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12/11/2019

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

**Compilation of comments received on the executive summary
prepared by an *ad hoc* group of experts of the DH-SYSC concerning the draft
CDDH Report on the place of the European Convention on Human Rights in
the European and international legal order /**

**Compilation des commentaires reçus concernant le résumé
établi par un groupe *ad hoc* du DH-SYSC concernant le projet de rapport
du CDDH sur la place de la Convention européenne des droits de
l'homme dans l'ordre juridique européen et international**

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Introduction

1. In accordance with the terms of reference given by the Committee of Ministers to the CDDH regarding the work of the Committee of experts on the system of the European Convention on Human Rights (DH-SYSC) for the 2018–2019 biennium, the DH-SYSC examined and adopted a draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order at its 5th meeting in October 2019.¹ The DH-SYSC further set up an informal *ad-hoc* group composed of interested delegations which elaborated a draft executive summary of the said draft CDDH Report (document CDDH(2019)37).²

2. The draft executive summary is submitted to the Bureau of the CDDH for consideration at its 102th meeting (13–15 November 2019) and to the CDDH for consideration and possible adoption at its 92nd meeting (26–29 November 2019), together with the draft CDDH Report on the place of the European Convention on Human Rights in the European and international legal order.

3. The participants in the CDDH meetings were invited to send comments, if any, on the draft executive summary in the form of drafting proposals to the Secretariat by 8 November 2019. The present document contains the compilation of these comments.

* * *

Introduction

1. Conformément au mandat confié par le Comité des Ministres au CDDH concernant les travaux du Comité d'experts sur le système de la Convention européenne des droits de l'homme (DH-SYSC) pour le biennium 2018–2019, le DH-SYSC a examiné et adopté un Projet de Rapport du CDDH sur la place de la Convention européenne des droits de l'homme dans l'ordre juridique européen et international lors de sa 5^e réunion en octobre 2019.³ Le DH-SYSC a également constitué un groupe *ad hoc* informel composé de représentants de délégations intéressées qui a élaboré un projet de résumé dudit projet de Rapport du CDDH (document CDDH(2019)37).⁴

2. Le projet de résumé est soumis au Bureau du CDDH pour examen lors de sa 102^e réunion (13–15 novembre 2019) et au CDDH pour examen et adoption éventuelle lors de sa 92^e réunion (26–29 novembre 2019), conjointement avec le projet de Rapport du CDDH sur la place de la Convention européenne des droits de l'homme dans l'ordre juridique européen et international.

3. Les participants aux réunions du CDDH ont été invités à faire parvenir au Secrétariat leurs commentaires éventuels sur le projet de résumé sous forme de propositions de rédaction au plus tard le 8 novembre 2019. Le présent document contient la compilation de ces commentaires.

¹ See document [DH-SYSC\(2019\)R5Addendum1](#).

² See for further details document [DH-SYSC\(2019\)R5](#), § 11 and [Letter by Ms Brigitte OHMS](#), Chairperson of the DH-SYSC, to the CDDH.

³ Voir le document [DH-SYSC\(2019\)R5Addendum1](#).

⁴ Voir pour plus de détails document [DH-SYSC\(2019\)R5](#), § 11 et [Lettre de Mme Brigitte OHMS](#), Présidente du DH-SYSC, à l'attention du CDDH.

Member States / États membres

CZECH REPUBLIC/ RÉPUBLIQUE TCHÈQUE

[...]

1. The “CDDH report on the place of the European Convention on Human Rights in the European and international legal order” is a response to the proposal of the CDDH that a more in-depth analysis be conducted into the subject matter. [?FN reference to Chapter V of the 2015 Report *The longer-term future of the system of the European Convention on Human Rights*]. In that respect the CDDH identified three key areas in which States could potentially find themselves facing conflicting obligations or diverging standards, with attendant risks for the credibility and coherence of the system of the Convention. These were:

- (a) The challenge of the interaction between the Convention and other branches of international law;
- (b) The challenge of the interaction ~~of~~ between the Convention and other international human rights instruments; and
- (c) The challenge of the interaction between the Convention and the legal order of the European Union and other regional organisations.

The report consists of three sections, sequentially devoted to each of these challenges.

2. The report contains a careful study of the relevant case law of the European Court of Human Rights (“the Court”) and its development, and identifies a number of challenges and, where possible, potential solutions. However, throughout the preparation of the Report ~~all those involved have paid~~ careful attention ~~was paid~~ to the fact that ultimately, in any given case, it will be a matter for the Court to decide on how to meet these challenges, in the independent exercise of its judicial function. The report therefore sets out in broad terms the views of States Parties ~~(who drafted and have subsequently consented to be bound by the Convention)~~ on these questions concerning the relationship of Convention obligations with obligations that they owe under other bodies of law. The key motivation of the report has been importance of avoiding the dangers of conflicting obligations and the fragmentation of international law in particular with a view to strengthen legal certainty for the State Parties. It is in this way intended to strengthen the Convention system.

Commented [KVZ1]: It is rather unusual to highlight the authors. Is it really needed?

Commented [KVZ2]: The majority of the States Parties did not draft the Convention, but later acceded to it. Are these words needed?

- (a) *The challenge of the interaction between the Convention and other branches of international law*

3. The breadth of this topic is potentially vast, but it has been broken down into four key issues.

- (i) The methodology of interpretation by the Court and its approach to international law

4. This sub-section takes as its starting point the rules on treaty interpretation contained in Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT), which are broadly regarded as reflecting the rules of customary international law. The report considers how the Court has applied the VCLT rules, but also methods of interpretation which it has developed beyond the provisions of the VCLT.

(ii) State responsibility and extraterritorial application of the Convention

5. This sub-section reviews the case law of the Court under Article 1 of the Convention in two respects. Firstly questions of the application of the Convention to actions of State beyond its own territory. Secondly questions of when a State can be held responsible under the Convention for the acts of another actor. The sub-section reviews the relevant case law, bearing in mind the complexity and the sensitivity of the issues raised. Given that in these cases Article 1 serves as a threshold provision determining whether the Convention should apply or not to a given case the importance of clarity, consistency and predictability in the developing case law is emphasised.

(iii) Interaction between resolutions of the UN Security Council and the Convention

[...]

(iv) Interaction between international humanitarian law and the Convention

7. This sub-section considers the case law of the Court on the complex and sensitive topic of the relationship between international humanitarian law (IHL) and the Convention. The Court – notably in its decision in *Hassan v. the United Kingdom* – has sought to reconcile differing provisions of these two bodies of law. The report considers whether a similar methodology is feasible in other situations, for example situations of non-international armed conflict. It also considers the potential use of derogation under Article 15 of the Convention in this regard.

(b) *The challenge of the interaction of between the Convention and other international human rights instruments*

8. This section deals with the challenge of parallel obligations for Council of Europe States under the Convention and under other international mechanisms for the protection of human rights, notably the UN treaty bodies. The report seeks to illustrate the difficulties by consideration of both a number of substantive divergences and also a number of divergences on procedural questions (e.g. admissibility and interim measures). The substantive divergences considered are approaches to (i) the wearing of religious symbols and clothing (ii) the involuntary placement or treatment of persons with mental disorder; and (iii) the use of diplomatic assurances in the case of non-refoulement and the prevention of torture. Among the potential challenges identified are legal uncertainty, forum-shopping and threats to the authority of relevant human

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rights institutions. However, the section closes by identifying a number of possible ways of containing divergences emphasising the potential for enrichment of the law.

(c) *The challenge of the interaction between the Convention and the legal order of the European Union and other regional organisations.*

9. This section starts with a **consideration** of the relevant characteristics of the EU legal order, before tracking the history of the interaction between the Convention and EU law. There follows an analysis of the development of fundamental rights protection in EU law, and the doctrines developed by the Strasbourg Court when **considering cases** concerning the application of EU law. A final descriptive sub-section **considers** the Opinion of the CJEU in its Opinion 2/13 on the draft Accession Agreement of the EU to the ECHR. The sub-section on analysis of challenges **considers** a number of categories of challenge arising from the fact of two complex and parallel bodies of law under EU law and the Convention which both aim to protect individual rights. Possible solutions identified include a co-operation and dialogue between the two European Courts. The question of EU accession to the ECHR remains a treaty commitment, but further work is required to address the concerns of all parties concerned. The final sub-section of the report **considers** the developing interaction between the Convention and the Eurasian Economic Union.

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Conclusions

[...]

12. In the light of significant differences between the regional and the universal systems of human rights protection, achieving absolute harmony in international human rights law is not a probability. In order to avoid a risk of fragmentation of the international legal order, the Court, just as all other systems making up the European architecture of human rights protection, should, however, strive to develop its practice while being aware of the other systems. It would be desirable if the international and regional human rights organs, be they judicial or monitoring, proceed, to the extent possible, in the direction of a harmonisation of their practice. To that end, dialogue between the different organs is one of the most powerful tools to enhance consistency in the case-law and practice of these different organs and should be further encouraged.

13. As regards, in particular, the risk that two diverging bodies of case-law develop under the EU Charter of Fundamental Rights and under the ECHR, it is desirable that the negotiations regarding the EU's accession to the ECHR will be resumed and concluded soon.

ESTONIA / ESTONIE

[...]

4. This sub-section takes as its starting point the rules on treaty interpretation contained in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT), which are broadly regarded as reflecting the rules of customary international law. The report considers how the Court has applied the VCLT rules, but also methods of interpretation which it has developed beyond the provisions of the VCLT, **in particular, proceeding from the doctrine of autonomous concept and the “living instrument” doctrine, the Court has applied an evolutive or dynamic interpretation.**

[...]

GREECE / GRÈCE

[...]

1. The “CDDH report on the place of the European Convention on Human Rights in the European and international legal order” is a response to the proposal of the CDDH that a more in-depth analysis be conducted into the subject matter. [?FN reference to Chapter V of the 2015 Report *The longer-term future of the system of the European Convention on Human Rights*]. In that respect the CDDH identified three key areas in which States could potentially find themselves facing conflicting obligations or diverging standards, with attendant risks for the credibility and coherence of the system of the Convention. These were:

- (a) The challenge of the interaction between the Convention and other branches of international law, including international customary law;
- (b) The challenge of the interaction ~~of~~ between the Convention and other international human rights instruments to which Council of Europe member States are parties; and
- (c) The challenge of the interaction between the Convention and the legal order of the European Union and other regional organisations.

The report consists of three sections, sequentially devoted to each of these challenges.

2. The report contains a careful study of the relevant case-law of the European Court of Human Rights (“the Court”) and its development, and identifies a number of challenges and, where possible, potential solutions. However, throughout the preparation of the Report all those involved have paid careful attention to the fact that ultimately, in any given case, it will be a matter for the Court to decide on how to meet these challenges, in the independent exercise of its judicial function. The report therefore sets out in broad terms the views of States Parties (who drafted and have subsequently consented to be bound by the Convention) on these questions concerning the relationship of Convention obligations with obligations that they owe under other bodies of law. The key motivation of the report has been the importance of avoiding the dangers of conflicting obligations and the fragmentation of international law in particular with a view to strengthen legal certainty for the State Parties. It is in this way intended to strengthen the Convention system.

- (a) *The challenge of the interaction between the Convention and other branches of international law, including international customary law.*

[...]

- (ii) State responsibility and extraterritorial application of the Convention

5. This sub-section reviews the case-law of the Court under Article 1 of the Convention in two respects. Firstly questions of the application of the Convention to actions of

Commented [SK4]: The changes are made to reflect the titles used in the draft Report.

State beyond its own territory. Secondly questions of attribution of an internationally wrongful act, and in particular when a State can be held responsible under the Convention for the acts of another actor. The sub-section reviews the relevant caselaw, bearing in mind the complexity and the sensitivity of the issues raised. Given that in these cases Article 1 serves as a threshold provision determining whether the Convention should apply or not to a given case, the importance of clarity, consistency and predictability in the developing case-law is emphasised.

(iii) Interaction between resolutions of the UN Security Council and the Convention

6. This sub-section reviews the case-law which has raised on the interaction of the Convention with decisions of the UN Security Council (UNSC) under Chapter VII of the UN Charter either to impose non-forcible measures e.g. sanctions or to authorise the use of force. The centrality of the UNSC to the system of international peace and security is also reflected in Article 103 of the UN Charter, ~~(which gives priority to obligations under the UN Charter over other treaty obligations)~~. Thus far the Court has avoided having to uphold Article 103 over Convention obligations, by reading relevant decisions of the UNSC in such a way as to avoid finding a conflict of obligations. However, such findings should ~~not be at the expense mindful of the need for~~ effectiveness of the action taken by the UNSC in the exercise of its responsibilities under the UN Charter.

Commented [SK5]: On a more positive tone

(iv) Interaction between international humanitarian law and the Convention

7. This sub-section considers the case-law of the Court on the complex and sensitive topic of the relationship between international humanitarian law (IHL) and the Convention. The Court – notably in its ~~decision in Hassan~~ – has sought ~~to reconcile~~ differing provisions of these two bodies of law. The report considers whether a similar methodology is feasible in other situations, for example situations of non-international armed conflict. It also considers the potential use of derogation under Article 15 of the Convention in this regard.

(b) *The challenge of the interaction of between the Convention and other international human rights instruments to which the Council of Europe member States are parties*

8. This section deals with the challenge of parallel obligations for Council of Europe States under the Convention and under other international mechanisms for the protection of human rights, notably the UN treaty bodies. The report seeks to illustrate the difficulties by consideration of both a number of substantive divergences and also a number of divergences on procedural questions (e.g. admissibility and interim measures). The substantive divergences considered are approaches to (i) the wearing of religious symbols and clothing (ii) the involuntary placement or treatment of persons with mental disorder; and (iii) the use of diplomatic assurances in the case of non-refoulement and the prevention of torture. Among the potential challenges identified are legal uncertainty, forum-shopping and threats to the authority of relevant human

rights institutions. However, the section closes by identifying a number of possible ways of containing divergences, emphasising the potential for enrichment of the law.

[...]

Conclusions

[...]

12. In the light of significant differences between the regional and the universal systems of human rights protection, achieving absolute harmony in international human rights law is not a probability. In order to avoid a risk of fragmentation of the international legal order, ~~the Court, just as all other systems making up the European architecture of human rights protection, should, however, strive to develop its practice while being aware of the other systems.~~ It would be desirable if the international and regional human rights organs, be they judicial or monitoring, are mutually aware and proceed, to the extent possible, in the direction of a harmonisation of their practice. To that end, dialogue between the different organs is one of the most powerful tools to enhance consistency in their case-law and practice ~~of these different organs~~ and should be further encouraged.

[...]

NETHERLANDS / PAYS-BAS

Draft executive summary

of the draft CDDH Report on the place of
the European Convention on Human Rights
in the European and international legal order

Commented [KB6]: NL: we congratulate the secretariat on the short and efficient summary. We regret that not all challenges and possible solutions are included, but we are aware that this may be inevitable.

1. The “CDDH report on the place of the European Convention on Human Rights in the European and international legal order” is a response to the proposal of the CDDH that a more in-depth analysis be conducted into the subject matter. [?FN reference to Chapter V of the 2015 Report *The longer-term future of the system of the European Convention on Human Rights*]. In that respect the CDDH identified three key areas in which States could potentially find themselves facing conflicting obligations or diverging standards, with attendant risks for the credibility and coherence of the system of the Convention. These were:

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- (c) The challenge of the interaction between the Convention and the legal order of the European Union and other regional organisations.

The report consists of three sections, sequentially devoted to each of these challenges.

2. The report contains a careful study of the relevant caselaw of the European Court of Human Rights (“the Court”) and its development, and identifies a number of challenges and, where possible, potential solutions. However, throughout the preparation of the Report all those involved have paid careful attention to the fact that ultimately, in any given case, it will be a matter for the Court to decide on how to meet these challenges, in the independent exercise of its judicial function. The report therefore sets out in broad terms the views of States Parties (who drafted and have subsequently consented to be bound by the Convention) on these questions concerning the relationship-interaction of Convention obligations with obligations that they owe under other bodies of law. The key motivation of the report has been importance of avoiding the dangers of conflicting obligations and the fragmentation of international law in particular with a view to strengthen legal certainty for the State Parties. It is in this way intended to strengthen the Convention system.

(a) *The challenge of the interaction between the Convention and other branches of international law*

3. The breadth of this topic is potentially vast, but it has been broken down into four key issues.

(i) The methodology of interpretation by the Court and its approach to international law

4. This sub-section takes as its starting point the rules on treaty interpretation contained in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT), which are broadly regarded as reflecting the rules of customary international law. The report considers how the Court has applied the VCLT rules, but also methods of interpretation which it has developed beyond the provisions of the VCLT. Using dynamic interpretative approaches to address the Convention in present day circumstances and to ensure that the rights are practical and effective, it is however important that the Court explains its methods of interpretation and that the outcome is predictable and understandable for the States Parties.

[...]

Commented [KB7]: Suggestion to include an indication of the possible solution since the other subthemes contain such an reference.

(b) *The challenge of the interaction of between the Convention and other international human rights instruments*

8. This section deals with the challenge of parallel obligations for Council of Europe States under the Convention and under other international mechanisms for the protection of human rights, notably the UN treaty bodies. The report seeks to illustrate the difficulties by consideration of both a number of substantive divergences and also a number of divergences on procedural questions (e.g. admissibility and interim measures). The substantive divergences considered are approaches to (i) the wearing of religious symbols and clothing; (ii) the involuntary placement or treatment of persons with mental disorder; and (iii) the use of diplomatic assurances in the case of non-refoulement and the prevention of torture. Among the potential challenges identified are legal uncertainty, forum-shopping and threats to the authority of relevant human rights institutions. However, the section closes by identifying a number of possible ways of containing divergences emphasising the potential for enrichment of the law of the protection and promotion of human rights.

(c) *The challenge of the interaction between the Convention and the legal order of the European Union and other regional organisations.*

9. This section starts with a consideration of the relevant characteristics of the EU legal order, before tracking the history of the interaction between the Convention and EU law. Followed by There follows an analysis of the development of fundamental rights protection in EU law, and the doctrines developed by the Strasbourg Court when considering cases concerning the application of EU law. A final descriptive sub-section considers the Opinion of the CJEU in its Opinion 2/13 on the draft Accession

Agreement of the EU to the ECHR. The sub-section on analysis of challenges considers a number of categories of challenges arising from the fact of two complex and parallel bodies of law under EU law and the Convention ~~which both aim to protect individual rights~~. Possible solutions identified include a co-operation and dialogue between the two European Courts. The question of EU accession to the ECHR remains a treaty commitment, but further work is required to address the concerns of all parties concerned. The final sub-section of the report considers the developing interaction between the Convention and the Eurasian Economic Union.

Conclusions

[...]

11. Legal certainty as regards the applicable rules concerning the interpretation of the ECHR, and its relationship with other rules of international law, for example on State responsibility or international humanitarian law, is of great importance for the States Parties. ~~As the~~ The Court itself found on many occasions, as follows from Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, ~~that~~ the ECHR cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the international protection of human rights.⁵

[...]

13. As regards, in particular, the risk that two diverging bodies of ~~case-law~~ ~~caselaw~~ develop under the EU Charter of Fundamental Rights and under the ECHR, it is desirable that the negotiations regarding the EU's accession to the ECHR will be resumed and concluded soon.

⁵ The Russian delegation regrets that the conclusions of the report do not properly reflect the challenges and solutions identified [according to the Russian delegation](#), and proposes to highlight that clarity and consistency in the application by the Court of general rules of international law on state responsibility, is of great importance for the States Parties (the full comment is reproduced in document [DH-SYSC-II\(2019\)R7](#)).

RUSSIAN FEDERATION / FÉDÉRATION DE RUSSIE

Draft executive summary

of the draft CDDH Report on the place of
the European Convention on Human Rights
in the European and international legal order

1. The “CDDH report on the place of the European Convention on Human Rights in the European and international legal order” is a response to the proposal of the CDDH that a more in-depth analysis be conducted into the subject matter. [?FN reference to Chapter V of the 2015 Report *The longer-term future of the system of the European Convention on Human Rights*]. In that respect the CDDH identified three key areas in which States could potentially find themselves facing conflicting obligations or diverging standards, with **possible detrimental effect on** ~~attendant risks for the~~ **authority of the Court’s case-law and the effectiveness** ~~credibility and coherence~~ of the system of the Convention [2015 Report – para 186]. These were:

- (a) The challenge of the interaction between the Convention and other branches of international law;
- (b) The challenge of the interaction of between the Convention and other international human rights instruments; and
- (c) The challenge of the interaction between the Convention and the legal order of the European Union and other regional organisations.

The report consists of three sections, sequentially devoted to each of these challenges.

2. The report contains a careful study of the relevant caselaw of the European Court of Human Rights (“the Court”) and its development, and identifies a number of challenges and, ~~where possible~~ **some**, potential solutions. ~~However, throughout the preparation of the Report all those involved have paid careful attention to the fact that ultimately, in any given case, it will be a matter for the Court to decide on how to meet these challenges, in the independent exercise of its judicial function.~~ The report therefore sets out in broad terms the views of States Parties (who drafted and have subsequently consented to be bound by the Convention **being thereby entitled to its authentic interpretation**[para 18]) on these questions concerning the relationship of Convention obligations with obligations that they owe under other bodies of law. The key motivation of the report has been importance of avoiding the dangers of conflicting obligations and the fragmentation of international law in particular with a view to strengthen legal certainty for the State Parties. It is in this way intended to strengthen the Convention system.

(a) *The challenge of the interaction between the Convention and other branches of international law*

3. The breadth of this topic is potentially vast, but it has been broken down into four key issues.

(i) The methodology of interpretation by the Court and its approach to international law

4. This sub-section takes as its starting point the rules on treaty interpretation contained in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT), which are broadly regarded as reflecting the rules of customary international law. **As agreed by the High Contracting Parties and consistently confirmed by the Court the ECHR is a part of public international law and thus should be interpreted in accordance with the VCLT rules of interpretation.** [para 78] The report considers how the Court has applied the VCLT rules, but also methods of interpretation which it has developed beyond the provisions of the VCLT. **However, it is emphasized that traditional rules of treaty interpretation and the consensual nature of international law, as well as the need to avoid its fragmentation, place limits on such methods.** [para 83] **The Court cannot, by means of an evolutive interpretation, derive from the Convention and its Protocols a right that was not included therein at the outset.** [para 76]

(ii) State responsibility and extraterritorial application of the Convention

5. This sub-section reviews the caselaw of the Court under Article 1 of the Convention in two respects. Firstly questions of the application of the Convention to actions of State beyond its own territory. Secondly questions of when a State can be held responsible under the Convention for the acts of another actor. The sub-section reviews the relevant caselaw, bearing in mind the complexity and the sensitivity of the issues raised. Given that in these cases Article 1 serves as a threshold provision determining whether the Convention should apply or not to a given case the importance of clarity, consistency and predictability in the **developing** caselaw is emphasised. **It is noted that even though the ECHR does not contain any provision that expressly differs from the general regime of the responsibility of States** [para 140], **the Court has developed its own notion of jurisdiction for the purpose of Article 1**[para 136]. **In some cases, the Court's threshold for establishing jurisdiction seems to reduce the requirements of the effective control test**[para 133], **being less stringent than the degree of control which must be exercised in order for the conduct to be attributable to the State under the case-law of the International Court of Justice**[para 154] **and the Articles on State Responsibility for Internationally Wrongful Acts adopted by the International Law Commission**[para 180]. **Furthermore, the Court does not always clearly distinguish between "jurisdiction" in the sense of Article 1 ECHR on the one hand, and attribution of conduct under the law of state responsibility on the other hand**[para 184]. **The broad formulation of the elements necessary for the Court to conclude that a State had jurisdiction and evolutive interpretation of the scope of Article 1 could make it difficult for States to foresee the exact scope of their obligations under the Convention and thus to fulfil them** [paras 133 and

138]. In cases, where a respondent State does not have direct territorial control, but only decisive influence over the administration of a breakaway territory, the consequences of a finding of jurisdiction are considerable and may cause difficulties for the States at the stage of the execution of judgments [para 134]. In situations of extraterritoriality, which usually concern politically sensitive areas including questions of national security, a clear methodology and interpretation of the applicable rules is of utmost importance in order to guarantee legal certainty[para 186].

[...]

(iv) Interaction between international humanitarian law and the Convention

7. This sub-section considers the caselaw of the Court on the complex and sensitive topic of the relationship between international humanitarian law (IHL) and the Convention. The Court – notably in its **caselaw attempted decision in Hassan** – has sought to reconcile differing provisions of these two bodies of law. The report considers whether a similar methodology is feasible in other situations, for example situations of non-international armed conflict. It also considers the potential use of derogation under Article 15 of the Convention in this regard.

[...]

(c) *The challenge of the interaction between the Convention and the legal order of the European Union and other regional organisations.*

9. This section starts with a consideration of the relevant characteristics of the EU legal order, before tracking the history of the interaction between the Convention and EU law. There follows an analysis of the development of fundamental rights protection in EU law, and the doctrines developed by the Strasbourg Court when considering cases concerning the application of EU law. A final descriptive sub-section considers the Opinion of the CJEU in its Opinion 2/13 on the draft Accession Agreement of the EU to the ECHR. The sub-section on analysis of challenges considers a number of categories of challenge arising from the fact of two complex and parallel bodies of law under EU law and the Convention which both aim to protect individual rights. **For example, the application of the presumption of equivalent protection that allows the ECtHR in some cases to “reduce the intensity of its supervisory role” and the need for the applicant to prove manifest deficiency constitute additional difficulties and could lead to a non-uniform level of protection of the rights of persons in different member States of the Council of Europe**[para 401]. Possible solutions identified include a co-operation and dialogue between the two European Courts. The question of EU accession to the ECHR remains a treaty commitment, but further work is required to address the concerns of all parties concerned. The final sub-section of the report considers the developing interaction between the Convention and the Eurasian Economic Union.

Conclusions

[...]

11. Legal certainty as regards the applicable rules concerning the interpretation of the ECHR, and its relationship with other rules of international law, for example on State responsibility or international humanitarian law, as well as clarity and consistency in the application by the Court of general rules of international law on State responsibility, is of great importance for the States Parties. As the Court itself found on many occasions, as follows from Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, the ECHR cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the international protection of human rights.⁶ Providing legal certainty is central to the legitimacy of the ECtHR and the maintenance of its effectiveness and authority as an independent and competent judicial institution.

Adjust its wording as follows:

12. In the light of significant differences between the regional and the universal systems of human rights protection, achieving absolute harmony in international human rights law is not a probability. In order to avoid a risk of fragmentation of the international legal order, the Court, just as all other systems making up the European architecture of human rights protection, should, however, strive to develop its practice while being aware of the other systems. It would be desirable if the international and regional human rights organs, be they judicial or monitoring, proceed, to the extent possible, in the direction of a harmonisation of their practice. To that end, dialogue between the different organs is one of the most powerful tools to enhance consistency in the caselaw and practice of these different organs and should be further encouraged.

13. As regards, in particular, the risk that two diverging bodies of case-law develop under the EU Charter of Fundamental Rights and under the ECHR, it is desirable that the negotiations regarding the EU's accession to the ECHR will be resumed and concluded soon.

⁶ The Russian delegation regrets that the conclusions of the report do not properly reflect the challenges and solutions identified, and proposes to highlight that clarity and consistency in the application by the Court of general rules of international law on state responsibility, is of great importance for the States Parties (the full comment is reproduced in document [DH-SYSC-II\(2019\)R7](#)).

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[...]

(iv) Interaction between international humanitarian law and the Convention

7. This sub-section considers the caselaw of the Court on the complex and sensitive topic of the relationship between international humanitarian law (IHL) and the Convention. The Court – notably in its decision in *Hassan* – has sought to reconcile differing provisions of these two bodies of law. The report considers whether a similar methodology is feasible in other situations, for example situations of non-international armed conflict. It also considers the potential use of derogation under Article 15 of the Convention in this regard.

(b) *The challenge of the interaction of between the Convention and other international human rights instruments*

8. This section deals with the challenge of parallel obligations for Council of Europe States under the Convention and under other international mechanisms for the protection of human rights, notably the UN treaty bodies. The report seeks to illustrate the difficulties by consideration of both a number of substantive divergences and also a number of divergences on procedural questions (e.g. admissibility and interim measures). The substantive divergences considered are approaches to (i) the wearing of religious symbols and clothing (ii) the involuntary placement or treatment of persons with mental disorder; and (iii) the use of diplomatic assurances in the case of non-refoulement and the prevention of torture. Among the potential challenges identified are legal uncertainty, forum-shopping and threats to the authority of relevant human rights institutions. However, the section closes by identifying a number of possible ways of containing divergences emphasising the potential for enrichment of the law.