DH-SYSC-II(2019)30

15/01/2019

STEERING COMMITTEE FOR HUMAN RIGHTS /
COMITE DIRECTEUR POUR LES DROITS DE L'HOMME
(CDDH)

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

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

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External voluntary contribution for the preparation of the draft 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*)

Contribution volontaire externe à la préparation du projet de chapitre du Thème 2 (*Défi de l'interaction entre la Convention et d'autres instruments internationaux relatifs aux droits de l'homme auxquels les États membres du Conseil de l'Europe sont parties*)

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(*available in English only / disponible en anglais uniquement*)

Challenge of the interaction between the Convention and other international human rights instruments to which the Council of Europe Member States are parties[1]

Comments on draft chapter of Theme 2

1. Introduction

Taking as a starting point the draft 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' as written by the Rapporteur, Ms Sofia Kastranta, in view of the 5th DH-SYSC-II meeting, February 2019,[2] this contribution aims to draw the Committee's attention on certain supplementary issues that might be worth taking into account.

It is the authors' view that the aforementioned draft Chapter succeeds in capturing some of the main challenges related to the interaction between the European Convention of Human Rights (ECHR), on the one hand, and the human rights conventions adopted under the auspices of the United Nations, on the other hand, while also offering reasonable and sound solutions to tackle these challenges.

The present authors agree that a 'thorough examination of the whole body of the jurisprudence and the practice of the ECtHR [European Court of Human Rights] and the UN treaty bodies would be impossible to undertake within the context of th[e] Report' under consideration.[3] This notwithstanding, one more area of divergence might be worth considering, as it is likely to raise significant challenges – i.e., that of non-derogable rights. Moreover, it should be highlighted that, in many cases of divergence between human rights norms as interpreted and applied by different monitoring bodies, States are left with the viable choice of abiding by the stricter

[1] This contribution was drafted by Prof. Marco Pedrazzi, Full Professor of International Law at the University of Milan, and Dr Federica Favuzza, Postdoctoral Fellow in International Law at the same university.
[2] DH-DYSC-II(2018)26.
[3] Ibid., para 13.

standards set by one without incurring international responsibility for violating those set by the other. Finally, the present authors wish to briefly consider the nature of the UN treaty bodies' case law.[4]

2. First comment: Divergence between the list of non-derogable rights pursuant to Article 15 para 2 ECHR and that provided by Article 4 para 2 ICCPR

Derogations from human rights obligations are regulated differently in the various human rights treaties pertaining to the UN and Council of Europe systems: on the one hand, the ECHR, the European Social Charter (in similar terms) and the International Covenant on Civil and Political Rights (hereinafter, 'ICCPR') all provide for the possibility for a State party to derogate from its obligations under these treaties during emergency situations; on the other hand, the International Covenant on Economic, Social and Cultural Rights (hereinafter, 'ICESCR') and UN human rights Conventions other than the ICCPR do not.

Whilst in the case of the ICESCR, due to the nature of States parties' obligations in relation to economic, social and cultural rights, the absence of a derogation clause would normally not prevent a State party from severely restricting its levels of compliance with the obligations stemming from this treaty, the same cannot be said for other Conventions, at least as far as their 'civil and political rights' component is concerned.[5] However, inasmuch as these conventions deal with rights that are considered non-derogable under all human rights treaties (including the ICCPR and the ECHR), the absence of derogatory clauses in these treaties is not a cause of concern for States parties to the ECHR. A typical case is that of CAT and the

[4] For the purposes of the present contribution and the sake of conciseness, the expression 'case law' is used in its broadest sense to include all of the documents produced by relevant treaty bodies, although bearing in mind that, at least for some of them (e.g. those adopted by the HRC), this is not completely accurate.

[5] See, in particular, such as the Convention Against Torture (CAT), the Convention for the Elimination of Racial Discrimination (CERD), the Convention for the Elimination of the Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the International Convention for the Protection of All Persons from Enforced Disappearance (CPED), and the Convention on the Rights of Persons with Disabilities (CRPD).

prohibition of torture. As for the prohibition of race, gender or disability-based discrimination enshrined in UN Conventions other than the ICCPR (such as CERD, CEDAW and CRPD), although not included among Article 15 ECHR's list of non-derogable rights, any contrary policy could hardly be considered compatible with the conditions justifying derogatory measures.[6] While the divergences mentioned so far do not seem to pose particularly serious challenges for States parties to the ECHR, the same is not necessarily true in respect of the UN Convention on the Rights of the Child, which deals with *all* rights of the child but, unlike the ECHR, does not allow States parties to take derogating measures.

The present contribution will focus on the derogation clauses included in the ECHR and the ICCPR, as this is where the main potential bone of contention lies. Under both Article 15 para 1 ECHR and Article 4 para 1 ICCPR, in time of public emergency threatening 'the life of the nation', States parties are allowed to take measures derogating from their obligations under these treaties 'to the extent strictly required by the exigencies of the situation' and 'provided that such measures are not inconsistent with' their 'other obligations under international law'. Thus, both instruments require that derogation measures be taken 'to the extent strictly required by the exigencies of the situation', which entails a necessity and proportionality assessment on the part of both the ECtHR and the Human Rights Committee (hereinafter, 'HRC'). Moreover, both provisions establish further substantive and procedural conditions for the validity of derogation measures, e.g. the requirement of notification of the measures taken.[7] In any event, notwithstanding the evident similarities in the text of these two provisions[8] and in the way that they have been interpreted by the ECtHR and the HRC respectively, some notable differences still exist.[9]

First, a significant difference lies in the extent of the ECtHR's and HRC's assessment of the existence of a situation of emergency. As far as the ECtHR is

[6] The prohibition of discrimination established by the ICCPR will be dealt with below.
[7] This duty of notification will be further discussed below.
[8] This striking textual similarity may come as no surprise, considering that Article 15's text was based on a previous draft of the ICCPR.
[9] The present contribution will only refer to those that are most likely to pose challenges for States parties to the ECHR.

concerned, it has consistently held that 'it is mostly up to each State party to determine whether a particular situation warrants the taking of measures derogating from its obligations under the ECHR', as Article 15 leaves national 'authorities a wide margin of appreciation'.[10] In other words, while still retaining a certain power of supervision, [11] the Strasbourg judges generally defer to the assessment made by national authorities in this respect. As a matter of fact, with the only notable exception of the so-called 'Greek case',[12] so far the ECtHR has generally agreed with States parties' assessment. Consider, *inter alia*, its recent judgment in the *Mehmet Hasan Altan* case, which concerned the public emergency invoked by the Turkish Republic following the attempted military coup of 15 July 2016.[13] At variance with the ECtHR, the HRC avoids any reference to a margin of appreciation. In fact, it generally requires States Parties to provide it with precise information concerning both (*a*) their law and practice and (*b*) the emergency situation; then, on the basis of said information, it assesses whether a threat to the life of the nation existed when a state of emergency was declared. Although, in practice, the HRC has generally 'been reluctant to reject the assessment of States that a threat to the life of the nation exist[ed]',[14] there are still certain cases in which it has deemed it necessary to do so. Consider, for instance, its 1995 comments on the report submitted by the United Kingdom under Article 40 ICCPR, in which it took note of the 'significant diminution of terrorist violence' in the UK and expressed serious doubts as to whether the situation of public emergency that the State had relied on in taking derogation measures still existed.[15] Thus, compared to the ECtHR's approach, there seems to be a

[10] *Ireland v the United Kingdom* Application No 5310/71, Judgment of 18 January 1978, para 207.
[11] Indeed, the ECtHR 'is empowered to rule on whether the States have gone beyond the "extent strictly required by the exigencies" of the crisis'. *Ireland v the United Kingdom* Application No 5310/71, Judgment of 18 January 1978, para 207.
[12] *Denmark, Norway, Sweden and the Netherlands v Greece* ('the Greek case') Applications Nos 3321/67 et al., Decision of the Commission of 5 November 1969, para 164. In this respect, see F Favuzza, *Security Detention in Times of Armed Conflict: The Relevance of International Human Rights Law*, Wolters Kluwer-CEDAM, Padua, p. 103.
[13] See *Mehmet Hasan Altan v Turkey* Application No 13237/17, Judgment of 20 February 2018, paras 88 ff. See also *Şahin Alpay v Turkey* Application No 16538/17, Judgment of 20 March 2018, para 75.
[14] D Kretzmer, 'Emergency, State of' (2008) *Max Planck Encyclopedia of Public International Law* (available at http://opil.ouplaw.com).
[15] CCPR/C/79/Add.55 (27 July 1995), para 23. See also *Silva and Others v Uruguay* Communication No 34/1978, 8 April 1981; *Salgar de Montejo v Colombia* Communication No 64/1979, 24 March 1982.

deeper and more effective control on the part of the HRC on the presence of the conditions for declaring a state of emergency pursuant to Article 4 para 1 ICCPR.

A further notable difference between the ECHR and the ICCPR relates to the procedural conditions for resorting to derogations: while both instruments require States parties to inform the Secretary General of, respectively, the Council of Europe and the UN of the measures taken and the reasons therefor, as well as of their lifting (although only the ICCPR demands 'immediate information'), only the ICCPR imposes that the public emergency be 'officially proclaimed'.

Nevertheless, for present purposes, the most relevant differences between the instruments at issue concern the lists of non-derogable rights provided by the two treaties. The first divergence that is certainly worth mentioning is a textual one. While there is a core of four fundamental rights that are expressly defined as non-derogable under both treaties (i.e. the right to life, the prohibition of torture, the ban on slavery or servitude, and the principle *nullum crimen sine lege, nulla poena sine lege*[16]), the list contained in the ICCPR further adds the following rights: the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (Article 11), the right to recognition as a person before the law (Article 16), and the right to freedom of thought, conscience and religion (Article 18). In addition, only Article 4 para 1 ICCPR expressly prohibits derogation measures that 'involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'. Still, in relation to this last point, the ECtHR's case law has shortened the distance between the two instruments under consideration: in the ECHR system, while some discrimination based on nationality might be justified in a state of emergency, no discrimination based on the grounds expressly mentioned by Article 4 ICCPR could ever be considered to be 'required by the exigencies of the situation'.[17]

[16] See Article 4 para 2 ICCR and Article 15 para 2 ECHR. Note, however, that Protocols 6, 13 and 7 ECHR add the prohibition of the death penalty and the principle of *ne bis in idem* to the list of non-derogable rights pursuant to Article 15 ECHR. As for the ICCPR, its second Optional Protocol adds the prohibition of the death penalty to the list of non-derogable rights pursuant to Article 4.

[17] See, *inter alia*, I Viarengo, 'Deroghe e restrizioni alla tutela dei diritti umani nei sistemi internazionali di garanzia' (2005) 88, 4 *Rivista di Diritto internazionale* 955 at 985 ff.

It should also be noted that, even when both the ECHR and the ICCPR define a certain right as non-derogable, some differences might still exist. Consider, in particular, the right to life. Article 2 ECHR and Article 6 ICCPR are formulated quite differently: on the one hand, according to Article 2 para 2 ECHR, a deprivation of life does not contravene the right to life 'when it results from the use of force which is no more than absolutely necessary' in a series of defined circumstances, all related to peacetime law enforcement purposes; on the other hand, Article 6 ICCPR merely prohibits, in general terms, any 'arbitrary deprivation of life'. The different formulation of these provisions enshrining the right to life is clearly reflected in the formulation of the abovementioned derogation clauses in each treaty. As far as the ECHR is concerned, Article 15 prohibits any derogation from the right to life 'except in respect of deaths resulting from lawful acts of war' (i.e. both international and non-international armed conflict). It follows that, if a State involved in an armed conflict derogates from the right to life, the lawfulness of the deprivation of life will have to be assessed in light of the applicable provisions of international humanitarian law (IHL),[18] whereas in the absence of derogations the ECtHR will apply the 'normal legal background' (i.e. the provisions of Article 2 ECHR).[19] By contrast, when it comes to the ICCPR, the HRC's view seems to be that, in the case of armed conflict, the concept of 'arbitrary deprivation of life' within the meaning of Article 6 should be interpreted on the basis of applicable IHL provisions. In particular, according to the recent General Comment No 36, '[u]se of lethal force consistent with international humanitarian law […] is, in general, not arbitrary'.[20] Therefore, a use of lethal force

[18] However, this is yet to be assessed in extraterritorial cases (provided that the ECHR applies).

[19] Note, however, that in a series of cases brought against the Russian Federation, the ECtHR still appeared to keep IHL rules in mind, at least to a certain extent. In this respect, see, *inter alia*, L Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?' (2006) 88, 864 *International Review of the Red Cross* 881; FJ Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' (2008) 90, 871 *International Review of the Red Cross* 549; M Pedrazzi, 'La jurisprudencia del Tribunal Europeo de Derechos Humanos relativa al derecho a la vida en operaciones militares o antiterroristas' in M Pérez GonzaJez and E Conde Pérez (eds), *Lucha contra el terrorismo, Derecho Internacional Humanitario y Derecho Penal Internacional*, Tirant lo Blanch, Valencia, 2012, 263 at 271 and ff. ?; M Pedrazzi, 'La protezione del diritto alla vita tra diritto internazionale umanitario e tutela internazionale dei diritti umani' in A Di Stefano e R Sapienza (eds), *La tutela dei diritti umani e il diritto internazionale*, Editoriale Scientifica, Naples, 2012, 79 and ff. ?

[20] General comment No 36: Article 6 (Right to life), CCPR/C/GC/36, 30 October 2018, para 64.

which is lawful under the ICCPR may, at least theoretically, be unlawful under the ECHR.

It should finally be highlighted that the HRC has progressively extended the list of non-derogable obligations by way of interpretation. Indeed, in its view, while Article 4 para 2 ICCPR is 'a first significant formal basis' for identifying non-derogable rights, it is not 'an exclusive basis for determining the field of non-derogability'.[21] In other words, according to the HRC, the fact that some of the provisions of the ICCPR have been expressly defined as non-derogable in Article 4 para 2 does not mean that other Articles could 'be subjected to derogations at will, even where a threat to the life of the nation exists'.[22] In this perspective, the HRC has justified the expansion of the non-derogable elements of the ICCPR on several different grounds. It has argued, for instance, that a number of rights had to be considered as non-derogable insofar as they were instrumental in protecting other non-derogable rights.[23] These '"functionally" non-derogable rights'[24] include, *inter alia*, the right to an effective remedy (Article 2 para 3),[25] the aforementioned non-discrimination principle (Article 26),[26] the procedural rights inherent to the exercise of the right to a fair trial (Article 14),[27] and the right to habeas corpus (Article 9 para 4).[28] The challenges that this practice may pose are evident when it comes, for instance, to the right to habeas corpus. Indeed, unlike the HRC, the ECtHR 'has never held that habeas corpus may not be suspended in times of emergency'[29] and has instead expressly accepted its derogability so far.[30]

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[21] Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, p. 449.
[22] General Comment No 29: Derogations during a State of Emergency (Article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11, para 6.
[23] Ibid., para 15.
[24] S Joseph 'Human Rights Committee: General Comment 29' (2002) 2, 1 *Human Rights Law Review* 81 at 94.
[25] See General Comment No 29: Derogations during a State of Emergency (Article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11, para 14.
[26] Ibid., para 8.
[27] Ibid., para 15.
[28] Ibid., para 16.
[29] F De Londras, 'The Right to Challenge the Lawfulness of Detention: An International Perspective on US Detention of Suspected Terrorists' (2007) 12, 2 *Journal of Conflict & Security Law* 223 at 253.
[30] See *Ireland v the United Kingdom* Application No 5310/71, Judgment of 18 January 1978, para 220. Note, however, that the ECtHR's power of supervision on the lawfulness of the derogating measures and the attention that it tends to pay to the requirements of necessity and proportionality may lead one to conclude that 'the total suspension of habeas corpus – lacking any other appropriate

In the light of the above, the present authors wish to draw the Committee's attention on the challenges that may arise from the divergences identified when it comes to derogations under the ECHR, on the one hand, and the ICCPR, on the other hand, as well as from the stance taken in this respect by, respectively, the ECtHR and the HRC. Still, it is important to highlight that the abovementioned reference to States parties' 'other obligations under international law' included in both Article 4 para 1 ICCPR and Article 15 para 1 ECHR might help deal with said divergences to a great extent. Indeed, both provisions prohibit States parties from taking derogating measures that are 'inconsistent with' their 'other obligations under international law'. For States parties to the ECHR, this reference clearly includes the ICCPR – by which all of them are bound – and other UN Conventions that are binding upon them. Admittedly, this clause may help reconcile both the substantive and procedural requirements of these various conventions, including the absence of derogatory clauses in a number of them.

3. Second comment: In most cases, States choosing to abide by the stricter standards set within one human rights system would not incur international responsibility for violating those set within the other

In dealing with challenges and possible solutions (Section II), the draft Chapter under consideration illustrates several problems arising from the coexistence of the ECtHR and the monitoring bodies created in the context of the UN human rights treaty system.

At para 80, the draft Chapter mentions the stance taken by Portugal on the *Correira de Matos* case[31] in its fourth periodic report to the HRC, in which this State expressed its 'concern about the differences arising between the case law of the [ECtHR] and the

safeguard against abuse – would not be found to be compatible with the ECHR'. Favuzza, *Security Detention in Times of Armed Conflict*, p. 109 ff. In this respect, see, in particular, Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, paras 15 and 20.

[31] ECtHR, *Correia de Matos v Portugal*, Application No 48188/99, Decision of 15 November 2001; HRC, *Correia de Matos v Portugal* Communication No 1123/2002, 28 March 2006; ECtHR (GC), *Correia de Matos v Portugal* Application No 56402/12, Judgment of 4 April 2018.

decision of the HRC in this case, which place[d] Portugal in a very awkward position regarding the fulfillment of its international human rights obligations'.[32]

At para 85, the draft Chapter further contends that, '[f]aced 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'. The footnote to this passage refers to the case of *I.A.O. v Sweden*, in which the claimant contended that he would 'face detention, torture and other cruel and degrading treatment if he [was] forced to return to Djibouti' after his application for asylum had been rejected by Swedish authorities.[33] In this case, Sweden noted that the test applied by the European Commission of Human Rights (hereinafter, 'ECmHR') under Article 3 ECHR was 'in principle the same' as the one applied by the Committee against Torture (hereinafter, 'CmAT') under Article 3 of the Convention against Torture; yet the ECmHR had 'declared inadmissible most complaints against Sweden as manifestly ill-founded', whereas the CmAT had 'found violations of article 3 in all the cases against Sweden which it [had] examined on the merits'.[34] Thus, Sweden expressed its views on this matter in the following terms:

> The State Party expresses its concern about a possible development of different standards under the two human rights instruments of essentially the same right. The State Party argues that diverging standards in this respect would create serious problems for States which have declared themselves bound by both instruments. Problems would arise when States attempt to adapt themselves to international case-law, if this case-law is inconsistent.[35]

In other words, according to Sweden, whilst these treaty bodies applied in principle the same test for determining whether asylum should be granted to individuals claiming a risk of torture, the CmAT had applied it differently – more strictly – in practice, thus making it hard for States parties to both the CAT and the ECHR to adapt themselves to inconsistent case law.

[32] CCPR/C/PRT/4 (2011), at 274.
[33] CAT/C/20/D/65/1997, 19 June 1998, para 3.2.
[34] Ibid., para 5.10.
[35] Ibid., para 5.11.

While States parties' concerns in this respect are certainly reasonable and understandable, it should be noted that, in most cases of divergence between norms pertaining to the ECHR, on the one hand, and those pertaining to UN Conventions, on the other hand, no actual conflict arises. Indeed, the relation between two human rights norms as interpreted and applied by relevant treaty bodies is not generally one of 'direct incompatibility', that is the case in which a State cannot simultaneously comply with its obligations pursuant to two norms that, in a specific situation, are equally valid (in that they both 'cover the facts of which the situation consists') and applicable (as they are both binding for 'the legal subjects finding themselves in the relevant situation'), as complying with one of these norms necessarily results in violating the other.[36] Quite the contrary, the relation between international human rights norms pertaining to different treaty systems generally consists in a mere divergence in the interpretation of substantial rights by different treaty bodies, with one setting stricter standards and therefore regarding as unlawful certain conducts that are instead perfectly lawful according to the other. In similar cases, a State abiding by the looser standards set within one human rights system could be internationally responsible for breaching the stricter ones set within the other, whereas a State choosing to comply with the latter would not incur international responsibility for either.[37]

In the light of the above, the present authors wish to draw the Committee's attention on the consideration that, whilst in some cases direct incompatibilities may indeed arise, in many other cases States wishing to unquestionably comply with two

[36] Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the International Law Commission, Fiftyeighth session (1 May-9 June and 3 July-11 August 2006), UNGA Official Records, Sixty-first session, Supplement No 10 (A/61/10), p. 175 at p. 178 (Conclusion 2). See also, *inter alia*, W Jenks, 'Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International Law* 401 at 426; W Czaplinski and G Danilenko, 'Conflicts of Norms in International Law' (1990) 21, 3 *The Netherlands Yearbook of International Law* 3 at 12; AE Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law' (2007) 56, 3 *International and Comparative Law Quarterly* 623.

[37] For a similar reasoning in respect of the relationship between international human rights norms and international humanitarian norms, see M Milanović, 'Norm Conflicts, International Humanitarian Law and Human Rights Law' in O Ben-Naftali (ed.), *International Human Rights and International Humanitarian Law: Pas de Deux*, Oxford University Press, Oxford, 2011, p. 95 at p. 123; AE Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law' (2007) 56, 3 *International and Comparative Law Quarterly* 623 at 633.

human rights norms pertaining to different treaty systems *and being interpreted and applied by relevant treaty bodies in a diverging way* may safely do so by opting for the application of the stricter standards. Clearly, a State may still not find it politically feasible or convenient to abide by the stricter standards when these are set by UN treaty bodies and their practice of complying with somehow looser standards is instead positively assessed by the ECtHR. In the final analysis, the choice is up to each State. However, the present authors believe that, in making this choice, States should be fully aware that, in many cases, whereas one choice results in full compliance will all treaty obligations, the other possible choice is likely to result in a breach of their other obligations. This inevitably leads to another brief consideration on the nature of the UN treaty bodies' case law,[38] which will be dealt with in the following paragraph (para 4).

4. Third comment: The nature of the UN treaty bodies' case law

The HRC is generally defined as a 'quasi-judicial organ', due to the fact that 'it is a body of experts largely independent of the United Nations and States parties, and considering its decision-making powers in individual and inter-State communications and the manner in which these procedures have thus far been conducted in practice'.[39] Clearly, the same applies to other UN treaty bodies, insofar as they meet the conditions identified above.

While the draft Chapter under consideration acknowledges that, in the light of the above considerations, the case law[40] of these treaty bodies should be taken into consideration 'in good faith', it also highlights that 'the whole UN treaty body system relies on dialogue and the exchange of opinions, not on legal obligations, and is not comparable to the "hard law" obligation to execute the [ECtHR's] judgments'.[41] In particular, in respect of 'the "Views" of the treaty bodies on individual

[38] See above at n 4.
[39] M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel Publishers, Kehl, 2005, p. 668.
[40] See above at n 4.
[41] DH-DYSC-II(2018)26, para 7.

communications', the draft Chapter notes that they 'contain recommendations to the States concerned and are not legally binding', as '[n]o equivalent of Article 46 ECHR is to be found in any of the relevant texts, Conventions or Optional Protocols' (para 7).

While the above is certainly true and correctly depicts the legal nature of the views, comments and observations adopted by UN treaty bodies, the present authors wish to note that these may also be generally presumed to reflect the correct interpretation of relevant treaty obligations. Indeed, UN treaty bodies have been specifically established by the States parties to relevant treaties with a view to interpreting and monitoring States' compliance with the provisions thereof. It may thus seem 'reasonable to assume that the views expressed in their documents can be treated as authoritative interpretations of such treaties'.[42] In fact, they appear to have been used as such on certain occasions. Consider, *inter alia*, the advisory opinion delivered by the International Court of Justice in the case of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which the Court expressly relied on the HRC's Views on individual communications and Concluding Observations on States' reports to determine the scope of application *ratione loci* of the International Covenant on Civil and Political Rights.[43]

Thus, it is the present authors' view that, while it is true that the views, comments and observations adopted by UN treaty bodies are non-binding,[44] it is also important to bear in mind that they are generally regarded as an authoritative interpretation of relevant treaties – though this may not always be the case in practice[45] – and that, most importantly for present purposes, they are likely to be referred to as such by other judicial or quasi-judicial organs.

[42] Favuzza, *Security Detention in Times of Armed Conflict*, p. 8. See also, *inter alia*, R Hanski and M Scheinin, *Leading Cases of the Human Rights Committee*, Institute for Human Rights, Åbo Akademi University, Turku, 2003, p. 22; F Pocar, 'La valeur juridique des constatations du Comité des droits de l'homme' (1991-1992) *Canadian Human Rights Yearbook* 129 at 130.
[43] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, paras 109-110.
[44] For the notion of 'case law' for present purposes, see above at n 4.
[45] In the final analysis, it is often States parties' reaction to the stance taken by UN treaty bodies that either confirms or ultimately refutes their interpretation of relevant treaties.