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COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
(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
(DH-SYSC-II)

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Revised 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 revised by the Rapporteur, Ms Sofia KASTRANTA,
in the light of the experts' written comments,
in view of the 5th DH-SYSC-II meeting)

Revised 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

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Comment [SK1]: I have taken note of the suggestion made by The Netherlands to reverse A and B and I must admit that while drafting the chapter I have changed that order at least five times and am still not absolutely certain about it. Still, after all these tribulations, it seems to me that the current order works better. Nevertheless, I am open to change it back if the Group so decides.

Introduction

1. The present Chapter deals with the interaction between the European Convention of 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.

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[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

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 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 of 2000,[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), ~~the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW, 1990)~~ and the Convention for the Protection of All Persons from Enforced Disappearance (CED, 2006).

Comment [SK2]: Chronological order

5. The compliance of States parties with these treaties is monitored by special bodies, composed of independent experts from all geographical areas.[5] Under the relevant instruments (the Conventions above or special Optional Protocols),[6] 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.[7] Such communications may be individual or, in most cases, also inter-State; the present Chapter, however limits itself to communications submitted by individuals.

Comment [SK3]: Footnote added following the suggestion by The Netherlands.

Comment [SK4]: Footnote added on the basis of a suggestion by Switzerland (on paragraph 4).

Comment [SK5]: Clarification suggested by the Netherlands.

6. 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, ~~It follows that~~ 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.*".[8] Moreover, situations where procedural rules and related practice of the UN treaty bodies enable them to examine cases that have been previously heard in Strasbourg "*may seriously undermine the credibility and the*

Comment [SK6]: Reformulated on the basis of suggestions by the Netherlands.

[4] Optional Protocol to the convention on the Rights of the Child on the Involvement of Children in Armed Conflict and Optional Protocol to the convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

[5] 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

[6] In the case of the ICESCR, also ECOSOC Resolution 1985/17 of 28 May 1985.

[7] Almost all CoE Member States (44) have accepted the competence of the Human Rights Committee to receive individual communications and an important 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.

[8] CDDH 2015 Report, *op.cit*, § 182

authority of the Court".[9] 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.

7. Before proceeding, 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 such, as has been repeatedly underlined by CoE Member States but also other States (also with respect to concluding observations on periodic reports).[10] No equivalent of Article 46 ECHR is to be found in any of the relevant texts, Conventions or Optional Protocols. Follow-up in Geneva 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 in its *General Comment no 33*,[11] 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 for the State concerned. They should therefore be taken in good faith.[12] The same can be said of concluding observations on periodic reports and General Comments.[13] Nevertheless, the whole UN treaty body system relies on dialogue and the exchange of opinions~~, not on legal obligations~~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 "hard law" obligation to execute the Court's judgments. This is a parameter to keep in mind when discussing the coexistence of the ECHR with the UN human rights conventions and the possibility of conflicts between them.

Comment [SK7]: Additions on the basis of suggestions by The Netherlands.

Comment [SK8]: Reformulated on the basis of suggestions by Switzerland

Comment [SK9]: Addition on the basis of suggestions by the Russian Federation.

Comment [SK10]: Addition by Switzerland.

Comment [SK11]: Suggestion by The Netherlands.

[9] *Ibid.,* § 184

[10] Nevertheless, see the (unique, so far) case of *Angela González v. Spain,* where the Spanish Supreme Court ruled that complying with the CEDAW Committee's views (no 47/2012, 16 July 2014), in particular its finding that the State should compensate the author for the infringement of her rights under the CEDAW, was a matter of rule of law and not doing so would breach the principles of legality and legal hierarchy proclaimed in the Spanish Constitution (Tribunal Supremo, sentencia núm. 1263/2018, 17 July 2018, particularly pages 23-28).

[11] (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.

[12] 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.

[13] 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.

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. Concerns arising from the 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~~the understanding was that the regional would eventually align itself 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 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.[14]

Comment [SK12]: Redrafting based on suggestions made by France.

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.[15] 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.[16] 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.

[14] 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 ~~*Problems arising... op.cit.*, p. 10).~~ 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

[15] 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.

[16] ~~See~~ 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

(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.

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

Comment [SK13]: Comment by the Netherlands.

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.[17] Diverging views have been adopted in the past in connections to matters such as abortion,[18] the right to self representation in criminal proceedings,[19] the right to vote of persons under guardianship,[20] as well as the responsibility of States when implementing UN

Comment [SK14]: A few more details on the cases mentioned in the footnotes were added, as suggested by France. **Additions were made to other footnotes as well, not on every case (that would make the chapter way too long).**

[17] 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

[18] 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.

[19] See the case of *Correia de Matos v. Portugal, infra,* (II) (B) (i).

[20] 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).

Security Council resolutions.[21] 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.

Comment [SK15]: Precision suggested by The Netherlands.

(i) Freedom to manifest one's religion: wearing 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 use of its "margin of appreciation" tool.

Comment [SK16]: Footnote deleted as requested by the Russian Federation.

Comment [SK17]: Addition on the basis of the suggestions made by Switzerland. See also paragraph 22.

15. In the case of *Leyla Sahin v. Turkey*,[22] 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 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*".[23] The Court has found inadmissible a number of applications involving religious clothing of pupils and students in Member States following the principle of secularism.[24]

16. Another set of cases concern religious symbols or clothing at the workplace. In respect of ~~public servants~~ the public sector, the Court has found that conspicuous manifestations of religion are incompatible with the requirement of discretion, neutrality and impartiality incumbent ~~in~~ on public ~~officials~~ employees in discharging their functions.[25] 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.[26] 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*

Comment [SK18]: Redrafted on the basis of suggestions by France.

[21] 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).
[22] No. 44774/98 (GC), 10 November 2005
[23] Judgment of 29 June 2004, § 108.
[24] 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.
[25] *Ebrahimian v. France,* no. 68486/11, Judgment of 26 November 2015, 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.
[26] *Vogt v. Germany,* no. 17851/91, (GC) 26 September 1995

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*".[27]

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.[28] 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.

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.[29]

19. With respect to the wearing of religious symbols and clothing in public, in its 2010 Judgment, *Ahmet Arslan and Others v. Turkey,*[30] 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.

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[27] *Dahlab v. Switzerland* (dec.), no. 42393/98, 15 February 2001

[28] *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.

[29] *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).

[30] 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.

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 wearing of the full-face veil (niqab)~~, 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.[31] 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.[32]

Comment [SK19]: Changed on the basis of suggestions by France.

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,[33] to appear bareheaded on identity photos for use on official documents[34] or to wear a crash helmet.[35]

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. An important source of divergence lies with the broad use made in Strasbourg of the "margin of appreciation" left on Member States.

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*".[36] Policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are also similarly inconsistent

[31] *S.A.S. v. France,* no 43835/11, (GC) 1 July 2014, §§125, 153
[32] Nos. 37798/13 and 4619/12, respectively, Judgments of 11 July 2017.
[33] 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.
[34] *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 May 1993 concerning the obligation imposed on a Muslim student to provide an identity photograph without a headscarf in order to receive her diploma.
[35] ECommHR, *X v. UK* (dec), no 7992/77, 12 July 1978, concerning a practicing Sikh.
[36] *Raihon Hudoyberganova v. Uzbekistan*, 931/2000, 5 November 2004, at. 6.2 concerning the expulsion of a University student wearing the "hijab".

with article 18.[37] 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.[38] 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.[39]

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.[40] Interestingly, examining the applications of other Sikh students of the same high school, the ECtHR did not found 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.[41]

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 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*".[42]

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[37] 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

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

[39] *General Comment no 22*, § 8

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

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

[42] *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 to Strasbourg, concerning the refusal to renew his driver's license (see para. 21 above), prompting France to comment that his decision to go to Geneva 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).

26. In *F.A. v. France* (known as the "Baby Loup" case), the Committee found that the dismissal ~~of a private childcare center employee~~ for serious fault without indemnity of a private childcare centre employee that refused~~refusing~~ 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 ~~violation of~~ Article 18 ICCPR. ~~France referenced relevant Strasbourg jurisprudence, including *Dahlab v. Switzerland*. However, t~~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 ~~As to~~ 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 ~~the Committee noted~~ that the criteria used to arrive at this conclusion had not been explained and ~~reiterated its position~~ 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. ~~t~~There had thus been differential treatment of the author ~~(a Muslim woman choosing to wear a headscarf),~~ and ~~that~~ her dismissal constituted intersectional discrimination based on gender and religion under Article 26 ICCPR.[43]

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~~the wearing of the full-face veil~~.[44] 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 Strasbourg jurisprudence.[45] The Committee also found that that the treatment of the authors constituted intersectional discrimination based on gender and religion under Article 26 ICCPR.[46]

(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*

Comment [SK20]: Following the suggestions by France

Comment [SK21]: Following the suggestions by France

[43] *F.A. v. France*, no. 2662/2015, 16 July 2018, §§ 8.8, 8.9, 8.12, 8.13
[44] 2747/2016 and 2807/2016, 22 October 2018.
[45] *Yaker v. France,* §8.10, *Hebbadj v. France,* §7.10
[46] *Yaker v. France,* §8.17, *Hebbadj v. France,* §7.17

warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder".[47]

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*".[48] 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.[49]

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.[50]

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, 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 also considers 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).[51]

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.[52] 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*

[47] *Stanev v. Bulgaria* (GC), no 36760/06, 17 January 2012, § 145
[48] *Bergmann v. Germany*, No. 23279/14, 7 January 2016, § 97
[49] *Stanev v. Bulgaria, op.cit.*, §147 and the references therein.
[50] *Naumenko v. Ukraine*, no. 42023/98, 10 February 2004, § 112
[51] *General Comment no. 1*, 2014, § 38. See also the CRPD *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), and the references therein to the Committee's concluding observations on the periodic report of several States. Also its Views of 2 September 2016, *Marlon James Noble v. Australia,* 7/2012, §8.7
[52] *General Comment no. 35, Article 9 (Liberty and security of person),* CCPR/C/GC/35, 2014, § 19

may be unavoidable", even though "*involuntary hospitalization must be applied only as a measure of last resort and for the shortest appropriate ~~time of~~ period of time, and must be accompanied by adequate procedural and substantive safeguards established by law*".[53]

Comment [U22]: Corrected by the Russian Federation.

34. Since 2013, recognizing that involuntary measures in psychiatry are regularly applied in the CoE Member States and have often been found to amount to violations of the ECHR (particularly of Articles 5 § 1, 8, 3 and, on occasion, 2), the Committee on Bioethics of the Council of Europe (DH-BIO) has undertaken drafting work on an Additional Protocol to the Convention on Human Rights and Biomedicine (Oviedo Convention) concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment and held a public consultation in 2015. This has prompted unfavourable reactions by the CRPD Committee and other human rights bodies,[54] but also within the CoE. The Parliamentary Assembly, for instance, has indicated that "*any legal instrument that maintains a link between involuntary measures and disability will be discriminatory and thus violate*" the CRPD.[55]

Comment [SK23]: Addition based on a suggestion by Switzerland.

35. The divergence of opinions is visible in the reply of the Committee of Ministers, which reflects the views expressed by Member States in the course of the public consultation. The Additional Protocol under consideration "*could be an effective tool to ensure that in all circumstances, involuntary measures are embedded with the guarantees required by the European Convention on Human Rights so as to (i) safeguard the human rights of the person concerned, and in particular provide the possibility for the right to an effective remedy against such a measure and (ii) prevent violations of the Convention similar to those already found by the European Court of Human Rights*".[56]

36. A modified draft Additional Protocol has been sent in May 2018 for opinion to the CDDH, the European Committee on the Prevention of Torture, the Parliamentary Assembly, the CoE Commissioner for Human Rights, the CDJC and to the Conference of the INGOs.[57]

Comment [SK24]: Addition by Switzerland.

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

37. Another point of divergence concerns the assurances provided ~~on~~ for the non use of torture in the context of procedures such as extradition or deportation, or even in cases of

Comment [SK25]: I took note of Switzerland's absolutely valid suggestion on this paragraph. It is, however, a choice to keep this part on the diplomatic assurances with respect to torture/ill-treatment, which is a more current debate. The death penalty could be added but I fear the chapter is already too long as it is. I would personally prefer to not elaborate more than the reference in footnote 58.

[53] (CCPR), *T.V. and A.G. v. Uzbekistan*, 2044/11, 11 March 2016, § 7.4.
[54] DH BIO/INF (2015) 7. Document DH-BIO/INF (2015)20 compiles the comments received by Member States, the CoE Commissioner for Human Rights, Patients' Associations, NGOs and UN bodies. It has been there suggested that the Oviedo Convention and the ECHR reflect a somewhat outdated approach on the rights of persons with disabilities and that new instruments should uphold the coherence of international human rights law and align themselves to the instruments most recently adopted (in this case, the CRPD).
[55] Recommendation 2091 (2016), "The case against on a Council of Europe legal instrument on involuntary measures in psychiatry", 22 April 2016, § 8
[56] Reply to Parliamentary Assembly Recommendation 2091 (2016), adopted by the Committee of Ministers on 9 November 2016, CM/AS(2016)Rec2091
[57] For more information on the progress of the drafting of the Additional Protocol to the Oviedo Convention, see https://www.coe.int/en/web/bioethics/psychiatry/about

forcible, extra-judicial transfers (cases of "extraordinary renditions").[58] 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.

38. 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[59]. 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.[60] 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*"[61] 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.[62]

Comment [SK26]: Addition by Switzerland.

Comment [SK27]: As suggested by France.

Comment [SK28]: Additions were made as it seems from the comments received that there is an interest to expand more on the subject than in the original draft. That does prolong the Chapter, however, so it must be discussed within the Group.

39. 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).[63] 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.[64]

40. 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

[58] 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

[59] See *Saadi v. Italy* (GC), no 37201/06, 28 February 2008, §§~~125 and~~ 128-1338.

[60] 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

[61] *Harkins and Edwards v. the United Kingdom*, Nos 9146/07 and 32650/07, 17 January 2012, §131

[62] See *J.K. and Others v. Sweden*, No 59166/12, 23 August 2016, §84.

[63] (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

[64] 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

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 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.[65] 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.[66]

41. In the Strasbourg case-law, importance is placed in the existence of assurances provided by the State to which a person is to be transferred ~~is seen as a preliminary condition for the lawfulness of the transfer under the ECHR~~ in cases where there is a real risk of torture or ill-treatment: in *X v. Sweden*, for instance, the Court held that the expulsion of the applicant, deemed a security threat in Sweden, to Morocco would involve a violation of Article 3 ECHR, ~~because~~ taking into consideration, *inter alia,* that "*no assurances by the Moroccan authorities relating to the treatment of the applicant upon return, or if he were to be detained, access to him by Swedish diplomats, have so far been obtained in order to help eliminate, or at least substantially reduce, the risk of the applicant being subjected to ill-treatment once returned to his home country*".[67]

42. In judgments such as *Chahal v. the United Kingdom* and *Mamatkulov and Askarov v. Turkey* (GC),[68] 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.[69]

Comment [SK29]: Additions based on suggestions by The Netherlands.

Comment [SK30]: Redrafted on the basis of comments by France

Comment [SK31]: Addition by Switzerland.

[65] For instance, (CAT), *M.C. v. The Netherlands*, 569/2013, 13 November 2015, §8.2.
[66] (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).
[67] No 36417/16, 9 January 2018, § 60
[68] Nos 46827/99, 15 November 1996 and 46951/99, 4 February 2004, respectively.
[69] *Saadi v. Italy*, § 148

43. 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.[70] 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.[71] 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 preclude accepting assurances from it; it is, however, a factor in determining whether these assurances are sufficient.[72]

44. 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*".[73]

45. 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*".[74] 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.[75] 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.[76]

46. 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,

[70] *Othman (Abu Qatada) v. the United Kingdom* , no. 8139/09, 17 January 2012, § 186
[71] Ibid., paras 188-189, including the case-law references therein, presenting the criteria the Court uses to evaluate each particular situation.
[72] Ibid., §§ 188, 193
[73] 1416/2005, Views of 10 November 2006
[74] (CAT), *Abichou v. Germany,* 430/2010, 21 May 2013, §§ 11.5-11.7
[75] *Ibid.*
[76] (CAT), *Agiza v. Sweden,* 233/2003, 20 May 2005, §§ 11.16, 13.4

impartial and sufficiently trustworthy.[77] 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.[78]

47. 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.[79] 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 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".

48. A similar problematic is the one concerning the return of asylum seekers under the Dublin system (currently Dublin III Regulation[80]). 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.[81] However, a string of cases has followed where the Court declared applications involving the Dublin system inadmissible.[82] At the same time, the UN treaty bodies ~~do not attach significance to "guarantees" and~~ consider that, in cases

Comment [SK32]: Comment by the Netherlands.

[77] 281/2005, Views of 29 May 2007, § 11
[78] 747/2016, Views of 9 August 2017, §§ 10.6, 10.7
[79] The written submissions of States parties, specialized entities, NGOs, Academia, etc. are accessible at https://www.ohchr.org/EN/HRBodies/CAT/Pages/Submissions2017.aspx
[80] *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.*
[81] 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.
[82] 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.

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*".[83] 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.[84]

Comment [SK33]: Addition suggested by Switzerland.

B. Concerns arising from the coexistence of different international mechanisms for the guarantee of human rights

49. 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.

(i) Diverging approaches to admissibility

50. 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.

51. 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.[85]

52. 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,[86] the general

[83](CCPR) *Hibaq Said Hashi v. Denmark*, 2470/2014, 28 July 2017, § 9.7
[84] (CAT) *A.N. v. Switzerland*, 742/2016, 3 August 2018, §§8.6-8.8
[85]See the Court's thorough *Practical Guide on Admissibility Criteria,* 4th edition (2017)
[86] 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.

rejection of *actio popularis,*[87] or the converging views on jurisdiction, including, to some extent, extraterritoriality, different normative texts notwithstanding.[88]

Comment [SK34]: Comment by the Russian Federation.

53. 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 in Strasbourg to (maybe) 5 years before the Human Rights Committee (3 years from the conclusion of another international procedure),[89] or even the absence of a time limit, as before the CERD, the CEDAW, the CED or, the CRPD Committees.[90] There are also examples of diversity in admissibility criteria that do not reflect textual differences: an example is the application by treaty bodies of the criterion of the exhaustion of domestic remedies.[91]

54. 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.

55. 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

[87] 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

[88] 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.

[89] 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*".

[90] 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*".

[91] 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).

same rule is to be found in the majority of the relevant texts of the UN human rights treaty bodies.[92]

56. 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.[93] 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 in Strasbourg or elsewhere. This ~~is also the case of~~applies also with respect to the CED Committee, where the same rule stands,[94] 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.[95]

Comment [SK35]: Addition on the basis of a suggestion by Switzerland.

57. In order to prevent the possibility of successive applications, some CoE Member States, following the suggestion of the Committee of Ministers,[96] 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 another organ.[97] 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.[98]

58. 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 in Strasbourg solely on procedural grounds or whether ~~rather~~ the Court examined the merits as well.

59. In *Leirvåg et al v. Norway,* a case concerning the inclusion of a mandatory religious subject in the Norwegian schools' curriculum ~~of a mandatory religious subject~~, also considered by the ECtHR in the case of *Folgerø and Others v. Norway,*[99] the Human Rights

[92] 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).
[93] 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*".
[94] Article 31§2(c) CED.
[95] *Koptova v. Slovak Republic,* 13/1998, 8 August 2000. The CERD Committee noted that the author of the communication was not the applicant before Strasbourg 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).
[96] Resolution 70(17), 15 May 1970
[97] 18 Member States with respect to ~~for~~ the Human Rights Committee, 17 with respect to ~~for~~ the CERD.
[98] *Kollar v Austria,* 989/01, inadmissibility, 30 July 2003, §§ 8.2-8.3.
[99] No 15472/02, (GC) 29 June 2007

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*".[100] 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.*[101] *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.[102] 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.[103]

60. 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*".[104] 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 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.[105]

61. 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*".[106] "*Even limited consideration of the merits*" of a case constitutes an examination within the meaning of the respective reservation.[107]

[100] *Leirvåag et al v. Norway,* 1155/2003, 3 November 2004, at 13.3 Before the Norwegian courts, the claims of the authors in *Leirvåag* and of the applicants in *Folgerøe* had been joined. Some chose to submit their case to the ECtHR, while the rest went to Geneva.
[101] *Koptova v. Slovakia, supra*; CEDAW, no. 8/2005, inadmissibility 27 January 2006
[102] *I.E. v. Switzerland,* 683/2015, 14 November 2017, § 6.1
[103] *Ali Aarrass v. Spain,* 2008/2010, 21 July 2014, at 9.4
[104] *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
[105] *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
[106] *Petersen v. Germany,* 1115/2002, inadmissibility, 1 April 2004, §§ 6.3-6.4
[107] *Mahabir v. Austria,* § 8.3

62. 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 in Strasbourg.[108] 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.[109]

63. 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.[110]

(ii) Interim measures

64. Interim measures are not provided for in the Convention; it is ~~U~~nder Rule 39 of the Rules of Court that~~,~~ the ECtHR indicates to States parties (and, rarely, to applicants)[111] the interim measures it considers "*should be adopted in the interests of the parties or of the proper conduct of the proceedings*". According to the jurisprudence, interim measures are compulsory; 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.[112] Non-compliance with interim measures indicated by the Court has been extremely infrequent.

65. Rule 39 comes into play ~~only~~ where there is an imminent risk of irreparable harm. In fact, interim measures are indicated relatively rarely, especially when compared to the frequency of some UN treaty bodies, in particular the CAT Committee, ~~only~~ and 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. ~~More e~~Exceptionally, such measures may be indicated in response to

Comment [SK36]: Reformulation on the basis of comments by the Russian Federation.

Comment [SK37]: Suggestion by Switzerland.

Comment [SK38]: Changes by the Russian Federation.

[108] *Maria Cruz Achabal Puertas v. Spain,* 1945/2010, 27 March 2013, § 7.3
[109] For instance, *Yaker v. France* and *Hebbadj v. France, supra,* §§ 6.2 and 6.4, respectively.
[110] CAT, *S. v. Sweden,* 691/2015, admissibility, 25 November 2016, § 7.5
[111] See *Rodic and Others v. Bosnia and Herzegovina,* no 22893/05, 27 May 2008, calling upon the applicants to stop their hunger strike (§ 4).
[112] *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.

certain requests concerning Article 6 (right to a fair trial)[113] and, rarely, Article 8 (right to respect for private and family life)[114] or other situations, such as the deterioration of the health of an applicant in detention,[115] the probable destruction of an element essential for the examination of the application[116] or eviction orders.[117]

66. 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,[118] going as far as to request that the State party adopts *"all necessary measures to protect the life, safety and personal integrity*" of the author or his family;[119] in cases where evidence needed to be preserved;[120] where a new law could affect individuals who had or would maybe submit communications;[121] where there were threats to the traditional way of life of a community;[122] where the authors risked becoming homeless;[123] and, generally, in order to prevent imminent violations of other rights such as those under articles 17, 18, 19 or 27 ICCPR.

67. The CAT Committee, as one would expect, 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.[124] For instance, in *Mr. X v.*

[113] 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).
[114] 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.
[115] See *Kotsaftis v. Greece,* no. 39780/06, 12 June 2008, where the Court requested the transfer of the applicant to a specialized medical centre.
[116] 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.
[117] See *Yordanova and others v. Bulgaria,* no 5126/05, 23 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.
[118] 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).
[119] *Fernando v. Sri Lanka,* 1189/2003, 31 March 2005
[120] *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.
[121] *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.
[122] 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.
[123] *"I Elpida"-The Cultural Association of Greek Gypsies from Halandri and Suburbs, and Stylianos Kalamiotis v. Greece,* 2242/2013, 3 November 2016
[124] 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).

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*";[125] 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.*[126] In *M.W. v. Denmark,* the CEDAW Committee asked the State party to take measures to allow access of the author to her son.[127]

68. 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 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* […]".[128] It has also often been repeated, and finally consolidated in General Comment no 33,[129] 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*".[130] 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.[131] 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.[132]

Comment [SK39]: Additions suggested by France (and Switzerland on footnote 127).

[125] (CRPD) 8/2016, 11 April 2014
[126] (CRPD) 28/2015, 18 August 2017; (CRC) 3/2016, 25 January 2018
[127] (CEDAW) 46/2012, 22 February 2016
[128] See *Piandiong et al v. The Philippines,* 866/1999, 19 October 2000, §§ 5.1-5.2
[129] *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.
[130] *Weiss v. Austria,* 1086/2002, 3 April 2003, § 8.3 ~~It is worth noting that~~in that case ~~the Austrian Ministry of Justice did order the Vienna Public Prosecutor's Office to file a request with the investigating judge of the Vienna Regional Criminal Court seeking suspension of the extradition of the author, but that Court refused to comply, 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*". Austria argued before the Committee that a request for interim measures could not override a contrary obligation of international law, and in particular its obligations under the US-Austria extradition treaty~~.
[131] (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.
[132] 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

II. Challenges and possible solutions

69. 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 different bodies are involved. Keeping that in mind, cross-fertilization between Strasbourg and Geneva ~~should be sought~~may serve as a tool for facilitating the achievement of the common goal, namely the protection of human rights and fundamental freedoms, and divergence should not be perceived as necessarily alarming.

Comment [SK40]: Suggestion by the Russian Federation. I did not, for the time being, adopt the rest of the suggestions by Russia, because in my view it is useful to remind ourselves where we stand before tackling the part on challenges and solutions.

70. 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.[133] The Human Rights Committee was the first to change its position in 1991;[134] 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.[135] The Court and the Committee have since a converging approach on the question of alternative service.[136]

71. 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")[137] or the CRPD. In respect to the latter, and in the case of

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contrary obligation of international law, in that case its obligations under the US-Austria extradition treaty. In *Ahani* (CCPR, 1051/2002, 29 March 2004, § 5.3), Canada also stressed that the relevant treaties (the ICCPR and the Optional Protocol) do not provide for interim measures and that such requests are recommendatory rather than binding. 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".

[133] 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

[134] (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

[135] *Bayatyan v. Armenia,* no 23459/03, 7 July 2011, at 110.

[136] See (ECtHR), *Adyan and Others v. Armenia,* no 75604/11, 12 October 2017 ; (CCPR), *Shadurdy Uchetov v. Turkmenistan,* 2226/2012, 15 July 2016

[137] See *Blokhin v. Russia* (GC), no 47152/06, 23 March 2016, §219; *Mennesson v. France,* no 65192/11, 26 June 2014, §81

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*."[138]

72. These evolutions in the jurisprudence are illustrative of the Court's fundamental belief that the Convention "*cannot be interpreted and applied in a vacuum*".[139] In line with Article 31§3(c) of the Vienna Convention on the Law of the Treaties,[140] 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, additionally to the case-law of other international jurisdictions such as the ICJ or the InterAmerican Court of Human Rights (I-ACHR), as a source of inspiration and argumentation in favour of its findings, in line with its "living instrument" doctrine.[141]

73. 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); [142] additionally, an important number of Committee members are from European countries and thus familiar with the Court. ~~In~~ On some occasions, the Human Rights Committee has ~~specifically~~ 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.

74. It must also be noted that divergence may exist~~s~~ also 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.[143] In a 2012 Report on Strengthening the

Comment [SK41]: Changed on the basis of suggestions by France, see also para. 27

Comment [SK42]: It has been suggested by the Russian Federation to delete this paragraph. I personally believe that it has added value, as it shows that the issue at hand is broader than the relation between the ECHR and the UN human rights treaties taken as a whole.

[138] *Guberina v. Croatia,* no 23682/13, 22 March 2016 §92
[139] ECtHR, *Loizidou v. Turkey*, no. 15318/89, (GC) 18 December 1996, § 43.
[140] See Theme I, sub-theme (i) of the present Report.
[141] See Sicilianos, *op. cit.* pp. 225, 229.
[142] 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.
[143] 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.

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*"[144]. Achieving consistency may be particularly challenging when monitoring bodies of subject-specific human rights conventions are called upon to weigh different human rights (including rights outside the scope of their own specialization) against each other objectively.

Comment [SK43]: Added on the basis of suggestions by Germany.

75. The question, therefore, is, where does all that leave the States parties, in particular CoE 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*

76. *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 Strasbourg and Geneva for the past almost twenty years.

77. The applicant's complaint of a violation of Article 6§3(c) ECHR was dismissed by the ECtHR in 2001 as manifestly ill-founded.[145] Notwithstanding the respondent Government's warning of "*the risk of inconsistency in international decisions*",[146] it was subsequently admitted by the Human Rights Committee, which in 2006 found a violation of Article 14§3 (d) ICCPR.

78. 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*".[147]

79. The applicant returned to Strasbourg 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

[144] Navanethem Pillay, *Strengthening the United Nations human rights treaty body system* ,2012, p. 25.
[145] (ECtHR), *Correia de Matos v. Portugal,* no 4188/99, dec. 15 November 2001
[146] (CCPR) *Carlos Correia de Matos v. Portugal,* 1123/2002, 28 March 2006 at 4.1
[147] (ECtHR) *Correia de Matos v. Portugal,* 46402/12, GC 4 April 2018, at 72, quoting the Portuguese Supreme Court.

(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.[148]

80. 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*".[149] 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) Threats to the coherence of the human rights case-law and to the authority of institutions delivering it

81. 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 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.

Comment [SK44]: Addition by Switzerland.

82. 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 she is of a different descent), or the CAT (if torture or other inhuman and degrading treatment or punishment is involved in a particular case).

83. 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

[148] (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.
[149] Fourth periodic report of Portugal, CCPR/C/PRT/4 (2011), at 274

example used above, it is conceivable that the same case is examined firstly in Strasbourg and then in Geneva, possibly by more than one treaty bodies.

84. Related concerns go beyond duplication and a waste of (deplorably scarce) resources. A communication to the UN treaty bodies of a case already dismissed in Strasbourg 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.

85. 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.[150] At the same time, under Article 46 ECHR CoE Member States must abide by the judgments of the Court, unavoidably discrediting UN treaty bodies that have issued diverging Views on the same matter. 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. Furthermore, diverging approaches as well as legal uncertainty may discourage those CoE Member States which have not yet done it from considering accepting the competence of UN treaty bodies to consider individual complaints.

Comment [SK45]: Suggested, in slightly different terms, by Switzerland.

86. 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 Strasbourg, 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 Geneva instead considering that the UN treaty bodies are more favourable to their cause.[151] The~~is~~ cause in question may be a ~~general~~ 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~~at~~: in the current circumstances in Europe, persons whose requests for asylum in European countries fail are more and more ~~bound~~ 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.

[150] 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.

[151] For instance, in *Bikremjit Singh, supra,* France referred to the similar ECtHR cases and submitted that the author had gone to Geneva instead of Strasbourg 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

87. 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

88. 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.

89. The ~~considerable~~ effort by the judges in Strasbourg 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.[152] The Court should 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]

Comment [SK46]: Deletion by the Russian Federation.

Comment [SK47]: Suggested by the Russian Federation, in my view it is repetitive.

90. At the same time, more consistent reference by the UN treaty bodies to regional courts, and uninhibited inspiration from the latters' jurisprudence would facilitate the development of consistent international human rights principles. It is undeniable that the ECHR and the Court's jurisprudence are formally irrelevant for 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.

Comment [SK48]: Clarifications are needed on Switzerland's comments on this paragraph!

91. 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 in Strasbourg and Geneva.[153] 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 different international and regional human rights bodies. This is a practice that should continue and expand.

92. At the same time, within the UN, inter-Committee Meetings ~~(bi-annual)~~ and Chairpersons Meetings ~~(annual) are held~~have been held since 2002 and 1988 respectively.[154] In addition,

[152] Sicilianos, *op. cit,* p. 241
[153] All UN treaty bodies share the same Secretariat.
[154] 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.

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.[155] 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".[156] Notwithstanding, among the measures proposed is the strengthening of synergies with fellow treaty bodies but also other human rights mechanisms. Consultations held with regional organs are already undertaken; it would be beneficial to include in the dialogue, on a regular basis, the ECtHR.

Comment [SK49]: Addition suggested by Switzerland.

Comment [SK50]: Addition suggested by Switzerland.

93. 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 "~~J~~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.

94. As underlined above, dialogue with States parties is a key element in Geneva. 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), should continue highlighting the approach to core issues of the ECHR, as interpreted by the ECtHR. In addition, they should 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 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.

Comment [SK51]: Although I am not certain whether this is the best verb here, what I mean to say is that the CoE Member States should try to present the ECHR views on certain core issues and try to "promote" them within the UN. Thus I think that the suggestion by the Russian Federation to replace "highlighting" by "taking into account" does not serve the meaning here.

95. While understanding that amending UN human rights treaties is not a realistic option,[157] 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

[155] For details, see www.geneva-academy.ch/geneva-humanrights-platform/treaty-body-members-platform

[156] See doc. A/73/309, 6 August 2018, Report of the Secretary General to the General Assembly on the Status of the Human Rights Tready Body System. The proposal (originally by Philip Alston in 1997, *supra*, then taken up by the UNHCHR Louise Arbour – see doc. HRI/ICM/2006/2, 22 March 2006) to introduce a "standing unified treaty body", competent for all UN human rights treaties –and thus ensuring, at least, uniformity with the UN- was opposed to by both States and the civil society.

[157] See the 2018 Report of the Secretary General on the Status of the treaty body system, *supra,* §82

would be beneficial to introduce, wherever possible, stricter time-limits for filing communications.

96. 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.[158]

97. In conclusion, achieving absolute harmony in international human rights law is not a probability. However, diversity is not necessarily negative. On the contrary, it may be a source of enrichment and a tool for the better 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 harmonization of their practice, excluding fragmentation of the international law of human rights.

Comment [SK52]: Additions on the basis of the suggestions of the Russian Federation, which also suggests deleting the second and the third sentence of the paragraph.

[158] See the 2015 CDDH Report, at 188 and the 2015 Report *The Interlaken process and the Court,* p. 4