authority and control even when he was subsequently transferred to US detention within Camp Bucca. The Court therefore emphasised that both IHL and the Convention were applicable in the circumstances.

20. The Court therefore had to face the difficulty that the legal bases for detention set out in Article 5(1) ECHR make no provision for some of the powers of detention that are permissible under the Third and Fourth Geneva Conventions (notably in relation to prisoners of war and the powers of internment necessary for reasons of security). The Court noted that this was the first occasion on which a State had requested it not to apply or to interpret Article 5 in the light of powers of detention permissible under IHL. The Court chose to seek an "accommodation" between these two apparently conflicting legal provisions through interpretive approach based on the rules of interpretation in Article 31 of the Vienna Convention on the Law of Treaties. In particular paragraph 3 which permits that for the purposes of interpretation account shall be taken of:

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.

21. The Court found that there was no subsequent agreement for the purposes of paragraph (a). In relation to paragraph (b), the Court looked at the practice of the Parties to the ECHR and found their consistent practice was not to use the derogation mechanism in Article 15 to modify their Convention obligations when undertaking military activity extra-territorially in an international armed conflict. In relation to (c) the Court underlined its previous caselaw requiring an interpretation of the Convention "in harmony with" other rules of international law, which applied also to IHL (*Varnava v Turkey* cited above).

> *"… 103. In the light of the above considerations, the Court accepts the Government's argument that the lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case.*
>
> *104. Nonetheless, and consistently with the case-law of the International Court of Justice, the Court considers that, even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15 (see paragraph 97 above).*
> *It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.*
>
> *105. As with the grounds of permitted detention already set out in those subparagraphs, deprivation of liberty pursuant to powers under international humanitarian law must be "lawful" to preclude a violation of Article 5 § 1. This means that the detention must comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness (see, for example, Kurt v. Turkey, 25 May 1998, § 122, Reports of Judgments and Decisions 1998-III; El-Masri,*

cited above, § 230; see also Saadi v. the United Kingdom [GC], no. 13229/03, §§ 67-74, ECHR 2008, and the cases cited therein).

106. As regards procedural safeguards, the Court considers that, in relation to detention taking place during an international armed conflict, Article 5 §§ 2 and 4 must also be interpreted in a manner which takes into account the context and the applicable rules of international humanitarian law. Articles 43 and 78 of the Fourth Geneva Convention provide that internment "shall be subject to periodical review, if possible every six months, by a competent body". Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent "court" in the sense generally required by Article 5 § 4 (see, in the latter context, Reinprecht v. Austria, no. 67175/01, § 31, ECHR 2005-XII), nonetheless, if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the "competent body" should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay. …" [5]

22. Lastly, note should be taken of the fact that the Court has on occasion been called upon to indirectly consider questions of IHL in the context of cases concerning the compatibility of a criminal conviction for war crimes and crimes against humanity – which can result from serious violations of international humanitarian law – with Article 7 ECHR and the principle of *nullum crime sine lege*.[6]

II. CHALLENGES AND POSSIBLE SOLUTIONS

23. The desirability of establishing clarity as to the applicable law is of course a constant in all situations, but it has an obvious and particular importance in armed conflict situations. This underlines the need for a reconciliation between the different bodies of law to the extent that they are both applicable.

24. Any reconciliation must take account of the nature of conflict. These are situations in which the costs of both action and inaction can have profound consequences on the lives of those affected (both combatants and non-combatants); and where decisions may have to be made very quickly and at times on the basis of limited information, sometimes at the level of the individual soldiers, in the context of ongoing violence whether actual or threatened. In that sense the IHL is undeniably a *lex specialis* that has been fashioned specifically to be applied in conflict situations in order to uphold its underlying core principles.

25. The judgment in *Hassan* suggests a possible approach to the reconciliation of the two bodies of law, in the context of detention of prisoners of war and internment of individuals who constitute security threats in the context of an international armed conflict. The provisions of IHL in this respect are clear and well-established, enabling the Court to find that they were reconcilable with the fundamental purpose of Article 5(1) to protect the

[5] See also the partly dissenting opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva, differing from the majority's approach of seeking to address the apparently conflicting legal provisions through a "harmonious" interpretation. In their view the only way for a State to reconcile its obligations under Article 5 of the ECHR with the exercise of IHL powers to detain/intern under the Third and Fourth Geneva Conventions, was to make a valid derogation under Article 15.

[6] See the judgments in the cases of *Vasiliauskas v. Lithuania [GC], no. 35343/05, ECHR 2015*; *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, §§ 55 and 74, ECHR 2013; *Kononov v. Latvia* [GC], no. 36376/04, §§ 200 ss., ECHR 2010; and *Korbely v. Hungary* [GC], no. 9174/02, §§ 86 ss., ECHR 2008.

individual from arbitrary detention. It is imaginable that there are other areas of IHL in which the rules are similarly clearly established where a similar solution may be possible.

26. Adopting a similar solution in relation to NIACs may be possible in some respects, but there may be additional complexities. A first set of complexities arises from very different circumstances in which NIACs can occur. There may be threshold questions about the existence of NIAC, for example States may be disinclined to characterise a situation on its own territory as a NIAC. Other complexities may arise where the forces of a contracting party to the ECHR are involved in a non-international armed conflict extraterritorially. Another complexity may arise from determining the content of some of the rules relating to NIAC, which are still largely derived from customary international law. It should be noted, however, that States are bound in any case by the fundamental principles of IHL (necessity, humanity, precaution and proportionality) as a minimum, and that States should operate on a clear framework to avoid arbitrariness. Any possible "accommodation" or "harmonious" interpretation of IHL and human rights obligations is likely to require this as a minimum.

27. It has been suggested that an alternative solution to the question of determining conflicts between (at least some) provisions of the two bodies of law is for a State to derogate from the ECHR in accordance with Article 15.[7]

28. However, as the judgment in *Hassan* noted, States have not derogated in relation to situations of IAC in which they have engaged extraterritorially, and given the approach in that judgment the need to derogate would have to be weighed carefully.[8] It is conceivable that there may be cases where derogation may provide an appropriate route in relation to an extra-territorial conflict situation. There may be questions as to the applicability of Art 15, but to the extent that the Convention is applicable extra-territorially it would seem logical that Article 15 is also applicable. Any actual derogation would require justification in any event, but it would seem that the terms of Article 15 should be read sufficiently broadly to allow a derogation in principle when a State is acting extra-territorially.

29. A further set of questions might then arise as to the extent of possible derogations, again particularly in respect of extra-territorial application. For a start, there may be difficult issues in determining which ECHR obligations are applicable, arising from the notion of "dividing and tailoring" Convention rights in situations of extraterritorial application. Even where a derogation is permissible on the face of Article 15, it is not clear how far derogations may be permitted. Thus for example a derogation from Article 2 is permissible in respect of deaths resulting from lawful acts of war, however, as regards the scope of the procedural obligations under Article 2 ECHR, it is not necessarily clear how far they would apply.

30. All of this suggests that the invocation of Article 15 may assist in answering some questions, but it is also likely to raise further questions, and careful assessments would have to be made of its overall contribution to creating greater legal certainty.

* * *

[7] According to the partly dissenting opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva in *Hassan*, this is the only possible solution under the Convention. Differing from the majority's approach of seeking to address the apparently conflicting legal provisions through a "harmonious" interpretation, they argued that the only way for a State to reconcile its obligations under Article 5 of the ECHR with the exercise of IHL powers to detain/intern under the Third and Fourth Geneva Conventions, was to make a valid derogation under Article 15. It is notable too that the Human Rights Committee in General Comment No. 35 seems to accept the possibility of States derogating from the right to liberty in conflict situations under certain conditions, including conflict situations outside their own territories in which they are engaged (see para. 65).

[8] States in practice do not appear to derogate in situations of extraterritorial NIAC.

Chapter of 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

Introduction

I. Coexistence and interaction between the ECHR and the UN human rights conventions through the case-law and the practice of the ECtHR and the UN treaty bodies

A. Coexistence of different normative sets: diverging interpretation of substantial rights

(i) Freedom to manifest one's religion: the wearing of religious symbols and clothing
(ii) Right to liberty and security: involuntary placement or treatment of persons with mental disorder
(iii) Transfer of persons to another State: non-refoulement, prevention of torture and the question of diplomatic assurances

B. Coexistence of different international mechanisms for the guarantee of human rights: diverging approaches to procedural matters

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A. Legal uncertainty, forum-shopping and the threats to the authority of human rights institutions

(i) An illustration: the *Correia de Matos v. Portugal* case
(ii) Analysis

B. Possible ways of containing divergence

INTRODUCTION

1. The present Chapter deals with the interaction between the European Convention on Human Rights (ECHR) and other international human rights instruments to which the Council of Europe (CoE) Member States are contracting parties. Those instruments may be universal in scope, or they may be regional. However, in accordance with directions received by the Steering Committee for Human Rights (CDDH), and in the light of the relevant paragraphs of the latter's 2015 Report on the longer-term future of the European Convention on Human Rights,[1] it shall be limited to the interaction between the European Convention and human rights conventions adopted under the auspices of the United Nations. As instructed, this interaction shall be examined through the jurisprudence and the practice of the European Court of Human Rights (ECtHR) and the monitoring bodies created by the UN Conventions ("treaty bodies").

2. According to Article 1(3) of the Charter of the United Nations, the promotion and encouragement of the respect for human rights and fundamental freedoms, without discrimination, is one of the purposes of the United Nations. Articles 55 and 56 of the Charter make human rights an integral part of the international economic and social cooperation obligations of the Organization and its Member States. Moreover, human rights fall within the mandate of the Economic and Social Council (ECOSOC) which established, in 1946, the UN Human Rights Commission (predecessor to the Human Rights Council). In 1948 the UN General Assembly adopted the Universal Declaration of Human Rights, the cornerstone for the international human rights system. It was understood that this would be followed by a legally binding instrument. The drafting process led to the adoption, in 1966, of the International Covenant on Civil and Political Rights (ICCPR) and its (First) Optional Protocol and of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

3. Already in October 1967, the CoE Committee of Ministers instructed the Committee of Experts on Human Rights to report on the problems arising from the co-existence of those three treaties,[2] identified as "*the twofold risk that international procedures for the guarantee of human rights operate in different and possibly divergent ways; and that conflicts may arise on account of the different definitions given in the various legal instruments established for the protection of human rights and freedoms*".[3] The concern seemed justified, given that at the time of their entry into force (1976), five of the then eighteen CoE Member States were also parties to the Covenants while eight more had signed them and were considering ratification.

4. Today all forty-seven CoE Member States are simultaneously bound by the ECHR and the Covenants. Moreover, since 1966 several more UN human rights instruments have been adopted: the International Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1966), the Convention on the Elimination on All Forms of

[1] See DH-SYSC-II(2017)002, 31 July 2017, *Context of the Work of the DH-SYSC-II on the Future Report of the CDDH,* § 15 and CDDH(2015)R84 Addendum I, 11 December 2015, adopted by the Committee of Ministers at its 1252nd meeting (30 March 2016), especially §§182-184 and 188.

[2] CM/Del/Concl. (67) 164, Item VI (b).

[3] *Problems arising from the co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights,* Memorandum prepared by the Directorate of Human Rights, Doc. DH/Exp (67) 6, 6 October 1967.

Discrimination Against Women (CEDAW, 1979), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984), the Convention on the Rights of the Child (CRC, 1989) and its Optional Protocols,[4] the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW, 1990), the Convention on the Rights of Persons with Disabilities (CRPD, 2006)[5], and the Convention for the Protection of All Persons from Enforced Disappearance (CED, 2006).

5. The compliance of States parties with these treaties is monitored by special bodies, composed of experts from all geographical areas. The experts are elected by the States Parties and shall be of recognised competence in the field of human rights, consideration being also given to legal experience.[6] Under the relevant instruments (the Conventions above or special Optional Protocols),[7] these monitoring bodies examine periodic reports submitted by the Contracting Parties and express their concerns and recommendations in the form of "concluding observations". Moreover, they adopt "General Comments" on matters they find of particular interest pertaining to the interpretation and the implementation of the respective convention. Some are also mandated to conduct confidential inquiries upon receipt of reliable information of systematic or serious violations. But most significantly, UN treaty bodies may receive and consider communications against contracting parties that have explicitly accepted their competence in this respect.[8] Such communications may be individual or, for most treaties, also inter-State; the present Chapter, however limits itself to communications submitted by individuals.

6. However, it must be noted that the "Views" of the treaty bodies on individual communications contain recommendations to the States concerned and are not legally binding, as has been repeatedly underlined by CoE Member States but also other States (also with respect to concluding observations on periodic reports). No equivalent of Article 46 ECHR is to be found in any of the relevant texts, Conventions or Optional Protocols. Follow-up to the "Views" of the UN treaty bodies consists of the initiation of a dialogue between the relevant treaty body and the State concerned, through the examination of periodic reports and special follow-up reports. This is not to argue that findings by the UN treaty bodies are not to be taken into consideration by States Parties. On the contrary, as indicated by the Human Rights Committee (CCPR) in its *General Comment no 33*,[9] its Views exhibit "*some important characteristics of a judicial decision*", including the impartiality and independence of its members, the "*determinative character*" of its findings on the question whether there has been a violation of the ICCPR, even the fact that failure by a State party to comply "*becomes a matter of public record",* through the publication of the Committee's decisions and the Annual Reports to the UN General Assembly, with obvious political repercussions

[4] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and Optional Protocol to the Convention on the Rights of the Child on a communications procedure.
[5] See also the Optional Protocol to the Convention on the Rights of Persons with Disabilities.
[6] See ICCPR, Articles 28 and 30. For a general presentation of the UN human rights treaty bodies see Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice,* Cambridge University Press, 2013, xlvii, 730 p., at 181-218.
[7] In the case of the ICESCR, also ECOSOC Resolution 1985/17 of 28 May 1985.
[8] Almost all CoE Member States (44) have accepted the competence of the Human Rights Committee to receive individual communications and a significant majority has accepted the competence of the other treaty bodies, with the exception of the ICECR (11) and the CED Committees (16). No CoE Member State has accepted the competence of the ICMW Committee, a mechanism which has not yet entered into force.
[9] (CCPR), *General Comment no 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 2008, CCPR/C/GC/33, §§ 11 and 17.

for the State concerned. They should therefore be taken in good faith.[10] The same can be said of concluding observations on periodic reports and General Comments.[11] Nevertheless, the whole UN treaty body system relies on dialogue and the exchange of opinions on how legal obligations must be interpreted, and, although that does not diminish the significance of the UN treaty bodies' practice, it is therefore not comparable to the obligation to execute the Court's judgments. All these parameters should be kept in mind when discussing the coexistence of the ECHR with the UN human rights conventions and the possibility of conflicts between them.[12]

7. In light of the proliferation of universal human rights treaties binding upon the CoE Member States, as well as of the bodies charged with monitoring the compliance of States parties under those treaties, the concerns expressed within the Council of Europe in the 1960s persist. As described by the CDDH, "*since numerous Council of Europe member States are Parties to these UN treaties, there is a risk that a comparable human rights standard is interpreted differently in Geneva compared to Strasbourg*".[13] Moreover, situations where procedural rules and related practice of the UN treaty bodies enable them to examine cases that have been previously heard by the ECtHR "*may seriously undermine the credibility and the authority of the Court*".[14] Accordingly, this Chapter will consider firstly the normative aspect of the subject at hand. Secondly, an indicative analysis of procedural and related questions shall be undertaken.

I. COEXISTENCE AND INTERACTION BETWEEN THE ECHR AND THE UN HUMAN RIGHTS CONVENTIONS THROUGH THE CASE-LAW AND THE PRACTICE OF THE ECTHR AND THE UN TREATY BODIES

A. Coexistence of different normative sets: diverging interpretation of substantial rights

8. Ever since the adoption of the ECHR, it was envisaged that the coexistence with a universal treaty could be a source of normative inconsistency and a reason to align the regional to the universal: "*If and when this United Nations Convention* [i.e. the future ICCPR] *comes into force, there may be a situation in which two sets of provisions on human rights differing perhaps in wording or substance have been accepted by those members of the United Nations that are also members of the Council of Europe. This* [...] *might be a case for*

[10] See the 2014 Report of the Venice Commission on the implementation of international human rights treaties in domestic law and the role of courts, CDL-AD(2014)036, p. 31.
[11] In that respect, see the ICJ's finding in its *Ahmadou Sadio Diallo* Judgment of 30 November 2010 (*ICJ Reports 2010,* p. 639, at § 66), with respect to the Human Rights Committee's Views and its General Comment no 15.
[12] Though not binding, Views of the treaty bodies may be influential. They may be taken into account by the ECtHR and the ICJ. See for example the ICJ's finding in its Ahmadou Sadio Diallo Judgment of 30 November 2010 (ICJ Reports 2010, p. 639, at § 66), with respect to the Human Rights Committee's Views and its General Comment no 15. See also the Advisory Opinion of the ICJ, "Legal Consequences of the Construction of a Wall in the Occupied Palestinial Territory", ICJ Reports 2004, p. 136, paras 109-110. Moreover, they could also be taken into account in rulings or decisions of the national courts. See, for example, the (unique, so far) case of *González Carreno v. Spain,* where the Spanish Supreme Court ruled the complainant should be compensated in compliance with the CEDAW Committee's views (no 47/2012, 16 July 2014) for the infringement of her rights under the CEDAW (Tribunal Supremo, sentencia núm. 1263/2018, 17 July 2018, particularly pages 23-28).
[13] CDDH 2015 Report, *op.cit*, § 182.
[14] *Ibid.,* § 184.

revising the list of Human Rights and Fundamental Freedoms set out in Part I of the Convention now before us in order to bring it in harmony with the United Nations Convention". Nevertheless, it was also acknowledged that it was possible for the European States, with their common background, to assume wider and more precise commitments than those that could be incorporated in the United Nations Convention, intended to apply to countries of a widely heterogeneous character.[15]

9. Indeed, although both the ECHR and the ICCPR are comprehensive human rights treaties, they do not necessarily coincide. A certain alignment of the two texts as suggested above was achieved through the adoption of Protocols to the ECHR or through the evolution of the Court's jurisprudence.[16] However, there still are a certain number of rights and freedoms recognized by the Covenant that are not directly addressed by the European Convention and vice-versa: one could mention Article 27 ICCPR and Article 1 of Protocol No.1 to the ECHR.

10. Additionally, differences exist in the definitions of certain rights that are protected by both the ECHR and the ICCPR.[17] These differences may be connected to the affirmation of the right itself or to the restrictions or limitations permissible. To give but a few examples:

(a) Article 2 § 2 ECHR sets out circumstances in which deprivation of life is permissible. There is no corresponding provision in the ICCPR.
(b) According to Article 7 ICCPR, "*no one shall be subjected without his free consent to medical or scientific experimentation*". There is no corresponding provision in Article 3 ECHR.
(c) Article 14 ECHR only prohibits discrimination in relation to other Convention rights, in contrast to Article 26 ICCPR, which has constantly been interpreted by the CCPR as guaranteeing non-discrimination in relation to all rights, including economic, social, and cultural rights. Protocol no 12 to the ECHR of 2000, introducing a free-standing right to non-discrimination is binding upon less than half of the CoE Member States.
(d) The restrictions allowed by Articles 10 and 11 ECHR seem more extensive than the ones in Articles 19, 21 and 22 ICCPR, inciting certain CoE Member States to make reservations to the latter stating that their obligations under the particular Covenant Articles would be implemented in accordance with the corresponding provisions of the Convention.

11. In addition to the ICCPR, the other UN human rights instruments also introduce their own, special rights, or their own, subject-specific norms on rights that are protected, in broader, more general terms, under the Covenant and the ECHR, and are redefined in the context of each specialized instrument.

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[15] Points made by Mr Davies (United Kingdom) and Mr Schuman (France) at a meeting of the Committee of Ministers in Rome on the 3rd November 1950 (see Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention of Human Rights*, Martinus Nijhoff Publishers 1985, 347 p., at 28-32.

[16] Such examples are, respectively, the introduction of a free standing right to non-discrimination, comparable to Article 26 ICCPR, by Protocol 12 to the ECHR or the right to appeal to a higher tribunal in criminal matters (Article 14§5 ICCPR /Protocol no. 7 ECHR, Article 2) and the *lex mitior* rule, i.e. the right to application of a more favourable criminal law (Article 15 par. 1 ICCPR *in fine*). On the latter, compare the ECommHR decision of 6 March 1978 in the case of *X v. Germany*, no. 7900/77 to the Grand Chamber Judgment of 17 September 2009 in the case of *Scoppola v. Italy (2)*, § 106.

[17] Compare the Table comparing the provisions of the ECHR to those of the ICCPR prepared in 1967 by the Committee of Experts on Human Rights, doc. DH/Exp(67) 7, 10 October 1967.

12. Different definitions are bound to make room for different interpretations and, thus lead to diverging implementation. More complex appear to be situations where the normative texts are quite similar, but still they are approached in a divergent and possibly conflicting manner.

13. A thorough examination of the whole body of the jurisprudence and the practice of the ECtHR and the UN treaty bodies would be impossible to undertake within the context of this Report.[18] Diverging views have been adopted in the past in connections to matters such as abortion,[19] the right to self-representation in criminal proceedings,[20] the right to vote of persons under guardianship,[21] as well as the responsibility of States when implementing UN Security Council resolutions.[22] Still, there are fields, examined in more detail below, where centrifugal tendencies seem to be stronger, and in some cases attract the attention of the media and the general public. These cover the freedom to manifest one's religion (i), the right to liberty and security (ii) and the transfer of persons to another State (iii).

(i) Freedom to manifest one's religion: the wearing of religious symbols and clothing

14. The Court qualifies the freedom of thought, conscience and religion (Article 9 ECHR) as one of the foundations of a democratic society, noting, however that when several religions coexist, it may be necessary to place limitations on the freedom to manifest one's religion or beliefs in order to reconcile the interests of the various groups and ensure the rights and freedoms of others. The particular circumstances of a State and its choices as regards secularism are also taken into consideration. With respect to Article 9, in general, and the freedom of religion, in particular, the ECtHR makes frequent reference to the margin of appreciation doctrine.

15. In the case of *Leyla Sahin v. Turkey*,[23] where a medical student complained about a rule prohibiting wearing a headscarf in class or during exams, the Grand Chamber accepted that institutions of higher education may regulate the manifestation of religious rites and symbols by imposing restrictions with the aim of ensuring peaceful coexistence between students of various faiths and thus protecting public order and the beliefs of others. The Grand Chamber upheld the Chamber's position that "*when examining the question of the Islamic headscarf in*

[18] For a concise but thorough examination of the interaction of the ECtHR and UN treaty bodies, see L.-A. Sicilianos, "Le précédent et le dialogue des juges: L'exemple de la Cour européenne des droits de l'homme", pp. 225-241 in N. Aloupi et C. Kleiner (dir), *Le précédent en droit international, Colloque de Strasbourg de la Société Française pour le Droit international,* Pédone 2016.
[19] Compare (CCPR) *Siobhán Whelan v. Ireland,* 2425/14, 11 July 2017 (esp. §7.7) to ECtHR (GC), *A, B and C v. Ireland,* no. 25579/05, 16 December 2010, where Ireland's margin of appreciation with regard to the prohibition of abortion and the protection of the unborn came into play.
[20] See the case of *Correia de Matos v. Portugal, infra,* (II) (B) (i).

[21] Compare (ECtHR), *Alajos Kiss v. Hungary* (no 38832/06, 20 May 2010, §§38, 41-42, where the Court admitted that a measure ensuring that only citizens capable of making conscious decisions participate in public affairs could be a measure pursuing a legitimate aim, though a blanket ban on voting irrespective of a person's actual faculties does not fall within an acceptable margin of appreciation to (CRPD) *János Fiala, Disability Rights Center v. Hungary* (4/2011, 9 September 2013, §9.4), where the CRPD Committee found that an exclusion of the right to vote on the basis of a psychosocial or intellectual disability, including pursuant to an individualized assessment, constitutes discrimination on the basis of disability (article 29 CRPD).
[22] See (CCPR), *Sayadi and Vinck v. Belgium,* 1472/2006, 22 October 2008, §7.2, a freezing of assets case where the Committee clearly differentiated itself from the *Bosphorus* doctrine (see Theme I, sub-theme ii). It also found that Belgium was responsible for the violations resulting from placing the authors on the sanctions list even if it was unable to subsequently remove them (§10.1-11).
[23] No. 44774/98 (GC), 10 November 2005.

the Turkish context, it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it".[24] The Court has found inadmissible a number of applications involving religious clothing of pupils and students in Member States following the principle of secularism.[25]

16. Another set of cases concern religious symbols or clothing at the workplace. In respect of the public sector, the Court has observed that the fact that the applicant wore her veil was perceived as an ostentatious manifestation of her religion which was incompatible with the requirement of discretion, neutrality and impartiality incumbent on public employees in discharging their functions.[26] This goes in hand with the Court's view that a democratic State is entitled to require public servants to be loyal to the constitutional principles on which it is founded.[27] With respect to teaching staff in particular, "*it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children.* […]*it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect* […] *weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Court considers that, in the circumstances of the case and having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable*".[28]

17. In a different context, concerning a Member State with no legislation regulating the wearing of religious symbols, the Court has found that there had been a violation of Article 9 with respect to an airline employee suspended from work for wearing a cross in contravention of the company's uniform policy, but not with respect to a nurse who had been redeployed to a desk job for wearing a cross in disregard to the hospital's health and safety policy against necklaces.[29] In the first case (with respect to the UK's positive obligations, as the applicant's employer was a private company), the Court held that the British courts had failed to strike a fair balance as they had accorded too much weight to the company's wish to project a certain corporate image. In the second case, where the employer was a public institution and therefore directly required to conform to Article 9, the Court acknowledged the existence of a wide margin of appreciation in relation to health and safety matters and concluded that the measures adopted with regard to the applicant were not disproportionate.

[24] Judgment of 29 June 2004, § 108.
[25] For instance, *Köse and 93 Others v. Turkey* (dec.), no. 26625/02, 24 January 2006; *Kervanci v. France*, no. 31645/04, 4 December 2008; *Ranjit Singh v. France* (dec.) no. 27561/08, 30 June 2009.
[26] *Ebrahimian v. France,* no. 64846/11 , Judgment of 26 November 2015, § 62, concerning a social worker in a municipal psychiatric institution. See also *Kurtulmuş v. Turkey* (dec.), no. 65500/01, 24 January 2006, concerning an associate professor at a public University.
[27] *Vogt v. Germany,* no. 17851/91, (GC) 26 September 1995.
[28] *Dahlab v. Switzerland* (dec.), no. 42393/98, 15 February 2001.
[29] *Eweida and Others v. United Kingdom,* nos 48420/10, 59842/10, 51671/10, 36516/10, 15 January 2013. The other two applications did not involve the wearing of religious symbols.

18. A violation of Article 9 has also been found in cases concerning persons expelled from courtrooms and fined for wearing religious clothing, where no other disrespect towards the court had been evidenced.[30]

19. With respect to the wearing of religious symbols and clothing in public, in its 2010 Judgment, *Ahmet Arslan and Others v. Turkey,*[31] the Court held that, since the aim of the legislation on the wearing of headgear and religious clothing in public had been to uphold secular and democratic values, the interference with the applicants' rights pursued a number of the legitimate aims listed in Article 9§2: public safety, public order and the rights and freedoms of others. It found, however, that the necessity of the measure in the light of those aims had not been established, particularly because there was no evidence to show that the manner in which the applicants had manifested their beliefs by wearing specific clothing constituted or risked constituting a threat to public order, a form of pressure on others or that they had engaged in proselytism.

20. However, in 2014, in *S.A.S. v. France,* concerning a legislative ban (law no 2010-1192) on the concealment of one's face in public places, the Grand Chamber found no violation of Article 9 with respect to the wearing of a full-face veil (niqab), reiterating that this Article does not protect every act motivated or inspired by a religion or belief and does not always guarantee the right to behave in public in a manner dictated by one's religion or beliefs. The Court further found that respect for the conditions of "living together" in the society was a legitimate aim for the measure under scrutiny and that the State had a wide margin of appreciation as regards this issue on which opinions differ significantly.[32] The case at hand was different than *Ahmet Arslan* in that the ban in question was not based on the religious connotation of the veil but solely on the fact that it conceals the face. This position was upheld in *Belcacemi and Oussar v. Belgium* and *Dakir v. Belgium,* where the Court found that the restriction imposed by the Belgian law sought to guarantee the conditions of "living together" and the protection of the rights and freedoms of others and that it was necessary in a democratic society.[33]

21. It is accepted that a State may find it essential to be able to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud. The Court has thus dismissed cases concerning the obligation to remove religious clothing in the context of security checks,[34] to appear bareheaded on identity photos for use on official documents[35] or to wear a crash helmet.[36]

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[30] *Hamidovic v. Bosnia and Herzegovina,* no. 57792/15, 5 December 2017 (expulsion from the courtroom of a witness wearing a skullcap). Also *Lachiri v. Belgium,* no 3413/09, 18 September 2018 (prohibition of assisting at a trial because the applicant –and civil party to the trial- refused to remove her headscarf).

[31] No. 41135/98, 23 February 2010, concerning the conviction of members of a religious group (*Aczimendi tarikatÿ)* who came to Ankara for a religious ceremony, toured the city wearing the distinctive clothing of the group and, following various incidents were arrested and convicted for breaching the law on the wearing of headgear and religious clothing in public.

[32] *S.A.S. v. France,* no 43835/11, (GC) 1 July 2014*,* §§ 125, 153.

[33] Nos. 37798/13 and 4619/12, respectively, Judgments of 11 July 2017.

[34] See *Phull v. France* (dec), no 35753/03, 11 January 2005, where airport authorities obliged a Sikh to remove his turban as part of a security check; also *El Morsli v. France* (dec), no 15585/06, 4 March 2008, where the applicant was denied an entry visa to France as she refused to remove her headscarf for an identity check at the French consulate general in Marrakesh.

[35] *Mann Singh v. France* (dec), no 24479/07, 13 November 2008, concerning the refusal by a practicing Sikh to take a bare-headed identity photograph for his driving license. Also *Karaduman v. Turkey* (dec), no 16278/90, 3

22. The wording of Article 18 ICCPR (especially § 3 on permissible restrictions) does not diverge significantly from Article 9 § 2 ECHR. Nevertheless, the Human Rights Committee has adopted a different approach on the issue, and, in general, does not appear to rely on a doctrine of margin of appreciation.

23. As a matter of principle, the Committee has declared that "*the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion*".[37] Policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are also similarly inconsistent with article 18.[38] The freedom to manifest one's religion is not absolute and may be subject to limitations prescribed by law but strictly on the grounds specified in Article 18 § 3.[39] Moreover, limitations may be applied only for those purposes for which they were prescribed, must be directly related and proportionate to the need on which they are predicated and may not be imposed in a discriminatory manner.[40]

24. In *Bikramjit Singh v. France,* on the expulsion from school of a Sikh student for refusing to remove his head covering, the Committee recognized that the principle of secularism is itself a means by which a State party may seek to protect the religious freedom of its population, and that the adoption of a law prohibiting ostentatious religious symbols responded to actual incidents of interference with the religious freedom of pupils and sometimes even threats to their physical safety; thus, it served purposes related to protecting the rights and freedoms of others, public order and safety. However, the Committee held that the State party had not furnished compelling evidence that, by wearing his head covering, the author would have posed a threat to the rights and freedoms of other pupils or to order at school, nor had it shown how the encroachment on the rights of persons prohibited from wearing religious symbols was necessary or proportionate to the benefits achieved.[41] Interestingly, examining the applications of other Sikh students of the same high school, the ECtHR did not find a reason to depart from its previous jurisprudence which leaves a wide margin of appreciation to the national legislator when it comes to the relation between the State and the religions and declared them inadmissible.[42]

25. The Committee has also acknowledged a State party's need to ensure and verify, for the purposes of public safety and order, that the person appearing in the photograph on a

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May 1993 concerning the obligation imposed on a Muslim student to provide an identity photograph without a headscarf in order to receive her diploma.

[36] ECommHR, *X v. UK* (dec), no 7992/77, 12 July 1978, concerning a practicing Sikh.

[37] *Raihon Hudoyberganova v. Uzbekistan*, 931/2000, 5 November 2004, at. 6.2 concerning the expulsion of a University student wearing the "hijab".

[38] Also measures restricting access to medical care, employment or the rights guaranteed by article 25 (participation in public affairs) and other provisions of the *Covenant. General Comment no 22, The freedom of thought, conscience and Religion (Article 18)*, CCPR/C/21/Rev.1/Add.4, 1993, § 5.

[39] *Hudoyberganova v. Uzbekistan, op.cit,* at 6.2.

[40] *General Comment no 22*, § 8.

[41] *Bikramjit Singh v. France*, 1852/08, 1 November 2012, §§ 8.6, 8.7.

[42] *Jasvir Singh v. France* (dec), no 25463/08, 30 June 2009; *Ranjit Singh v. France* (dec), no. 27561/08, 30 June 2009.

residence permit is in fact the rightful holder of that document. However, in another Sikh turban case, it concluded that the limitation imposed upon the author was not necessary under Article 18§3 ICCPR, because the turban covered only the top of the head, leaving the face clearly visible. In addition, "*even if the obligation to remove the turban for the identity photograph might be described as a one-time requirement, it would potentially interfere with the author's freedom of religion on a continuing basis because he would always appear without his religious head covering in the identity photograph and could therefore be compelled to remove his turban during identity checks*".[43]

26. In *F.A. v. France* (known as the "Baby Loup" case), the Committee found that the dismissal for serious fault without indemnity of a private childcare centre employee that refused to abide by the centre's internal regulations imposing religious neutrality on employees and remove her headscarf at work constituted a disproportionate measure with respect to Article 18 ICCPR. The Committee held that no sufficient justification had been provided by the State party that would allow concluding that the wearing of a headscarf by an educator in a childcare centre in the particular circumstances of the case would violate the fundamental rights and freedoms of the children and parents attending the centre. The Committee did not spend much time on the argumentation by the French government, based on ECtHR case-law, including the *Leyla Sahin* and *Dahlab* cases, that the headscarf is "a powerful external symbol", asserting that the criteria used to arrive at this conclusion had not been explained and that "*the wearing of a headscarf, in and of itself, cannot be regarded as constituting an act of proselytism*". The Committee also found that the restriction in the centre's internal regulations affected in a disproportionate manner muslim women that chose to wear a headscarf, such as the author. There had thus been differential treatment of the author and her dismissal constituted intersectional discrimination based on gender and religion under Article 26 ICCPR.[44]

27. The recent Views in the cases of *Sonia Yaker v. France* and *Miriana Hebbadj v. France* openly conflict with the Court's *S.A.S.* jurisprudence concerning law no 2010-1192 of 11 October 2010 on the prohibition of the concealment of one's face in public and the possibility of imposing sanctions to persons not complying, including muslim women choosing to wear the full-face veil.[45] In this first case concerning the niqab before it, the Committee considered that a general ban was not proportionate to security considerations advanced by the respondent State or for attaining the goal of "living together" in society, a concept that it qualified as "*very vague and abstract*", quickly dismissing the ECtHR jurisprudence.[46] The Committee also found that the treatment of the authors constituted intersectional discrimination based on gender and religion under Article 26 ICCPR.[47]

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[43] *Ranjit Singh v. France*, 1876/2009, 22 July 2011, § 8.4. The Committee reiterated its position in *Shingara Mann Singh v. France* (1928/2010, 26 September 2013), a case concerning the refusal to renew a man's passport for lack of a bareheaded identity card. That author had already filed an application with the ECtHR, concerning the refusal to renew his driver's license (see para. 21 above), prompting France to comment that his decision to submit a communication to the Committee this time was " *motivated by a desire to obtain a decision from the Committee differing from the one already adopted by the Court*" (§ 4.3).
[44] *F.A. v. France*, no. 2662/2015, 16 July 2018, §§ 8.8, 8.9, 8.12, 8.13.
[45] 2747/2016 and 2807/2016, 22 October 2018.
[46] *Yaker v. France,* §8.10, *Hebbadj v. France,* § 7.10.
[47] *Yaker v. France,* §8.17, *Hebbadj v. France,* § 7.17.

(ii) Right to liberty and security: involuntary placement or treatment of persons with mental disorder

28. Article 5 § 1 (e) ECHR provides for the lawful detention of "persons of unsound mind". According to the jurisprudence, however, the following three minimum conditions must be satisfied in order for an individual to be deprived of his liberty: "*firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder*".[48]

29. As to the second condition, "*a mental disorder may be considered as being of a degree warranting compulsory confinement if it is found that the confinement of the person concerned is necessary as the person needs therapy, medication or other clinical treatment to cure or alleviate his/her condition, but also where the person needs control and supervision to prevent him/her from, for example, causing harm to him/herself or other persons*".[49] Additionally, in principle the detention of a mental-health patient will be "lawful" for the purposes of Article 5 § 1 (e) only if effected in a hospital, clinic or other appropriate institution authorised for that purpose.[50] The lawfulness of the detention also requires the observance of a procedure prescribed by law; in this respect the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. It requires in addition, however, that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness.[51]

30. The Court has held that it is the medical authorities' call to decide which therapeutic measures to use, if necessary forcibly, in order to preserve the physical and mental health of detained persons: no matter how disagreeable, therapeutic treatment cannot in principle be regarded as "inhuman" or "degrading" in the sense of Article 3 ECHR if it is persuasively shown to be necessary.[52]

31. Although the Convention on the Rights of Persons with Disabilities does not explicitly refer to involuntary placement or treatment of people with disabilities, its Article 14 (liberty and security of the person) clearly states that a deprivation of liberty based on the existence of disability would be contrary to the Convention.

32. In its General Comment no. 1 (2014), the CRPD Committee has advanced that mental health laws imposing involuntary measures even in circumstances of dangerousness to one's self or to others are incompatible with Article 14, are discriminatory in nature and amount to arbitrary deprivation of liberty. It has also considered that States parties have an

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[48] *Winterwerp v. the Netherlands,* 24 October 1979, § 39, Series A no. 33; *Stanev v. Bulgaria* (GC), no. 36760/06, 17 January 2012, § 145; and *Rooman v. Belgium* (GC), no. 18052/11, 31 January 2019, § 192.
[49] *Ilnseher v. Germany*, nos. 10211/12 and 27505/14, § 133, 4 December 2018.
[50] *Stanev v. Bulgaria, op.cit*., § 147 and the references therein; and *Rooman v. Belgium* (GC), no. 18052/11, 31 January 2019, § 193, where the Court reiterated that a significant delay in admission to an appropriate institution and in therapeutic treatment of the person concerned will obviously affect the prospects of the treatment's success, and may thus entail a breach of Article 5 (§ 198).
[51] *Hadžimejlić and Others v. Bosnia and Herzegovina*, nos. 3427/13 and 2 others, § 52, 3 November 2015; and; *Rooman v. Belgium* (GC), no. 18052/11, 31 January 2019, § 190.
[52] *Naumenko v. Ukraine*, no. 42023/98, 10 February 2004, § 112.

obligation to require all health and medical professionals (including psychiatric professionals) to obtain the free and informed consent of persons with disabilities prior to any treatment and that forced treatment by psychiatric and other health professionals is a violation of the freedom from torture, the right to equal recognition before the law and personal integrity, as well as of the freedom from violence, exploitation and abuse (Articles 15-17 CRPD).[53] Likewise, in its Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities (2015), the Committee reiterated its view that Article 14(1)(b)[54] prohibits the deprivation of liberty on the basis of actual or perceived impairment even if additional factors or criteria, such as risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis, are also used to justify the deprivation of liberty[55]. The Committee found a violation of article 14 (1) (b) of the Convention in *Marlon Jams Noble v. Australia,* where it was considered that the author's disability and the State party's authorities' assessment of its potential consequences was the "core cause" of his detention.[56] In the same context, the CRPD Committee has on several occasions urged upon States parties to repeal provisions which allow for involuntary commitment of persons with disabilities in mental health institutions and not to permit substitute decision-makers to provide consent on behalf of such persons.[57]

33. It must be noted that the Human Rights Committee has adopted a differing approach on the issue, leaving space for involuntary placement and treatment under the condition that they be necessary and proportionate for the purpose of protecting the individual concerned from serious harm or preventing injuries to others.[58] Indeed, "*an individual's mental health may be impaired to such an extent that, in order to avoid harm, the issuance of a committal order may be unavoidable*", even though "*involuntary hospitalization must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law*".[59]

34. These diverging interpretations manifest themselves notably in the difficulties in drafting new standards on this matter within the Council of Europe.[60]

(iii) Transfer of persons to another State: non-refoulement, prevention of torture and the question of diplomatic assurances

35. Another point of divergence concerns assurances provided for the non-use of torture, when there is a real risk thereto, in the context of procedures such as extradition or deportation, or even in cases of forcible, extra-judicial transfers (for example, cases of

[53] *General Comment no. 1*, 2014, §§ 40-42.
[54] "*1. States Parties shall ensure that persons with disabilities, on an equal basis with others: [...] Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.".*
[55] *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities* (2015), §§ 6-7.
[56] Communication 7/2012, views of 2 September 2016, § 8.7.
[57] For instance, Concluding Observations CRPD/C/POL/CO/1/29.10.2018 §24, CRPD/C/MLT/CO/1/17.10.2018 §23, CRPD/C/SVN/CO/1/16.4.2018 §23, CRPD/C/GBR/CO/1/03.10.2017 § 35.
[58] *General Comment no. 35*, *Article 9 (Liberty and security of person),* CCPR/C/GC/35, 2014, § 19.
[59] (CCPR), *T.V. and A.G. v. Uzbekistan*, 2044/11, 11 March 2016, § 7.4.
[60] See the drafting work on the Additional Protocol to the Convention on Human Rights and Biomedicine (Oviedo Convention), see https://www.coe.int/en/web/bioethics/psychiatry/about.

"extraordinary renditions").[61] Non-refoulement cases are quite central to the work of the ECtHR but also of the UN treaty bodies, considering that relevant claims are by far the most common ones raised before all the treaty bodies and constitute over 80 per cent of CAT's caseload.

36. Extradition or expulsion of an individual may give rise to an issue under Article 3 ECHR (prohibition of torture and of inhuman or degrading treatment of punishment) where substantial evidence has been presented that the individual involved, if extradited or deported, faces a real risk of being subjected to treatment contrary to Article 3. "Substantial evidence" includes all material available, including an assessment of the foreseeable consequences of sending the individual to a particular country, bearing in mind the general situation in the country in question but giving emphasis to the individual's personal circumstances at the time of the extradition or expulsion or at the time of the examination of the case by the Court, if the extradition or expulsion have not taken place yet.[62] In such a case, Article 3 implies an obligation not to extradite or deport, including in cases where the protection of national security is at play.[63] It should, however, be noted that, in general, the Court "*has been very cautious in finding that removal from the territory of a Contracting State would be contrary to Article 3 of the Convention*"[64] and that it acknowledges that it is not its task to substitute its own assessment to the one made by the authorities of the respondent State, even if it must satisfy itself that the latter was adequate and sufficiently supported by domestic materials and materials originating from other reliable and objective sources.[65]

37. In its *General Comment no. 31* (2004), the Human Rights Committee highlights also 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 real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant (right to life and prohibition of torture).[66] The Committee has indicated that the risk must be personal and that the threshold for providing substantial grounds to establish that a real risk of irreparable harm exists is high.[67]

38. States are under the explicit obligation not to deport or extradite a person where there are substantial grounds for believing that he/she would be in danger of being subjected to torture under Article 3 of the Convention Against Torture. The second paragraph of that same Article provides that for the purpose of determining whether there are such grounds, the competent authorities of the States Parties shall take into account all relevant considerations including, where applicable, "*the existence in the State concerned of a consistent pattern of flagrant or mass violations of human rights*". Nevertheless, the existence of such a pattern does not of itself constitute sufficient reason for determining that

[61] A similar issue would be that of the assurances given on the non-use of the death penalty. See, for instance, the case of *Al Nashiri v. Poland,* already referred to under Theme 1 of this Report. Also *Al Nashiri v. Romania*, no. 33234/12, 31 May 2018.
[62] See *Saadi v. Italy* (GC), no 37201/06, 28 February 2008, §§ 128-133.
[63] See *Soering v. the United Kingdom*, no 14038/88, 7 July 1989, § 88; *Saadi v. Italy,* §§ 117, 125; *Chahal v. the United Kingdom,* No 46827/99, 15 November 1996, § 80.
[64] *Harkins and Edwards v. the United Kingdom,* Nos 9146/07 and 32650/07, 17 January 2012, § 131.
[65] See *J.K. and Others v. Sweden,* No 59166/12, 23 August 2016, § 84.
[66] (CCPR), *General Comment no 31, Nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13, § 12.
[67] See *X v. Denmark,* 2523/2015, inadmissibility, 1 April 2016, § 9.2; *A.R.J. v. Australia,* 62/1996, 28 July 1997, § 6.6, *X v. Sweden,* 1833/2008, 1 November 2011, § 5.18.

a particular person would be in danger if returned to a particular country. Rather, the aim of such a determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country of return.[68] Although "considerable weight" is to be given to findings of fact made by organs of the State party on the individual's claims of risk of torture, the CAT Committee considers itself not to be bound by such findings, having instead the power, on the basis of Article 22 (4) of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.[69]

39. In the ECtHR's case-law, importance is placed in the existence of assurances provided by the State to which a person is to be transferred in cases where there is a real risk of torture or ill-treatment. In judgments such as *Chahal v. the United Kingdom* and *Mamatkulov and Askarov v. Turkey* (GC),[70] the Court has held that reliance can lawfully be placed on assurances provided by the State to which the person is to be transferred. Nevertheless, the weight to be given to these assurances depends on the circumstances of each case. There is a difference between relying on an assurance which requires a State to act in a way that does not accord with its normal law and an assurance which requires a State to adhere to what its law requires but may not be fully or regularly observed in practice. The ECtHR has acknowledged that assurances are not in themselves sufficient to prevent ill-treatment; therefore it examines whether they provide in their practical application a sufficient guarantee against ill-treatment in the light of the circumstances prevailing at the material time.[71]

40. In the case of *Othman (Abu Qatada) v. the United Kingdom* (deportation of a terrorist suspect to Jordan), the Court recognized that "*there is widespread concern within the international community as to the practice of seeking assurances to allow for the deportation of those considered to be a threat to national security*" ; however, it refrained from ruling upon the propriety of seeking assurances, or assessing the long term consequences of doing so, maintaining that its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment.[72] To do so, the Court follows several steps going from the preliminary task of examining whether the general human rights situation in the receiving State excludes accepting any assurances, to the task of assessing the quality of the assurances given and their reliability in light of the receiving State's practices.[73] To the Court's opinion, "*it will only be in rare cases that the general situation in a country will mean that no weight at all can be given to assurances*". A State's negative record vis-a-vis human rights, in particular the prohibition of torture, does not

[68] For instance, (CAT), *M.C. v. The Netherlands,* 569/2013, 13 November 2015, § 8.2.
[69] (CAT) *General Comment no 4 (2017) on the implementation of Article 3 of the Convention in the context of Article 22*, CAT/C/CG/4, § 50; *I.E. v. Switzerland,* 683/2015, 14 November 2017, § 7.4; *Alp v. Denmark,* 466/2011, 14 May 2014, § 8.3. The CAT Committee has taken the view that in cases where "strong and almost unequivocal medical reports" on previous occurrences of torture are present, the respondent Government is warranted to conduct further medical examinations. For example, *M.C. v. The Netherlands, supra,* § 8.6, a case where the Dutch Government had nevertheless expressed its belief that the author's claims were not credible and that a risk was no longer present. At the same time, the ECtHR has ruled that if the applicant has made a plausible case of previous occurrences of torture, it is for the Government to prove that the situation in the country of transfer have changed so that such a risk no longer exists (*J.K. and Others v. Sweden,* § 102).
[70] Nos 46827/99, 15 November 1996 and 46951/99, 4 February 2004, respectively.
[71] *Saadi v. Italy*, § 148.
[72] *Othman (Abu Qatada) v. the United Kingdom* , no. 8139/09, 17 January 2012, § 186.
[73] Ibid., paras 188-189, including the case-law references therein, presenting the criteria the Court uses to evaluate each particular situation.

preclude accepting assurances from it; it is, however, a factor in determining whether these assurances are sufficient.[74]

41. In *Alzery v. Sweden* (removal pursuant diplomatic assurances obtained from the Egyptian Government), the Human Rights Committee held that "*the existence of diplomatic assurances, their content and the existence and implementation of enforcement mechanisms are all factual elements relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment exists*".[75]

42. The CAT Committee's approach to diplomatic assurances is more reluctant: "*diplomatic assurances cannot be used as a justification for failing to apply the principle of non-refoulement as set forth in article 3 of the Convention*".[76] For instance, in *Abichou v. Germany,* the German authorities "*knew or should have known*" that the country requesting the extradition routinely resorted to the widespread use of torture against detainees, and that the complainant's other co-defendants had been tortured.[77] In *Agiza v. Sweden,* the Committee referred to the 2004 Report to the General Assembly by the UN Special Rapporteur on Torture, who argued that, as a baseline, diplomatic assurances should not be resorted to in circumstances where torture is systematic, and that if a person is a member of a specific group that is routinely targeted, this factor must be taken into account.[78]

43. In *Pelit v. Azerbaijan,* the CAT Committee found a breach of Article 3 as Azerbaijan had not supplied the assurances against ill-treatment it had secured to the Committee in order for it to perform its own independent assessment of them, nor had it detailed with sufficient specificity the monitoring undertaken and the steps taken to ensure that it was objective, impartial and sufficiently trustworthy.[79] Whereas in *H.Y. v. Switzerland*, the Committee took note of the State Party's argument that it had obtained diplomatic assurances in support of the extraditing request, that its authorities would be able to monitor their implementation and that the requesting State had never breached its diplomatic assurances, however it still went on to find that in the circumstances of the case, those assurances could not dispel "*the prevailing substantial grounds*" for believing that the complainant's extradition would expose him to a risk of being subjected to torture.[80]

44. The question of assurances proved to be a major point of discord during the procedure of revising the CAT's General Comment no 1 on the implementation of Article 3 of the Convention against Torture in the context of Article 22 (now General Comment no 4). In the draft, the Committee proposed to explicitly state that diplomatic assurances are inherently contrary to the principle of non-refoulement. Notably almost all CoE Member States that submitted comments challenged this position referencing the *Othman (Abu Qatada) v. the United Kingdom* judgment.[81] In the final text, a much softer position has been retained, namely that "*diplomatic assurances from a State party to the Convention to which a person*

[74] Ibid., §§ 188, 193.
[75] 1416/2005, Views of 10 November 2006.
[76] (CAT), *Abichou v. Germany,* 430/2010, 21 May 2013, §§ 11.5-11.7.
[77] *Ibid.*
[78] (CAT), *Agiza v. Sweden,* 233/2003, 20 May 2005, §§ 11.16, 13.4.
[79] 281/2005, Views of 29 May 2007, § 11.
[80] 747/2016, Views of 9 August 2017, §§ 10.6, 10.7.
[81] The written submissions of States parties, specialized entities, NGOs, Academia, etc. are accessible at https://www.ohchr.org/EN/HRBodies/CAT/Pages/Submissions2017.aspx .

is to be reported should not be used as a loophole to undermine the principle of non-refoulement as set out in Article 3 of the Convention, where there are substantial grounds for believing that he/she would be in danger of being subject to torture in that State". This could be read in the sense that the CAT Committee may rely upon diplomatic assurances as long as it ascertains that they are not used as a "loophole".

45. A similar issue arises in relation to the return of asylum seekers under the Dublin system (currently Dublin III Regulation[82]). The ECtHR has, indeed, held, in an initial set of judgments on the issue, that there had been (or would be) a violation of Article 3 ECHR in cases where no individual guarantees that the applicants would be taken into account in a manner respectful of international human rights standards and adapted to their specific circumstances. The context was the deficiencies in the reception arrangements for asylum seekers in the countries of first entry.[83] However, a string of cases has followed where the Court declared applications involving the Dublin system inadmissible.[84] At the same time, the UN treaty bodies consider that, in cases involving the Dublin Regulation, States parties should take particularly into account "*the previous experiences of the removed individuals in the first country of asylum, which may underscore the special risks that they are likely to face and may thus render their return to the first country of asylum a particularly traumatic experience for them*".[85] And, in *A.N. v. Switzerland,* the CAT Committee seems to suggest that it was the responded Government's obligation to not only undertake an individualized assessment of the personal and real risk that the complainant would face if returned to Italy, but to ascertain details such as whether appropriate rehabilitation centres were available there, and seek assurances from the Italian authorities that the complainant would have immediate and continuous access to treatment for as long as he needed it.[86]

B. Coexistence of different international mechanisms for the guarantee of human rights: diverging approaches to procedural matters

46. This part will endeavour to highlight any divergences between the two systems as regards issues related to procedural matters, mainly (i) admissibility but also (ii) the indication of interim measures.

[82] *Regulation (EU) No 604/2013 of the European Parliament and the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*.
[83] See *Tarakhel v. Switzerland* (GC), no 29217/12, 4 November 2014: the Court concluded that there would be a violation of Article 3 if the Swiss authorities returned an Afghan couple and their six children to Italy without first obtaining guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together; also *M.S.S. v. Belgium and Greece* (GC), no 30696/09, 21 January 2011, where the Court imposed upon the Belgian authorities to verify how asylum legislation was applied in Greece before taking the decision to return the applicant there.
[84] See *A.S. v. Switzerland*, no 39350/13, 30 June 2015, or *H and others v. Switzerland* (dec), no. 67981/16, 15 May 2018: the Court concluded that doubts previously expressed as to the capacities of the reception system for asylum seekers in Italy could not justify barring all removals to that country.
[85] (CCPR) *Hibaq Said Hashi v. Denmark*, 2470/2014, 28 July 2017, § 9.7.
[86] (CAT) *A.N. v. Switzerland*, 742/2016, 3 August 2018, §§ 8.6-8.8.

(i) Admissibility

47. By "admissibility", reference is made to the requirements that need to be present for a judicial organ (or, in the case at hand, the UN treaty bodies) to consider the substance of a given case.

48. Articles 34 and 35 ECHR set the admissibility requirements with respect to individual applications. Those refer to (a) categories of applicants that may appear before the Court, (b) victim status, (c) procedural grounds for inadmissibility (anonymity, non-exhaustion of domestic remedies, applications submitted after the time-limit has expired, applications concerning the same matter with previous or parallel applications before other international organs, abuse of the right of application) and (d) inadmissibility based on the merits (applications incompatible with the provisions of the ECHR and its Protocols or manifestly ill-founded, applications that constitute an abuse of the right of individual application or where the applicant has not suffered a significant disadvantage). Questions of jurisdiction are also addressed.[87]

49. There are significant points of convergence with respect to admissibility between the two systems, such as a similar approach to the recognition of the victim status,[88] the general rejection of *actio popularis,*[89] or the converging views, to some extent, on jurisdiction, including extraterritoriality, different normative texts notwithstanding.[90]

50. There is, however, also an important degree of diversity, not only between the ECtHR and the UN treaty bodies, but also among the latter. An evident example is the time limit for the submission of a complaint, going from 6 months (and soon to be 4) from the exhaustion of domestic remedies before the ECtHR to (maybe) 5 years before the Human Rights Committee (3 years from the conclusion of another international procedure),[91] or even the absence of a time limit, as before the CERD, the CEDAW, the CED or the CRPD Committees.[92] There are also examples of diversity in admissibility criteria that do not reflect

[87] See the Court's thorough *Practical Guide on Admissibility Criteria,* 4th edition (2017).
[88] For instance, both the ECtHR and the Human Rights Committee accept that close family members can bring complaints on behalf of deceased or disappeared relatives, concerning violations related to their death or disappearance.
[89] See ECtHR, *Klass and others v. Germany,* no 5029/1971, 6 September 1978, § 33; (CCPR) *Aumeeruddy-Cziffra and other 19 Mauritian Women v. Mauritius,* 35/78, 9 April 1981, § 9.2; (CRPD), *Marie-Louise Jungelin v. Sweden,* 5/2011, 2 October 2014, § 10.2 ; (CEDAW) *Dayras and others v. France,* 13/2007, inadmissibility, 4 August 2009, § 10.5.
[90] Compare Article 1 ECHR to Article 2§1 ICCPR, but see (CCPR) *Lopez Burgos v Uruguay*, 52/1979, 29 July 1981, § 12, as taken aboard by the ECtHR in *Issa and others v. Turkey,* no 31821/96, 16 November 2004. Cf. Theme I, sub-theme (iii) of this Report.
[91] Rule 96 (c) of the Rules of Procedure of the Human Rights Committee: "*a communication may constitute an abuse of the right of submission, when it is submitted after 5 years from the exhaustion of domestic remedies by the author of the communication, or, where applicable, after 3 years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay taking into account all the circumstances of the communication*".
[92] Also, Articles 3§1(a) of the Optional Protocol to the ICESCR and 7 (h) of the third OP to the CRC provide for an 1 year time-limit, unless the author demonstrates it was impossible to submit the communication earlier, while Rule 113(f) of the CAT's Rules of Procedure requires that "*the time elapsed since the exhaustion of domestic remedies is not so unreasonably prolonged as to render consideration of the claims unduly difficult by the Committee or the State party*".

textual differences: an example is the application by treaty bodies of the criterion of the exhaustion of domestic remedies.[93]

51. Nevertheless, not every difference with respect to admissibility criteria has the potential to present a threat to the coherence of human rights law. Diverging or even conflicting jurisprudence in a formal sense may only occur in cases of overlapping jurisdiction, where two or more organs have come to contradictory results concerning the same legal obligations applied in the same case. Therefore, this part shall focus on the question of the parallel examination of the same or very much similar matter.

52. The relevant rule of the ECHR (Article 35 § 2) reads: "*The Court shall not deal with any application under Article 34 that:* […] *b. is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information*". The same rule is to be found in the majority of the relevant texts of the UN human rights treaty bodies.[94]

53. In comparison, Article 5 § 2 (a) of the Optional Protocol to the ICCPR only bars the Human Rights Committee from examining communications which are *simultaneously* being heard by another international body, not *previously* considered elsewhere, even when a decision on the merits has already been issued.[95] It is thus possible, given its broad time limit for the submission of an individual communication (*supra,* § 53), for the Committee to consider complaints already examined by the ECtHR or elsewhere. This applies also with respect to the CED Committee, where the same rule stands,[96] whereas the absence of a relevant rule in the CERD has led its Committee to hold that it may even consider communications that are simultaneously examined elsewhere.[97]

54. In order to prevent the possibility of successive applications, some CoE Member States, following the suggestion of the Committee of Ministers,[98] have made reservations against the competence of the Human Rights Committee to re-examine communications already considered under an alternative international procedure, as well as against the competence of the CERD Committee to examine communications previously or simultaneously heard by

[93] In *N. v the Netherlands,* a non-refoulement case (39/2012, inadmissibility,17 February 2014), the CEDAW Committee was not barred from considering the complaint in spite of the fact that the author had not invoked sex-based discrimination domestically, because "*gender-based violence is a form of discrimination against women*" (§ 6.4). In *Quereshi v. Denmark,* 033/2003, 9 March 2005, the CERD Committee decided that the application of further domestic remedies would be unreasonably prolonged after a domestic process of less than 2 years (§ 6.4). The CAT Committee may find a communication admissible even when the victim has not exhausted domestic remedies if a State party's authorities have been informed, given that Article 12 CAT provides for the *ex officio* prosecution of torture (*Gallastegi Sodupe v. Spain,* 453/2011, 23 May 2012, § 6.4).

[94] CAT Article 22§4(a), OP-ICESCR Article 3§2(c), OP-CEDAW Article 4 § 2 (a), 3rd OP-CRC Article 7(d), ICMW Article 77 and OP-CRPD Article 2(c).

[95] CCPR, *Nikolov v. Bulgaria,* 824/1998, inadmissibility, 24 March 2000, § 8.2. But see *Polay Campos v. Peru,* 577/1994, 6 November 1997, where the Committee found a communication already filed with the Inter-American Commission on Human Rights to be admissible, because the latter had indicated that "*it had no plans to prepare a report on the case within the next 12 months*".

[96] Article 31 § 2 (c) CED.

[97] *Koptova v. Slovak Republic,* 13/1998, 8 August 2000. The CERD Committee noted that the author of the communication was not the applicant before the ECtHR and that, even if she was, "*neither the Convention nor the rules of procedure prevented the Committee from examining a case that was also being considered by another international body*" (§ 6.3).

[98] Resolution 70(17), 15 May 1970.

another organ.[99] In numerous cases, these reservations have succeeded in rendering a communication inadmissible. In *Kollar v. Austria,* the Human Rights Committee confirmed that the Austrian reservation, which expressly applied to cases before the European Commission of Human Rights, would be read as applying to cases before the Court, since the latter body succeeded to the functions of the Commission.[100]

55. Generally speaking, treaty bodies examine three conditions to ascertain admissibility of a given communication: a) whether the author and the facts are the same with those of a petition before the ECtHR, b) whether the rights at play are the same in substance, and c) whether inadmissibility was declared by the ECtHR solely on procedural grounds or whether the Court examined the merits as well.

56. In *Leirvåg et al v. Norway,* a case concerning the inclusion of a mandatory religious subject in the Norwegian schools' curriculum, also considered by the ECtHR in the case of *Folgerø and Others v. Norway,*[101] the Human Rights Committee reiterated its position that the words "the same matter" "*must be understood as referring to one and the same claim concerning the same individual*".[102] That is also the approach of the CERD Committee as expressed in *Koptova v. Slovaki*a and of the CEDAW Committee in *Kayhan v. Turkey.*[103] *I.E. v. Switzerland* was admissible before the CAT Committee because the complainant had submitted his application to the Court in connection to his first asylum application, not his second asylum application brought before the Committee.[104] In *Ali Aarrass v. Spain,* on the extradition of a terrorist suspect to Morocco, the case was admissible because the author's complaint under Article 3 ECHR referred to prison conditions in Morocco in general, whereas his complaint under Article 7 ICCPR referred to the risk of being held incommunicado and tortured to extract a confession.[105]

57. In *Pindado Martínez v. Spain*, concerning Article 14 § 5 ICCPR (right to appeal in criminal matters), the Human Rights Committee recalled that "*where the rights protected under the European Convention differ from the rights established in the Covenant, a matter that has been declared inadmissible by the European Court as incompatible with the Convention or its Protocols cannot be deemed to have been "examined" within the meaning of article 5, paragraph 2, of the Optional Protocol, such as to preclude the Committee considering it*".[106] The matter is considered the same if the norm of the ECHR is sufficiently proximate to the protection afforded under the Covenant. Thus, in *Mahabir v. Austria*, the Committee found itself barred from considering the claims with respect to Articles 8 and 17 of the Covenant, "*which largely converge with Articles 4 and 8 of the European Convention*

[99] 18 Member States with respect to the Human Rights Committee, 17 with respect to the CERD.
[100] *Kollar v Austria,* 989/01, inadmissibility, 30 July 2003, §§ 8.2-8.3.
[101] No. 15472/02 (GC), 29 June 2007.
[102] *Leirvåg et al v. Norway,* 1155/2003, 3 November 2004, at 13.3. Before the Norwegian courts, the claims of the authors in *Leirvåg* and of the applicants in *Folgerø* had been joined. Some chose to submit their case to the ECtHR, while the rest submitted communications to the Human Rights Committee.
[103] *Koptova v. Slovakia, supra*; CEDAW, no. 8/2005, inadmissibility 27 January 2006.
[104] *I.E. v. Switzerland,* 683/2015, 14 November 2017, § 6.1.
[105] *Ali Aarrass v. Spain,* 2008/2010, 21 July 2014, at 9.4.
[106] *Pindado Martínez v. Spain,* 1490/2006, inadmissibility, 30 October 2008. § 6.4. Spain was not yet bound by Protocol no. 7 to the ECHR. See also *Casanovas v. France*, 441/1990, 15 July 1994, § 5.1.

on Human Rights", but not with respect to Articles 10 and 26 of the Covenant, since "*neither the European Convention nor its Protocols contain provisions equivalent*" to them.[107]

58. In *Petersen v. Germany*, the Human Rights Committee reaffirmed its long-standing position "*that where the Strasbourg organs have based a declaration of inadmissibility not solely on procedural grounds, but on reasons that comprise a certain consideration of the merits of the case, then the same matter has been 'examined' within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol*".[108] "*Even limited consideration of the merits*" of a case constitutes an examination within the meaning of the respective reservation.[109]

59. The Committee departed from this practice in *Maria Cruz Achabal Puertas v. Spain*, a case on torture and the lack of relevant effective investigations. Despite admitting that *"the European Court has gone well beyond the examination of the purely formal criteria of admissibility when it declares a case inadmissible because it does not reveal any violation of the rights and freedoms established in the Convention or its Protocols*", the Committee found that, in the particular circumstances of the case, *"the limited reasoning contained in the succinct terms of the Court's letter*" did not allow to assume that the examination included sufficient consideration of the merits. The Committee then found a violation of Article 7, independently and in conjunction with Article 2 § 3, namely the equivalent of the breaches of the ECHR previously claimed before the ECtHR.[110] The Committee has similarly declared admissible cases where the Court's (former) practice to dismiss an application by a general reference to Articles 34 and 35 ECHR did not allow to determine whether "the same matter" had been examined.[111]

60. This approach was echoed in *S. v. Sweden* before the CAT Committee, where it was held that the succinct reasoning provided by the ECtHR, sitting in single judge formation, did not allow verifying the extent to which the Court had examined the application.[112] However, in *M. T. v. Sweden*,[113] on non-refoulement, the Committee arrived at the opposite conclusion, where the Court previously had declared the complainant's application inadmissible as it considered that "the material in its possession … did not disclose any appearance of violation of the rights and freedoms set out in the Convention or its Protocols". The Committee considered that the decision of the Court was not solely based on mere procedural issues, but on reasons that indicated a sufficient consideration of the merits of the case.

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[107] *Mahabir v. Austria,* 944/2000, inadmissibility, 26 October 2004, § 8.6 See also *General Comment no 24 (52), Issues relating to reservations made upon ratification to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant* (1994), CCPR/C/21/Rev.1/Add.6, § 14.
[108] *Petersen v. Germany,* 1115/2002, inadmissibility, 1 April 2004, §§ 6.3-6.4.
[109] *Mahabir v. Austria,* § 8.3.
[110] *Maria Cruz Achabal Puertas v. Spain,* 1945/2010, 27 March 2013, § 7.3.
[111] For instance, *Yaker v. France* and *Hebbadj v. France, supra,* §§ 6.2 and 6.4, respectively.
[112] CAT, *S. v. Sweden,* 691/2015, admissibility, 25 November 2016, § 7.5.
[113] CAT, *M. T. v. Sweden*, 642/2014, 7 August 2015, § 8.5. See also *U. v. Sweden*, 643/2014, 23 November 2015, § 6.2, and 6.4. C.f. § 96 below.

(ii) Interim measures

61. Interim measures are not provided for in the Convention; it is under Rule 39 of the Rules of Court that the ECtHR indicates to States parties (and, rarely, to applicants)[114] the interim measures it considers "*should be adopted in the interests of the parties or of the proper conduct of the proceedings*". Despite the absence of a relevant provision in the Convention text, according to the jurisprudence, interim measures are compulsory to the extent that non-compliance by Member States constitutes a violation of Article 34 ECHR, in particular the obligation of the States Parties not to hinder in any way the effective exercise of the right of any person to have his/her case heard by the Court.[115] Non-compliance with interim measures indicated by the Court has been extremely infrequent.

62. Rule 39 comes into play where there is an imminent risk of serious and irreparable harm. In fact, interim measures are indicated only in a limited number of areas, mostly expulsion and extradition, when it is assessed that the applicant would otherwise face a real risk of serious and irreversible harm in connection with Articles 2 and 3 of the Convention. Exceptionally, such measures may be indicated in response to certain requests concerning Article 6 (right to a fair trial)[116] and Article 8 (right to respect for private and family life)[117], including eviction orders,[118] or in other situations concerning different articles of the Convention, such as the deterioration of the health of an applicant in detention[119] or the probable destruction of an element essential for the examination of the application[120].

63. The Rules of Procedure of the Human Rights Committee also have a provision (Rule 92) enabling it to indicate interim measures, with the aim to "*avoid irreparable damage to the victim of the alleged violation*". In comparison to the Court, the Committee seems to have a broader approach with respect to interim measures. Thus, in addition to expulsion and extradition, and the stay of the execution of a death penalty, the Committee has issued interim measures on cases where an individual's health and well-being were at risk,[121] going as far as to request that the State party adopts *"all necessary measures to protect the life,*

[114] See *Rodic and Others v. Bosnia and Herzegovina,* no 22893/05, 27 May 2008, calling upon the applicants to stop their hunger strike (§ 4).

[115] *Mamatkulov and Askarov v. Turkey* (GC), no 4 February 2005; *Paladi v. the Republic of Moldova* (GC), no. 39806/05, 10 March 2009. The Court's initial position on the issue (compare *Cruz Varas and Others v. Sweden,* no 15576/89, 20 March 1991, § 99) shifted after several international judgments, in particular the ICJ landmark Judgment in the *LaGrand (Germany v. USA)* case, 27 June 2001.

[116] See *Othman (Abu Qatada) supra*, on the risk of a "flagrant denial of justice" if the applicant was expulsed to Jordan (in connection to evidence obtained by torture).

[117] See *Soares de Melo v. Portugal,* no 72850/14, 16 February 2016, where the Court granted the applicant a right of contact with her children that had been taken into care with a view to adoption.

[118] See *Yordanova and others v. Bulgaria,* no 25446/06, 24 April 2012, request to stay the decision to evict the applicants from a Roma settlement until such time as the authorities presented to the Court the measures undertaken for their alternative housing. See *Lahbil Balliri v. Spain*, no. 4577/19, request to stay the decision to evict the applicant and his family (the children were minors) from their house in Sabadell (Catalonia) until such time as the authorities presented to the Court the measures undertaken for their alternative housing.

[119] See *Kotsaftis v. Greece,* no. 39780/06, 12 June 2008, where the Court requested the transfer of the applicant to a specialized medical centre.

[120] See *Evans v. the United Kingdom* (GC), no 10 April 2007, and the request to prevent the destruction of fertilized embryos until the Court was able to examine the case. See also the exceptional case of *Lambert and others v. France* (GC), no. 46043/14, 5 June 2015: request to stay the execution of a decision to discontinue nutrition and hydration of a patient in coma.

[121] For instance, requesting the State party to abstain from administering certain medication (*Umarova v. Uzbekistan,* 1449/2006, 19 October 2010), or to produce detailed medical reports to the Committee (*Sedic v. Uruguay,* 63/1979, 28 October 1981).

safety and personal integrity" of the author or his family;[122] in cases where evidence needed to be preserved;[123] where a new law could affect individuals who had or would maybe submit communications;[124] where there were threats to the traditional way of life of a community;[125] where the authors risked becoming homeless;[126] and, generally, in order to prevent imminent violations of other rights such as those under articles 17 (right to privacy), 18 (freedom of thought, conscience and religion), 19 (freedom of expression) or 27 (minority rights) ICCPR.

64. The CAT Committee also receives regularly requests for interim measures, mainly in non-refoulement cases. So do, with a varying frequency, other UN treaty bodies, with respect to non-refoulement but also other situations.[127] For instance, in *Mr. X v. Argentina,* the CRPD Committee has requested the State party *"to consider taking steps to provide the care, treatment and rehabilitation that the author required because of his state of health*";[128] the same body asked the State party to stay the authors' deportation in *O.O.J. v. Sweden,* as did the CRC Committee in *I.A.M. v. Denmark.*[129] In *M.W. v. Denmark,* the CEDAW Committee asked the State party to take measures to allow access of the author to her son.[130]

65. Likewise, the CRC (Committee on the Rights of the Child) and the CESCR (Committee on Economic, Social and Cultural Rights) often receive requests for the adoption of interim measures, which they automatically grant without a previous study of the substantive issues of the claim. In the first case, the requests normally refer to undocumented immigrants claiming to be unaccompanied minors and therefore requesting the special legal protection legally awarded to minors.[131] In the second case, the CESCR regularly receives requests for, – and automatically grants – interim measures in order to stay judicial evictions for humanitarian reasons (ill people or children living in the house which is the object of the eviction).[132] [Comment by the CDDH: It is suggested that this statement is verified by the DH-SYSC-II and that, if possible, the percentage of requests for interim measures which are accepted is added.]

66. Interim measures pronounced by treaty bodies are, like their findings, not legally binding. Nevertheless, the Human Rights Committee has expressed the view that *"implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good*

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[122] *Fernando v. Sri Lanka,* 1189/2003, 31 March 2005.
[123] *Shin v. the Republic of Korea* (926/2000, 16 March 2004), where the State party was requested not to destroy the painting for the production of which the author had been convicted.
[124] *Boucherf v. Algeria,* 1996/2003, 30 March 2006, where the Committee requested the State party not to invoke the provisions of a new amnesty law with respect to victims of enforced disappearances.
[125] See *Länsman (Jouni) et al. v. Finland*, 1023/2001, 17 March 2005, concerning the traditional reindeer husbandry by the Sami threatened by intensive logging. Also *Ominayak (Lubicon Lake Band) v. Canada,* 167/1984, 26 March 1990.
[126] *"I Elpida"-The Cultural Association of Greek Gypsies from Halandri and Suburbs, and Stylianos Kalamiotis v. Greece,* 2242/2013, 3 November 2016.
[127] Interim measures are provided for in Rule 114 of the CAT's Rules of Procedure. More recent treaties, such as the CEDAW or the CRPD, have included an express basis for adopting interim measures (article 5 § 1 and article 4 § 1 of their Optional Protocols, respectively).
[128] (CRPD) 8/2016, 11 April 2014.
[129] (CRPD) 28/2015, 18 August 2017; (CRC) 3/2016, 25 January 2018.
[130] (CEDAW) 46/2012, 22 February 2016.
[131] See, for instance, CRC, resolution G/SO CRC-IC ESP(26) - CE/AB/mbe 40/2018; and resolution G/SO CRC-IC ESP(31)- APP/AB/mbe 57/2018.
[132] See, *inter alia*, CESCR, resolution G/SO CESCR esp (67) – APP/MMM/mbe 75/2018; and resolution G/SO CESCR esp (68) – APP/MMM/mbe 76/2018.

faith so as to permit and enable it to consider such communications […] *Quite apart then from any violation of the Covenant charged to a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile* […]".[133] It has also often been repeated, and finally consolidated in General Comment no 33,[134] that "*flouting of the Rule* [92], *especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol*".[135] Similarly, the CAT Committee has argued that, by accepting its competence under Article 22 of the Convention against Torture, States parties have implicitly undertaken to cooperate with that Committee in good faith by providing it with the means to examine the complaints submitted to it; by failing to respect a request for interim measures, a tool that is "vital to the role entrusted to the Committee under that article", States parties "seriously fail" in their obligations.[136] However, several respondent States have expressed their firm opposition to such an interpretation of the Committees' competence to request interim measures and the nature of the latter.[137]

II. CHALLENGES AND POSSIBLE SOLUTIONS

67. Trying to identify challenges arising from the coexistence of the Court and the treaty body systems and evaluate whether they present a threat to the coherence of international human rights law, one should not loose from sight (a) what has already been stressed with respect to the binding nature, or absence thereof, of the Court's jurisprudence, on the one hand, and of the treaty bodies practice, on the other (supra §7), and (b) that complete convergence would be neither possible nor appropriate for reasons inherent in the relevant treaty provisions, in the different geographical scope of those treaties, but also because

[133] See *Piandiong et al v. The Philippines,* 866/1999, 19 October 2000, §§ 5.1-5.2.
[134] *General Comment no 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights,* CCPR/C/GC/33 § 19.
[135] *Weiss v. Austria,* 1086/2002, 3 April 2003, § 8.3.
[136] (CAT) *Brada v. France*, 195/2002, 17 May 2005, §§ 6.1-6.2, The CAT Committee has also suggested that the binding nature of its interim measures is based on the fact that Article 18 of the Convention explicitly vests the Committee with the competence to adopt its own Rules of Procedure, which then constitute an integral part of the Convention, including Rule 114 on interim measures. (CAT), *R.S. et al v. Switzerland,* 482/2011, 21 November 2014, § 7.
[137] In *Weiss,* it was the Vienna Regional Court that refused to comply with the interim measures pronounced by the Human Rights Committee on the basis that Rule 92 (then 86) of the Committee's Rules of Procedure "*may neither invalidate judicial orders or restrict the jurisdiction of an independent domestic court*". Additionally, Austria argued before the Human Rights Committee that a request for interim measures could not override a contrary obligation of international law, in that case its obligations under the US-Austria extradition treaty. In *Brada,* France indicated that the Convention against Torture did not provide the CAT Committee with the competence to pronounce interim measures, therefore State parties are only required to examine such measures carefully and in good faith and endeavour to enforce them when possible. Therefore, the choice not to follow such measures does not constitute "a failure to respect obligations". In *Dar v the State*, a decision of 16 April 2008, the Norwegian Supreme Court found that requests for interim measures made by the CAT Committee were not binding under international law. The Supreme Court noted in this context that, distinct from the ICJ and the ECtHR whose decisions were binding under international law on the parties to the case, the Committee was a monitoring body that issued non-binding opinions in respect of individual communications. Therefore, Norway was not obliged under international law to comply with the Committee's request for interim measures to protect the applicant. However, due weight was to be given to such requests and they were generally complied with insofar as possible. With the same reasoning, Dutch lower courts (President of the lower court of The Hague (26 March 1999) and Amsterdam (17 January 2019) decided that the State was under no legal obligation to follow interim measures of the CAT or HRC.

different bodies are involved. Keeping that in mind, cross-fertilisation between the ECtHR and the UN treaty bodies may serve as a tool for facilitating the achievement of the common goal, namely the protection of human rights and fundamental freedoms.

68. Examples of inspiration, explicit or implicit, have been briefly mentioned above, under (I), and many more could further illustrate the converging routes followed in many fields. For instance, both systems initially refused the application of Articles 9 ECHR and 18 ICCPR to conscientious objectors.[138] The Human Rights Committee was the first to change its position in 1991;[139] it was followed, albeit several years later, by the Court in *Bayatyan v. Armenia,* where the Grand Chamber, referring to the Committee's views and applying its own "living instrument" doctrine, held that Article 9 ECHR is applicable to conscientious objection, even if it does not refer to it explicitly.[140] The Court and the Committee have since a converging approach on the question of alternative service.[141]

69. The Court's jurisprudence has also significantly evolved through the influence of the UN specialized human rights conventions, and the practice of their monitoring bodies with respect to the subject-specific norms contained therein. This becomes evident with respect, inter alia, to the influence on the Court's jurisprudence of the CRC (for example, the concept of the "best interests of the child")[142] or the CRPD. In respect to the latter, and in the case of *Guberina v. Croatia,* the Court noted: *"by adhering to the requirements set out in the CRPD the respondent State undertook to take its relevant principles into consideration, such as reasonable accommodation, accessibility and non-discrimination against persons with disabilities with regard to their full and equal participation in all aspects of social life* [...] *In the case in question, however, the relevant domestic authorities gave no consideration to these international obligations which the State has undertaken to respect*."[143]

70. These evolutions in the jurisprudence are illustrative of the Court's fundamental belief that the Convention "*cannot be interpreted and applied in a vacuum*".[144] In line with Article 31 § 3 (c) of the Vienna Convention on the Law of the Treaties,[145] the Court seeks to interpret and apply the rights protected under the ECHR and its Protocols in a way that is in harmony not only with general international law, but in particular with the relevant universal human rights instruments. To that end, it uses the practice of the UN treaty bodies as a source of inspiration and argumentation in favour of its findings, in line with its "living instrument" doctrine.[146] The Court also refers to the case-law of other international jurisdictions such as the ICJ or the Inter-American Court of Human Rights (I-ACHR).[147]

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[138] Inter alia, *Johansen v. Norway,* no 10600/83, (ECommHR), inadmissibility decision of 14 October 1985, at 4; (CCPR) *L.T.K. v. Finland,* 185/1984, inadmissibility decision of 9 July 1985, at 5.2.
[139] (CCPR), *J.P. v. Canada,* 446/1991, inadmissibility decision of 7 November 1991, at 4.2. Also *Yeo-Bum Yoon v. Republic of Korea* and *Myung-Jin Choi v. Republic of Korea,* nos. 1321/2004 and 1322/2004, 3 November 2006, at 8.3.
[140] *Bayatyan v. Armenia,* no 23459/03, 7 July 2011, at 110.
[141] See (ECtHR), *Adyan and Others v. Armenia,* no 75604/11, 12 October 2017 ; (CCPR), *Shadurdy Uchetov v. Turkmenistan,* 2226/2012, 15 July 2016.
[142] See *Blokhin v. Russia* (GC), no 47152/06, 23 March 2016, §219; *Mennesson v. France,* no. 65192/11, 26 June 2014, § 81.
[143] *Guberina v. Croatia,* no 23682/13, 22 March 2016 § 92.
[144] ECtHR, *Loizidou v. Turkey*, no. 15318/89, (GC) 18 December 1996, § 43.
[145] See Theme I, sub-theme (i) of the present Report.
[146] See Sicilianos, *op. cit.* pp. 225, 229.
[147] See paragraphs 43 – 45 *[Theme 1 subtheme i) on methodology]* above.

71. By contrast, the UN treaty bodies, in particular the Human Rights Committee, rarely refer to the Court's case-law, although this does not necessarily mean that the latter is not considered, since it frequently serves as a basis for the arguments of the authors and/or the respondent States (even non-European); [148] additionally, an important number of Committee members are from European countries and thus familiar with the Court. On some occasions, the Human Rights Committee has fleetingly referred to the ECtHR jurisprudence on certain matters (for instance the freedom to express one's religion through the wearing of religious attire, *supra,* cf. in particular § 27) and then dismissed it.

72. When considering the interaction between the Convention system and treaty bodies system, it must also be noted that divergence may even exist within the treaty bodies system. This has been identified since the early years of the coexistence of UN human rights conventions: even accepting the uniqueness of each treaty regime, "*it seems inevitable that instances of normative inconsistency will multiply and that significant problems will result. Among the possible worst-case consequences, mention may be made of the emergence of significant confusion as to the "correct" interpretation of a given right, the undermining of the credibility of one or more of the treaty bodies and eventually a threat to the integrity of the treaty systems*", warned Philip Alston in the 1990s.[149] In a 2012 Report on Strengthening the UN human rights treaty bodies system, the UN High Commissioner on Human Rights acknowledged that "*the nine core human rights treaties each have their own scope, but some or all share similar provisions and cover identical issues from different angles"* and called upon the treaty bodies "*to ensure consistency among themselves on common issues in order to provide coherent treaty implementation advice and guidance to States. This consistency is also required under the individual communication procedures of all treaty bodies*"[150].

73. The question, therefore, is, where does all that leave the States parties, in particular Council of Europe Member States.

A. Legal uncertainty, forum-shopping and the threats to the authority of human rights institutions

(i) An illustration: the *Correia de Matos v. Portugal* case

74. *Correia de Matos v. Portugal,* a case filed by a lawyer complaining that Portuguese legislation did not allow an accused person to defend him/herself in person in criminal proceedings, has occupied both the ECtHR and the UN treaty bodies for the past almost twenty years.[151]

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[148] For instance, (CCPR) *Osbourne v. Jamaica* (759/1997, 13 April 2000), where the author used the ECtHR findings in its landmark *Tyrer v. United Kingdom* judgment (no. 5856/72, 25 April 1978) concerning corporal punishment; (CCPR) *P.K. v. Canada* (1234/2003, 3 April 2007), where the respondent Government referred to the European *Bensaid v. United Kingdom* judgment (no. 44599/98, 6 February 2001), in order to argue that a higher burden of proof of the risk of torture is required where the risk comes from a non-state actor.

[149] Report of the independent expert, Philip Alston, on enhancing the long-term effectiveness of the United Nations human rights treaty system, First Report A/44/668, 8 November 1989, Final Report Doc. E/CN.4/1997/74, 24 March 1997, §§ 127-128.

[150] Navanethem Pillay, *Strengthening the United Nations human rights treaty body system*, 2012, p. 25.

[151] See on the issue of cases being dealt with by the Human Rights Committee after having been declared inadmissible by the ECtHR also the CDDH Report on "The longer-term future of the system of the European Convention on Human Rights" adopted on 11 December 2015, § 184.

75. The applicant's complaint of a violation of Article 6 § 3 (c) ECHR was dismissed by the ECtHR in 2001 as manifestly ill-founded.[152] Notwithstanding the respondent Government's warning of "*the risk of inconsistency in international decisions*",[153] it was subsequently admitted by the Human Rights Committee, which in 2006 found a violation of Article 14 § 3 (d) ICCPR.

76. The Portuguese legislation was not changed to give effect to the CCPR's Views; as a matter of fact, the Portuguese Supreme Court, in a judgment of 20 November 2014, held that the implementation of the Committee's Views, which were not legally binding, by means of amendment of the domestic law "*would break with a legal tradition and cause innumerable and foreseeable disturbances*".[154]

77. The applicant returned to the ECtHR in 2012 with a similar case, again claiming violation of Article 6 § 3 (c) ECHR. The Grand Chamber, reiterating that "*the Convention, including Article 6, cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law concerning the international protection of human rights*", did consider the Views of the Human Rights Committee on the matter (without failing to note that the Committee had not explicitly addressed its own reasoning), as well as the General Comment no. 32 on Article 14 ICCPR. Nevertheless, stressing that even where the provisions of the two treaties are almost identical, the interpretation of the same right may not always correspond, the Court acknowledged the existence of a wide margin of appreciation of the States parties on the issue at hand, ascertained that the reasons provided by the respondent Government for the requirement of compulsory assistance overall and in the present case were both relevant and sufficient and concluded, once again, that there had been no violation of Article 6 § 3 (c) of the Convention.[155]

78. In its fourth periodic report (2011), Portugal stressed its "*concern about the differences arising between the case law of the ECHR and the decision of the Human Rights Committee in this case, which place Portugal in a very awkward position regarding the fulfilment of its international human rights obligations*".[156] This concern is entirely understandable, taking into consideration that the texts of Articles 6 § 3 (c) ECHR and 14 § 3 (d) ICCPR set out this particular right in identical terms.

(ii) Analysis

79. As exemplified by the *Correia de Matos* case, the existence of parallel human rights protection mechanisms, normally a source of enrichment and enhancement of the universal protection of human rights, has also the potential of becoming a source of uncertainty for States parties on how to best fulfil their human rights commitments, not to mention for

[152] (ECtHR), *Correia de Matos v. Portugal,* no 4188/99, dec. 15 November 2001.
[153] (CCPR) *Carlos Correia de Matos v. Portugal,* 1123/2002, 28 March 2006 at 4.1.
[154] (ECtHR) *Correia de Matos v. Portugal,* 46402/12, GC 4 April 2018, at 72, quoting the Portuguese Supreme Court.
[155] (ECtHR) *Correia de Matos v. Portugal,* at 134, 67, 135, 159. But see the dissenting opinions of Judges Sajó, Tsotsoria, Mits, Motoc, Pejchal, Wojtyczek, Bosnjak and especially Pinto de Albuquerque, criticizing the majority's use of the margin of appreciation doctrine in this case and warning against the Court being less rights protective than the Human Rights Committee.
[156] Fourth periodic report of Portugal, CCPR/C/PRT/4 (2011), at 274.

individuals as regards the exact scope of their rights, and a threat to the coherence of human rights law and the credibility of human rights institutions.

80. Theoretical concerns about the lack of normative harmony between the universal and the regional become practical through the real possibility of overlapping jurisdiction of the Court and the UN treaty bodies, one or possibly several of them, as a case may easily fall under both the comprehensive treaties (the ECHR and the ICCPR), but also under subject-specific conventions, such as the CEDAW (if the alleged victim is a woman), the CRPD (if she is also a person with disability), the CERD (if her complaint is linked to discrimination based on her descent), or the CAT (if torture or other inhuman and degrading treatment or punishment is involved in a particular case).

81. The flexibility encased within the relevant UN treaties or developed through the practice of their monitoring bodies with respect to admissibility, in particular their interpretation of "the same matter" criterion, but also other procedural requirements (time-limit, exhaustion of domestic remedies, etc.), as presented above under (I)(B), may lead to situations where more human rights bodies have competence to consider the same case or very similar ones. In the example used above, it is conceivable that the same case is examined firstly by the ECtHR and then by one or more UN treaty bodies.

82. Related concerns go beyond duplication and a waste of (deplorably scarce) resources. A communication to the UN treaty bodies of a case already dismissed by the ECtHR could appear to amount to a sort of "appeal", bound to undermine the authority of the Court. The absence of a strict time-limit requirement in the relevant texts of the treaty bodies is also worrying, since the longer the time period that has lapsed since the facts of a communication took place, the more difficult is to ascertain what really happened, including vis-à-vis the records of the Court. And of course, the lack of normative uniformity and the guarded approach by the UN treaty bodies to an equivalent of the "margin of appreciation" doctrine are conducive to divergent implementation of human rights standards.

83. Faced with divergence and even conflict, States parties may find it hard to have a legal certainty of the exact content and extent of their human rights commitments and even harder to adjust their domestic laws and policies.[157] At the same time, under Article 46 ECHR CoE Member States must abide by the judgments of the Court. Contracting States to the UN conventions are not under a legal obligation to comply with treaty body Views, but even the dialogue-centered follow-up in respect of the latter inevitably puts a political burden on them.[158]

84. In addition, overlapping jurisdictions and conflicting findings enable human rights forum-shopping. One would expect that an alleged victim would rather bring her case to the ECtHR, due to the binding nature of the Court's judgments, as well as the possibility of awarding just satisfaction. However, as it has often been observed, including by States parties, individuals may bring their complaints to UN treaty bodies instead, considering that

[157] See *I.A.O. v. Sweden,* 65/1997, 6 May 1998, at 5.11, where Sweden argued that although the test applied by both the ECommHR and the CAT for determining whether to grant asylum to foreign nationals claiming a risk of torture was "in principle the same", in practice the CAT had applied it more liberally than the Commission, thus making it difficult for contracting parties to align themselves with inconsistent case-law.
[158] See on the legal nature of the Views of the UN treaty bodies paragraph 6 above.

the UN treaty bodies are more favourable to their cause.[159] The cause in question may be a broad one, related to policy issues, such as the wearing of religious clothing, or it may be very specific. Expulsion cases and the request for interim measures would be an illustration of the latter: in the current circumstances in Europe, persons whose requests for asylum in European countries fail are more and more inclined to apply for a stay of removal to the UN treaty body believed to be more favourable as a last hope to delay or even avert their return to their country of origin.

85. Finally, incoherent human rights case-law is conducive to a loss of respect for the institutions delivering it. A situation of diminished or no respect for institutions can only thwart the international protection of human rights, not only on a theoretical but on a very practical, specific level.

B. Possible ways of containing divergence

86. As it has already been underlined, the significant differences between the regional and the universal system exclude any realistic aspiration of absolute uniformity. Nevertheless, it is argued that there are ways to help contain divergence.

87. The effort by the judges of the ECtHR to ensure, to the extent possible, a harmonious interpretation of substantive rights protected under a multitude of simultaneously binding treaties renders the ECtHR a focal point for guaranteeing the coherence of international human rights law.[160] It is important that the Court stay true to this practice and continue endeavouring to interpret the Convention in harmony with other international rules for the protection of human rights, in particular those binding upon the CoE Member States, such as the (majority of) the UN conventions, not allowing fragmentation of international law.

88. At the same time, more consistent reference by the UN treaty bodies to regional courts, and in-depth discussion of the latters' jurisprudence would facilitate the development of consistent international human rights principles. It is true that the ECHR and the Court's jurisprudence do not apply to the majority of States Parties to the UN conventions. Nevertheless, as it has been demonstrated above, both authors and respondent Governments of non-European States do not hesitate to refer to the Court's jurisprudence in their argumentation.

89. One way to increase interaction between the two systems could be the intensification of encounters between the members of the Court and the UN treaty bodies. Working contacts between the two systems are already in place: on either side (UN/CoE), there is a focal point for exchanging information concerning the docket, in order to ensure that the same complaints are not dealt with at the same time both by the ECtHR and by the UN treaty bodies.[161] Meetings between representatives of the UN Human Rights Committee and delegations of judges have taken place, and in 2015 the Court hosted a meeting of regional human rights courts/mechanisms, intended to allow dialogue and exchange between

[159] For instance, in *Bikramjit Singh, supra,* France referred to the similar ECtHR cases and submitted that the author had gone to the Human Rights Committee instead of the ECtHR because he "*evidently believed that the European Court's case law would not be in his favour*"(§ 4.1). Also *Mann Singh v. France, supra,* at § 4.3.
[160] Sicilianos, *op. cit,* p. 241.
[161] All UN treaty bodies share the same Secretariat.

different international and regional human rights bodies. This is a practice that should continue and expand.

90. At the same time, within the UN, inter-Committee Meetings and Chairpersons Meetings have been held since 2002 and 1988 respectively.[162] In addition, since 2014 the "Treaty Body Members' Platform", hosted by the Geneva Academy of International Humanitarian Law and Human Rights, connects experts of treaty bodies with each other as well as practitioners, academics and diplomats with a view to share expertise, exchange views and develop synergies.[163] Reform of the UN treaty body system has been on the agenda for several years now and measures to improve its effectiveness are actively sought, although the focus seems to be on the harmonization of working methods and procedures on the basis of UN General Assembly Resolution 68/268 (2014) on "Strengthening and enhancing the effective functioning of the human rights treaty body system". Notwithstanding, among the measures proposed is the strengthening of synergies with fellow treaty bodies but also other human rights mechanisms. It has also been stressed that sufficient means of functioning should be accorded to the UN treaty bodies in order to permit interaction. Consultations held with regional organs are already undertaken; it would be beneficial to include in the dialogue, on a regular basis, the ECtHR. In this respect, the Council of Europe states could play an active role in the further discussion to strengthen the functioning of the human rights treaty body system, to allow it to constructively interact with the Convention system.

91. Regular meetings between judges of the ECtHR and members of the treaty bodies would contribute to the mutual transfer of knowledge concerning relevant jurisprudence and may thereby foster greater understanding for the other institutions' approach to certain common problems. The "judicial dialogue" is a useful tool for avoiding the fragmentation of international law and should be further encouraged. Interaction of the legal staff of the institutions would also be highly advisable. In 2012 an exchange took place between the Registry of the ECtHR and the UN Office of the High Commissioner for Human Rights ("the OHCHR"), where a member of the Court's Registry spent 8 weeks at the OHCHR and two members of the OHCHR spent one month each in the Registry. In a Resolution adopted on 24 March 2017 the United Nations Human Rights Council (HRC) requested the OHCHR to expand its cooperation with regional human rights mechanisms by creating, as of 2018, a dedicated programme for the said mechanisms to gain experience in the United Nations human rights system in order to enhance capacity-building and cooperation among them. However, no further exchanges have taken place since 2012.

92. As underlined above, dialogue with States parties is a key element with regard to the UN treaty bodies. The 47 CoE Member States, when interacting with treaty bodies (in connection to Views, periodic reports or in the drafting of General Comments, as illustrated with respect to CAT General Comment no 4), could continue to draw the treaty bodies' attention to the approach to core issues of the ECHR, as interpreted by the ECtHR. In addition, they could endeavour to foster a more intensive domestic dialogue on the opinions held by the UN treaty bodies, associating their national human rights institutions and the civil

[162] See doc. A/73/140, 11 July 2018, *Implementation of the human rights instruments,* the Report of the Chairs of the treaty bodies on their 30th meeting. The next Chairpersons' meeting is to take place in 2020, in connexion with the 2020 review of the treaty bodies by the UN General Assembly.
[163] For details, see www.geneva-academy.ch/geneva-humanrights-platform/treaty-body-members-platform .

society, with a view to possibly readjusting their human rights policies. Dialogue in the Council of Europe, inclusive of UN institutions, for instance as in the process of drafting the Additional Protocol to the Oviedo Convention, is also a practice to retain.

93. While understanding that amending UN human rights treaties is not a realistic option,[164] a certain remodeling of the Rules of Procedure of treaty bodies in the general direction of adopting clearer, and to the extent feasible, uniform admissibility criteria, as far as allowed by the respective treaties and without curtailing individual rights, would reduce cases of overlapping jurisdiction. In turn, that would minimize the risk of contradictory interpretation of human rights standards and thus limit the possibility of forum-shopping. For instance, it would be beneficial to introduce, wherever possible, stricter time-limits for filing communications.

94. It is too soon to verify this, but the new (since 2016) practice of the Court with respect to inadmissibility decisions, namely to contain a succinct indication of the grounds on which the case was rejected instead of a general reference to Articles 34 and 35 ECHR, may assist in reducing cases of contradictory findings, by enabling the UN treaty bodies to ascertain that the "same matter" has indeed been previously sufficiently considered by the Court.[165]

95. In conclusion, achieving absolute harmony in international human rights law is not a probability. The existence of different human rights protection systems may be a source of enrichment for the protection and the promotion of human rights. Attention should nevertheless be given by international and regional implementing organs, be they judicial or monitoring, not to give the impression that they are competing and to work in the direction of containing, to the extent possible, conflict in their case law. They should proceed, to the extent possible, in the direction of the harmonisation of their practice, excluding fragmentation of the international law of human rights.

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[164] See the 2018 Report of the Secretary General on the Status of the treaty body system, *supra,* § 82.
[165] See the 2015 CDDH Report, at 188 and the 2015 Report *The Interlaken process and the Court,* p. 4.