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Diverging Interpretation of Personal Liberty and Security: Inconsistencies between the Jurisprudence of the UN Human Rights Committee and the European Court of Human Rights

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List of Abbreviations

App	Application
Art/art	Article
CoE	Council of Europe
CoM	Committee of Ministers of the Council of Europe
Doc	Document
ECHR, Convention	European Convention on Human Rights
EComHR	European Commission of Human Rights
ECtHR, Court	European Court of Human Rights
eds	editors
et al	et alia
GC	Grand Chamber of the European Court of Human Rights
HRC, CCPR, Committee	United Nations Human Rights Committee
IACtHR	Inter-American Court of Human Rights
Ibid, ibid	Ibidem, ibidem
ICCPR, Covenant	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICJ	International Court of Justice
i.e.	id est
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	United Nations International Law Commission
n	footnote
NGO	Non-governmental Organization
NHRI(s)	National Human Rights Institution(s)

no, nos	Number, numbers
OHCHR	United Nations Office of High Commissioner for Human Rights
para	paragraph, paragraphs
pp	page, pages
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
v, v., vs	versus
VCLT	Vienna Convention on the Law of Treaties
Vol	Volume

Abstract

Human rights are protected under multiple treaties and by multiple actors within a multi-layered system. This may lead to inconsistencies in how universal rights are understood and implemented. The International Covenant on Civil and Political Rights and the European Convention on Human Rights, two core human rights treaties, guarantee the right to liberty and security in similar wordings. However, their supervisory bodies, the UN Human Rights Committee and the European Court of Human Rights, diverge to some extent in its interpretation and requirements. The thesis compares these two bodies' jurisprudence on the right to liberty and security, in light of their structural characteristics and functions. It discusses the identified inconsistencies and the reasons behind them within the context of the function of the multi-layered protection system. It demonstrates the key role of the relationship between these two bodies in ensuring that individuals can enjoy effective protection of the universal standards of the right to liberty and security.

Abstrakt

Die Menschenrechte werden durch mehrere Verträge und von mehreren Akteuren innerhalb eines vielschichtigen Systems geschützt. Dies kann zu Unstimmigkeiten darüber führen, wie die universellen Rechte zu verstehen und umzusetzen sind. Der internationale Pakt über bürgerliche und politische Rechte, die europäische Menschenrechtskonvention und zwei zentrale Menschenrechtsverträge garantieren das Recht auf Freiheit und Sicherheit in ähnlichen Formulierungen. Ihre Kontrollorgane, der UN-Menschenrechtsausschuss und der europäische Gerichtshof für Menschenrechte, legen dieses Recht jedoch teilweise unterschiedlich aus und stellen unterschiedliche Anforderungen. In dieser Arbeit wird die Rechtsprechung dieser beiden Organe zum Recht auf Freiheit und Sicherheit im Hinblick auf ihre strukturellen Merkmale und ihre Funktionsweise verglichen. Sie erörtert die festgestellten Unstimmigkeiten und die Gründe dafür im Zusammenhang mit der Funktion des vielschichtigen Schutzsystems. Es wird aufgezeigt, welche Schlüsselrolle die Beziehung zwischen diesen beiden Organen, wenn es darum geht, sicherzustellen, dass der Einzelne einen wirksamen Schutz der universellen Standards des Rechts auf Freiheit und Sicherheit genießen kann.

INTRODUCTION

The "right to liberty and security" is enshrined in similar terms in both, the International Covenant on Civil and Political Rights (ICCPR or Covenant) and the European Convention on Human Rights (ECHR or Convention) –two core human rights treaties– interpreted by their own supervisory bodies: the UN Human Rights Committee (HRC or Committee) and the European Court of Human Rights (ECtHR or Court). One may ask, then, what are the differences in these bodies` approaches to the right to liberty and security and what do they mean in terms of the multi-layered protection of human rights.

Motivated by this legal issue, this master thesis mainly compares the jurisprudence of the HRC and the ECtHR on the right to liberty and security and identifies their inconsistencies. It then seeks the reasons behind the identified inconsistencies and interprets them for more effective protection of higher standards in the context of multi-layered human rights protection. As the individual complaint mechanism provides a more detailed and comparable sample on concrete individual cases, and to avoid outdated conclusions in the face of changing approaches, it focuses on the individual complaint jurisprudence from 2005 to today.[1]

The presumption of this thesis is that the HRC provides a higher level of protection than the ECtHR on personal liberty and security in some aspects and that for the better exercise of the multi-layered protection system, the judgments of the ECtHR play a key role in the full implementation of the universal standards interpreted by the HRC.

The first chapter takes a brief overview of the historical background, characteristics, and functioning of the HRC and the ECtHR, relevant to comprehend the reasons behind the inconsistencies of the jurisprudences.

[1] The year 2005 is chosen to avoid outdated conclusions as well as repetition with existing work. It has been observed that some comparative studies and the main extensive pieces of literature dealing with one of the organs are largely based on pre-2005 jurisprudence. On the other hand, it is considered more useful to focus on more recent jurisprudence and current approaches within a given time for research. For examples from existing works, see Crawshaw and Holmström 'Right to liberty and security of person' in Crawshaw and Holmström (eds) Essential Cases on Human Rights for the Police (2006) 199-286; Jacobsen 'Right to liberty and security of the person' in Jacobsen (ed) Human Rights Monitoring (2008) 139-182; Paul De Hert, 'Balancing Security and Liberty within the European Human Rights Framework: A Critical Reading of the Court's Case Law in the Light of Surveillance and Criminal Law Enforcement Strategies after 9/11' (2005) 1 Utrecht L Rev 68; Richard Burchill and Alex Conte, Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee (Taylor & Francis Group 2016) 111-118; Magdalena Forowicz, *The reception of international law in the European Court of Human Rights* (Oxford University Press 2010) 151-189.

The second chapter compares the individual complaint jurisprudence of the HRC and ECtHR on the right to liberty and security. It closely follows the common order of respective provisions under the ICCPR and the ECHR. The chapter does not ignore the similarities in their jurisprudence and considers them to some extent. However, it rather focuses on their inconsistencies to identify the differences in their approaches. This chapter also considers separate and dissenting opinions.

Lastly, the third chapter analyses the inconsistencies between the HRC and the ECtHR under the idea of multi-layered human rights protection. To achieve this, it builds its examination on the findings of the second chapter. It first addresses the multi-layered human rights protection and the relationship between the HRC and the ECtHR. It proceeds to criticize the inconsistencies in their approach by discussing the reasons behind them. Finally, it suggests how to ensure that individuals enjoy more effective protection of higher standards.

The research methods are comparison and analysis of the treaty texts and case law, the study of literature, and the conduct of interviews on the criticism of inconsistency and the relationship between the HRC and the ECtHR.

CHAPTER I:
Comparison of the UN Human Rights Committee and the European Court of Human Rights

In order to answer the research questions and to achieve the aim of the research, it is first necessary to understand the institutional and structural differences between the HRC and the ECtHR. Since the jurisprudence of the HRC and the ECtHR on the right to liberty and security will be compared in detail in the next chapter, this chapter will provide a brief summary of the historical background, institutional and structural characteristics, functions, and protection means of these two bodies.

1.1. UN Human Rights Committee

The HRC is a treaty body under the UN, established as the guardian and supervisory body of the ICCPR[2] to ensure its implementation.

The main reference and basis of the ICCPR goes back to the Universal Declaration of Human Rights (UDHR). Although this list of rights is still regarded as one of the main texts of international human rights law, over time, due to its inability to become a binding instrument and the UN's desire to strengthen its function of human rights protection, two different treaties have been adopted: the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[3] Although the number of human rights treaties created at the UN level has increased over time, the ICCPR has become one of the core instruments and a part of the International Bill of Human Rights.

The ICCPR was created as a binding instrument and had been ratified by many states, however, the idea of its monitoring by an independent committee was long met with reluctance by some State parties. Indeed, the HRC was established after negotiations as the monitoring body of the ICCPR.[4] It is composed of 18 independent experts, mostly lawyers, who serve in their personal

[2] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[3] Richard Burchill and Alex Conte, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Taylor & Francis Group 2016) 2.
[4] ibid 3; Hennebel L, 'The Human Rights Committee' in Mégret F and Alston P (eds), The United Nations and Human Rights: A Critical Appraisal (2nd edn, OUP 2020) 340-342.

capacity. Although members are selected and nominated by States Parties, they do not serve as diplomatic representatives of any country or region, but as independent human rights experts.[5]

The Committee is neither a court nor judicial authority in the classical sense. However, whether the Committee is a quasi-judicial body or a non-judicial committee of a sui generis nature is disputed in the literature.[6] Nevertheless, the relatively common approach is that the Committee is a quasi-judicial body.[7] Therefore, conclusions reached through the mechanisms of the Committee are not court decisions, verdicts, or judgments in the classical sense, but views and recommendations.[8] In this framework, it is noted that the Committee, at least from its point of creation, does not issue decisions to condemn the States, but does rather develop "constructive dialogue" aimed at "promoting and protecting human rights" at the universal level. Moreover, it could be argued that, in a sense, its promotion function even outweighs its protection function.[9]

The Committee carries out its monitoring activities through four mechanisms: periodic reporting procedure, general comments, examination of inter-State communications, and examination of individual complaints.[10]

The periodic reporting procedure is the Committee's main monitoring mechanism. The objective and the function of the periodic review is "to ensure that a comprehensive review is undertaken by the State concerned with respect to legislative, administrative, and other measures taken to fulfil its obligations".[11] Under this procedure, the State party periodically reports to the Committee on the situation with respect to its treaty obligations.[12] Based on this report, the Committee prepares a list of issues, taking into account the submissions of NGOs and third parties.[13] The State Party is asked to respond to this list of issues. Following an open dialogue session, the Committee adopts and publicly presents its concluding observations and

[5] ICCPR art 28, 38.
[6] Burchill and Conte (n 3) 9.
[7] Subedi, OBE, QC (Hon), Surya P., *Effectiveness of the UN Human Rights System* (Taylor & Francis Group 2019) 71; Hennebel distinguishes the Committee`s nature by its functions. Accordingly, he argues that the Committee is a monitoring body when exercising its scrutiny of States' reports and it acts as a quasi-judicial organ when exercising its competence over individual communications, see Hennebel (n 4) 346.
[8] Subedi (n 7) 90.
[9] ibid 75-76.
[10] Burchill and Conte (n 3) 10-12.
[11] Subedi (n 7) 79.
[12] Sancin, V, 'Functioning of the UN Human Rights Committee (CCPR) in the 21st Century', *International Organizations* (Institute of International Politics; Economics; Faculty of Philosophy of the University of St. Cyril; Methodius 2022) 302 <http://dx.doi.org/10.18485/iipe_ioscw.2022.1.ch16>.
[13] ibid 303: "*In the review process, in addition to the information submitted by the state party, all available sources of information, including those originating from other treaty bodies, special procedures, the Universal Periodic Review, and the UN system, as well as from regional human rights mechanisms, national human rights institutions (NHRIs), and non-governmental organizations (NGOs), can be, and regularly are, considered.*".

recommendations.[14] The State party is expected to comply with the relevant recommendations through the periodic reporting process.[15] Throughout this procedure, the Committee aims the implementation and development of human rights in this cooperative and constructive dialogue process.[16]

General comments are detailed guidelines that clarify state parties` obligations under the ICCPR. They are usually issued on a specific provision of the ICCPR but sometimes may address thematic, cross-cut issues or the Committee`s work methods.[17] General comments mainly reflect and refer to the Committee`s experience in the reviewing of the periodic reports and the consideration of individual communications.[18] They can also review and identify the other relevant treaties, regional jurisprudence, or soft law to encourage state parties to follow.[19] Furthermore, while the State parties can submit their observations on the general comments,[20] drafts of comments are also sent to the other treaty bodies, intergovernmental institutions, and NGOs for their observations.[21] General comments don't impose new or further obligations to states but provide guidance on the necessary measures for the implementation of their obligations under the ICCPR and full compliance with human rights.[22]

The inter-state complaints mechanism is a mechanism by which a State party can complain to another State party about violations of its obligations under the ICCPR. Upon such a complaint, the Committee examines that and determines whether the State party has violated the ICCPR. However, given the lack of political motivation and the existence of other mechanisms that can be invoked in potential disputes, this mechanism has so far not been used.[23]

Individual complaint (or communication) mechanism procedure is not included in the main text of the ICCPR and is not the main function of the Committee that ICCPR provided. However,

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[14] For a more detailed and comprehensive description of the periodic reporting procedure, see Hennebel (n 4) 348-354.
[15] ICCPR art 40: "*The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights*".
[16] Subedi (n 7) 79.
[17] Sancin V, 'General Comments and Recommendations' in Christina Binder and others (eds), *Elgar Encyclopedia of Human Rights*, vol 2 (2022) 312; OHCHR, General Comments, Treaty Bodies, available at <https://www.ohchr.org/en/treaty-bodies/general-comments>; see all General Comments in OHCHR`s database at <tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?TreatyID=8&DocTypeID=11>.
[18] Sancin (n 17) 319; Liz Heffernan, 'A Comparative View of Individual Petition Procedures under the European Convention on Human Rights and the International Covenant on Civil and Political Rights' (1997) 19(1) Human Rights Quarterly 78, 88 <http://dx.doi.org/10.1353/hrq.1997.0006>.
[19] Sancin (n 17) 312.
[20] ICCPR art 40(5).
[21] Hennebel (n 4) 370.
[22] See the references to discussions on that the general comments `tend to have a quasi-legislative character´ or that `they form some sort of persuasive body of jurisprudence´, Sancin (n 17) 319.
[23] Subedi (n 7) 89; Sancin (n 12) 303; Heffernan (n 18) 89.

by ratification of the Optional Protocol to the ICCPR,[24] this procedure was established and gained importance over time.[25] Therefore, the individual complaint mechanism can be invoked only if the State concerned has ratified both the ICCPR and its Optional Protocol.[26] This mechanism refers in the classical sense to individuals filing a complaint alleging that their rights protected under the ICCPR have been violated by the State party concerned. The Committee examines the complaint on its admissibility and, if admissible, on its merits. These two stages are often carried out at the same time.[27] Upon receiving an individual complaint, the Committee contacts the individual complainant and the State party for their observations. Once it has completed its examination, it adopts its views on whether there has been a violation of the ICCPR and requests the State party to provide reparation to the victim.[28] The Views are non-binding in the classical sense. However, although not directly linked to an enforcement mechanism, there is a follow-up procedure by the Special Rapporteur[29] on whether the remedies had been implemented.[30]

While not denying the importance of the Committee's other monitoring mechanisms and instruments, and even being aware that its main function is to carry out the periodic reporting mechanism, it can indeed be argued that the examination of individual complaints has made a significant contribution to the jurisprudence of international human rights law.[31] At the time of writing this thesis, the Committee has been carrying out individual communications for more than forty years. Thus, it dealt with numerous individual complaints on various issues and developed and constructed comprehensive case law over time.

The Committee defines the right subject to the complaint and interprets the ICCPR, by following the Vienna Convention on the Law of Treaties (VCLT). It refers to the ordinary meaning of the words,[32] and sometimes, to some extent, to preparatory works[33] as

[24] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171(OP-ICCPR).
[25] For discussions turned around the State sovereignty during the drafting of the OP-ICCPR and establishing individual complaint mechanism, see Hennebel (n 4) 356.
[26] As of August 2023, 116 of the 176 State parties have ratified the OP-ICCPR, see the ratification status at the official website of the OHCHR, tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR
[27] Burchill and Conte (n 3) 12.
[28] Klein E, 'Human Rights Committee' in Helmut Volger (ed), *A Concise Encyclopedia of the United Nations* (2nd Revised, Martinus Nijhoff Publishers 2010) 293.
[29] The Special Rapporteur here, should not be confused with the UN Human Rights Council Special Rapporteurships. The Special Rapporteur for follow-up on views(or concluding observations) has been established by the Committee itself for its own working organization according to its Rules of Procedure, see Hennebel (n 4) 346.
[30] Klein (n 28) 294.
[31] Subedi (n 7) 92.
[32] Vienna Convention on the Law of Treaties(adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31.
[33] VCLT art 32.

supplementary means of interpretation.[34] However, there are some observations in the literature that, unlike the ECtHR and Inter-American Court of Human Rights (IACtHR) judgments, there is no general or common interpretative trend in the HRC views.[35] This is explained by the fact that the Committee is composed of frequently changing members from diverse regions, meets only at certain times of the year, and does not have sufficient human resources to support the development of a common interpretation.[36] Nevertheless, the Committee considers the ICCPR as a living instrument in light of the present-day conditions.[37]

Although the Committee has occasionally referred to other international treaties and jurisprudence in the interpretation of treaty rights, it does not generally choose to do so.[38] However, it is indicated that there is no general interpretative trend in this sense: While some members of the Committee take a more globalist and open approach to other jurisprudence, some other members have an opposite position to avoid direct references to regional systems based on regional ideas in order to 'preserve the universal understanding of the Covenant'.[39] On the other hand, since it has the interpretation mandate at the universal level, it defines a universal common understanding of human rights for all different regions and countries. Hence, the Committee has explicitly rejected the margin of appreciation doctrine with respect to fundamental rights in order not to be overly influenced by debates on cultural relativism, etc.[40] Therefore, in the development of its jurisprudence on fundamental rights and its evolution over time, interpretations and views have been established without a reference to the general practices of State parties.

For the Committee, given the guardianship of civil and political rights under the ICCPR and developing jurisprudence at the universal level, there are some concrete challenges. Some progressive and controversial interpretations in the Committee's approach, as opposed to a clear and detailed court decision, while understandable and perhaps even affirmable at some points, have been criticized in terms of the qualification and sufficiency of legal reasoning. Some

[34] Hennebel (n 4) 375.
[35] Burchill and Conte (n 3) 16; Hennebel (n 4) 377.
[36] Burchill and Conte (n 3) 17.
[37] Hennebel (n 4) 375.
[38] For example, the HRC cited an ECtHR judgment in a communication in which it considered the imposition of the death penalty following an unfair trial as inhuman treatment, see *Larrañaga v Philippines*, UN Doc CCPR/C/87/D/1421/2005 (24 July 2006) para 7.11, for this communication, its dissenting opinion, and an observation that the Committee tends not to refer to other international jurisprudence when interpreting the Covenant, see Hennebel (n 4) 376; for further examples, see also *Yevdokimov and Rezanov v Russia*, UN Doc CCPR/C/101/D/1410/2005 (21 March 2011) para 7.5; *Kindler v Canada*, UN Doc CCPR/C/48/D/470/1991 (30 July 1993) para 15.3.
[39] Hennebel (n 4) 377.
[40] Hennebel (n 4) 376; Burchill and Conte (n 3) 14-18.

authors even formulate this criticism as a "lack of legal reasoning for the sake of the desire for consensus".[41] On the other hand, each document produced by the Committee, including views, has been limited to 10,700 words by the UN General Assembly resolution.[42] Further considering the need to translate these documents, with annexed separate opinions, to two other official languages of the UN, this strict word limit affects the quality of argumentation in views and their persuasiveness.[43]

In any event, while the Committee initially had difficulties in receiving individual complaints from certain parts of the world and developing universally inclusive jurisprudence,[44] it now seems to have been able to accumulate a certain level of comprehensive jurisprudence on complaints received from different parts of the world, including Europe. This jurisprudence has played an influential role in the development of international human rights law and has enabled the Committee's general comments, which describe and elaborate on ICCPR rights, to emerge over time as more detailed guidelines.[45]

For instance, in line with the topic of this research, i.e. the right to liberty and security under Article 9 of the ICCPR, while the Committee's General Comment No. 8[46] has rather short and principal statements by referring to its early jurisprudence, the General Comment No. 35,[47] which had replaced the former one, is much more detailed, comprehensive, concrete, and instructive. This situation shows that the Committee has developed its experience over time and dealt with more complex issues in more detail.

Regarding the criticism of the Committee's approach in the examination of individual complaints and the quality of its views, besides the strict word limit set by the UN General Assembly, it is useful to keep in mind that the main function of the Committee is the universal promotion and protection of human rights. In this framework, the activities of the Committee are important in that they constitute a universal basis and can be seen as a soft power for human rights to gain judicial value and validity in international human rights law.[48]

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[41] Burchill and Conte (n 3) 14.
[42] UNGA Res 68/268 (09 April 2014) UN Doc A/RES/68/268, para 15.
[43] Sancin (n 12) 309.
[44] Burchill and Conte (n 3) 13.
[45] Joseph S, 'International Covenant on Civil and Political Rights(CCPR)' in Christina Binder and others (eds), *Elgar Encyclopedia of Human Rights*, vol 3 (2022) 181.
[46] CCPR `General Comment no 8: Article 9 (Right to Liberty and Security of Persons) ´ Adopted at the Sixteenth Session of the Human Rights Committee, on 30 June 1982' (1982), available at <https://www.refworld.org/docid/4538840110.html>.
[47] CCPR 'General Comment 35' on the Article 9 (Liberty and Security of Person), adopted by the Committee at its 112th session (2014) UN Doc CCPR/C/GC/35.
[48] Subedi (n 7) 91.

1.2. European Court of Human Rights

The ECtHR is a judicial body under the Council of Europe (CoE), which guards the ECHR[49], and thus a regional human rights court.

The ECHR was signed in 1950, immediately after the establishment of the CoE, and entered into force in 1953. Although the ECHR was created before the ICCPR, it was inspired by the same source, the UDHR,[50] and was intended to give it binding force, based on the CoE's aim to create a "greater unity between its members".[51] However, over time, the ECHR's scope of protection has been enlarged by the additional protocols. The rights guaranteed by the text of the ECHR, like the ICCPR, are essentially civil and political rights. Furthermore, it can be said that these two treaties, which are considered to correspond to each other at different levels, enshrine and protect fundamental rights in largely similar statements. However, for some rights, while the ECHR recognizes and admits a wider ground of limitations, the ICCPR permits States narrower discretion in imposing limits.[52] Moreover, some rights are included in the ICCPR but not in the text of the ECHR, e.g. the rights of the detainee.[53] Conversely, there are some rights protected by the additional protocols to the ECHR that are not mentioned in the ICCPR, such as the right to property.[54]

The ECHR provides a broad and detailed list of civil and political rights, as well as its monitoring mechanisms with two institutions: the European Commission of Human Rights (EComHr or Commission) and the ECtHR.[55] The Commission was authorized as the ordinary

[49] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

[50] Similar to what the UN did later, the CoE created the ECHR by dividing the UDHR over first (civil and political rights) and second (economic, social, and cultural rights) generation rights. For an analysis of the coverage of the ECHR compared with the UDHR, see Bates E, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press 2010)109-114.

[51] ECHR, preamble; for the historical and political background of the aim of "the creation of greater unity", see Nußberger A, *The European Court of Human Rights* (Oxford University Press 2020) 6-8.

[52] For example, while Article 8 of the ECHR expresses the permissible grounds for interference, Article 17 of the ICCPR, its parallel provision, does not. Similar differences in the texts of the treaties can be seen for the freedom of expression. ECHR allows the State relatively more grounds for interference. In terms of practical application of the treaties, the ECtHR`s application of the margin of appreciation doctrine can be seen in a similar way. See Heffernan (n 18) 90-91.

[53] Magdalena Forowicz, The reception of international law in the European Court of Human Rights (Oxford University Press 2010) 153 (with further examples).

[54] Council of Europe, Protocol (no 1) to the ECHR, Paris 20 March 1952 (entered into force on 21 September 1970), art 1.

[55] Nussberger (n 51) 7; Additionally, the Committee of Ministers, the standing executive organ of the CoM in political nature, had the role in some situations, to take the final decision on an application upon its transmission by the Commission the act complained as a breach of the Convention upon transmitting, see the original text of the ECHR (without amendments) Article 32, available at <https://www.echr.coe.int/documents/d/echr/Archives_1950_Convention_ENG >.

address for the monitoring and review activities envisaged by the Convention,[56] while the Court was authorized as a kind of discretionary body composed of judges, to which complaints could be referred by the parties with a declaration of competence, or which could be activated by an application of the Commission if it considered the complaint admissible.[57] After the accession of new member states to the Convention over time,[58] in 1998, the Commission and the Court were merged into the present ECtHR, a permanent court based in Strasbourg.[59] With this development, it was held obligatory for the State parties to accept the jurisdiction of the ECtHR.[60]

The ECtHR is composed of judges from each member State, elected by vote of the Parliamentary Assembly from lists of three candidates submitted by each Member State.[61] The Court is composed of various administrative and judicial units, and the scope of the powers and duties of each unit is defined in detail by the ECHR and the Rules of Court. All the judge-members of the Court constitute the General Assembly of the ECtHR, which is an administrative unit. Judicial activities, on the other hand, are carried out by a single-judge formation, three-judge Committees, seven-judge Chambers, a five-judge Subcommittee of the Grand Chamber, and the seventeen-judge Grand Chamber, with different divisions of work and competence.[62]

The main text of the ECHR, as amended by the protocols, also regulates the structure and mechanisms of the ECtHR. Accordingly, the ECtHR protects the ECHR rights through two main mechanisms: the examination of individual complaints[63], and the examination of inter-State cases[64]. In addition, the execution of judgments with supervision by the Committee of Ministers (CoM),[65] could be counted as a strong means for human rights protection, considering its effectiveness and detailed procedure. Apart from that, the Court is also competent to issue advisory opinions upon the request of the CoM, on legal questions concerning the interpretation

[56] The Commission was, unlike the Court, considered as a quasi-judicial and quasi-political body, see Bates (n 50) 127.
[57] Bates (n 50) 125; see the original text of the ECHR Article 45-48, available at <https://www.echr.coe.int/documents/d/echr/Archives_1950_Convention_ENG>.
[58] The relevance of the accession of new members to this structural change is linked to the homogeneity of the Convention system and the aim of creating greater unity. Accordingly, from the early 90s onwards, the Court had a potential role in the face of emerging diversity, see Nussberger (n 51) 27.
[59] Council of Europe, Protocol no 11 to the ECHR, Strasbourg 11 May 1994 (entered into force on 1 November 1998).
[60] Nussberger (n 51) 27; This development was especially important since all cases would be subject to full-judicial treatment, see Bates (n 50) 146.
[61] ECHR art 22.
[62] ECHR art 26-31.
[63] ECHR art 34.
[64] ECHR art 33.
[65] ECHR art 46.

of the ECHR.[66] It appears that the HRC enjoys a greater independence within the UN system and even within the UN Human Rights System, the ECtHR appears to be closely associated with the CoE as its judicial body.[67]

The mechanism of inter-state cases, as set out in Article 33 of the ECHR, is based on a complaint by one State Party against another State Party, claiming that it has violated its obligations under the Convention. This mechanism essentially refers to the CoE's "common public order of the free democracies of Europe". Thus, the aim of this mechanism is to protect the common public values of Europe, rather than to reinforce one's own rights.[68] In contrast to the HRC, the inter-state case mechanism has been used many times before the ECHR, especially in the last two years, compared with the past. States invoke this mechanism mostly in situations of crisis and conflict.[69] Upon such a complaint, the Court examines its admissibility and then determines whether there has been a violation. If it finds a violation, the Court orders certain individual or general measures, as well as compensation. The execution of judgments, as in the case of individual complaints, is supervised by the CoM. The Court has so far decided on five inter-State cases.[70] Three of them are still pending execution before the CoM.[71]

The individual complaint mechanism of the ECtHR is the main mechanism envisaged by the ECHR, which states parties are obliged to accept. Accordingly, individuals can complain against the state party to the Court about alleged violations of their rights protected under the ECHR and its protocols. The Court carries out a strict admissibility review of these complaints and, if admissible, examines them on their merits before its above-mentioned judicial units. The Court conducts almost all of its examinations by written-based procedure, but in exceptional situations, where it deems it necessary, it holds public hearings.[72] When the Court holds that there has been a violation of the ECHR, it orders the State to remedy the violation and to pay a determined amount of compensation to the applicant. It sends its final judgments to the CoM for their execution.[73]

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[66] ECHR art 47.
[67] Heffernan (n 18) 86; Forowicz (n 53) 152.
[68] Szklanna A, "The Execution of ECtHR Judgments Related to Inter-State Disputes" in Philip Czech and others (eds), *European Yearbook on Human Rights 2022* (Intersentia 2022), 382.
[69] ibid 382.
[70] *Ireland v the UK*, App no 5310/71 (ECHR, 18 January 1987 and 20 March 2018 (revision)); *Denmark v Turkey*, App no 34382/97 (ECHR, 05 April 2000); *Cyprus v Turkey*, App no 25781/94 (ECHR, 10 May 2001 (merits) and 12.05.2014 (just satisfaction)); *Georgia v Russia (I)*, App no 13255/07 (ECHR, 03 July 2014 (merits) and 31 January 2019 (just satisfaction)); *Georgia v Russia (II)*, App no 38263/08 (ECHR, 21 January 2021).
[71] Szklanna (n 68) 381.
[72] ECHR art 40.
[73] ECHR art 46(2).

The ECHR also provides a "friendly settlement procedure" to the Court in the settlement of disputes and the examination of complaints, as a difference from the HRC system. This procedure can be applied in either inter-state cases or individual complaints, as well as on either the merits of the case or the just satisfaction. It is considered as an inherent mechanism of the ECtHR to protect human rights, with the aim of "preserving reputation, avoiding costs, saving time, reducing caseload, and escaping a confrontation with governments".[74] According to the ECHR, the Court may, at any stage of the proceedings, assist the parties in securing a friendly settlement on the matter by issuing a brief decision confined to the issue and the solution. In this case, the Court conducts the proceedings confidentially, dismisses the application from the register, and sends the file to the CoM for the execution of its limited decision.[75]

Due to the topic of the thesis, the individual application mechanism of the ECHR should be further elaborated, as it has done for the HRC. The Court has been establishing its jurisprudence for more than sixty years, taking also into account the pre-1990 bi-institutional structure. As a judicial body, the ECtHR has developed a well-developed jurisprudence over time, interpreting ECHR rights in detail on various complex issues. In this respect, ECHR law is seen as a whole with its case law, which elaborates the ECHR, also in procedural aspects. As a matter of fact, in the framework of the admissibility criteria and of the gradual division of tasks within its judicial bodies, briefly mentioned above, previous judgments of the Court in similar cases play an important role.[76] It can be observed that its judgments frequently refer to the previous judgments and make justifications by following a cumulative and systematic structure. Therefore, it can be said that the Court has developed detailed legal reasonings in its case law. For these reasons, it is considered that the impact of its judgments can transcend its jurisdictional geography in some matters where there are not yet enough precedents or the challenges it has to deal with are universal.[77]

In interpreting the ECHR, the ECtHR draws in principle from the VCLT, as explicitly indicated in some judgments.[78] However, there is a strong reliance on the application of the "margin of appreciation", which is denied by the HRC, especially in the interpretation of certain rights in concrete cases.[79] In this respect, it can be said that the ECtHR, when interpreting the ECHR and

[74] Orakhelashvili A, "The European Convention on Human Rights and International Public Order" (2003) 5 Cambridge Yearbook of European Legal Studies 237, 255.
[75] ECHR art 39.
[76] ECHR, art 27-30, 35(3)(a); ECtHR, Rules of Court (23 June 2023), Rule 49-54, available at <https://www.echr.coe.int/documents/d/echr/rules_court_eng>.
[77] Nussberger (n 51) 194.
[78] Forowicz (n 53) 6; Bankovic and others v Belgium, App no 52207/99 (ECtHR, 12 December 2001).
[79] It has become an integral part of the Court's interpretation of certain rights. It is often applied with regard to Article 8-11 of the ECHR, however, it has been applied more recently in cases involving Article 6, and rarely

setting standards, has an important consideration to whether there is a certain ground of consensus among the States Parties. The application of this doctrine can usually be observed in the interpretation of vague terms, the scope of protection, and the balancing of interests.[80] It can also be understood from the fact that the ECtHR is composed of judges from a relatively homogenous group of States.[81] Besides the emphasis on common values and consensus, wide application of this practice is considered to be an approach that restricts the jurisdiction of the Court, in favor of State-parties.[82] For this reason, it is argued that wide application of this doctrine has some potential risks,[83] since the States may also justify their own faults and attitudes.[84]

Besides this main approach, the ECtHR sometimes departs from the ordinary meaning requirement of the VCLT through a strict interpretation of the terms of the ECHR, establishing that certain terms have independent and autonomous meanings.[85] At this point, judicial restraint is seen as predominant in the development and interpretation of certain standards, and judges' approaches have a strict relationship with the ECHR.[86] On the other hand, especially in circumstances where the "margin of appreciation" is applied in certain issues, a "living instrument" approach to the interpretation of the rights and setting standards is also explicitly taken.[87] In such situations, the Court practices dynamic interpretation and judicial activism to ensure the standards and protections comply with the needs of the time.[88] Thus, it can be said that both judicial restraint and judicial activism are applied to a certain extent in the interpretation of the ECHR by the Court.[89]

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applied Article 2-3 which contain "rights of an absolute or close to absolute nature", see Shany Y, 'Margin of Appreciation' in Christina Binder and others (eds), *Elgar Encyclopedia of Human Rights*, vol 3 (2022) 443.

[80] P van Dijk, *Theory and practice of the European Convention on Human Rights* (Kluwer Law and Taxation Publishers 1984) 83; George Letsas, 'Two Concepts of the Margin of Appreciation', *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 80-81 <http://dx.doi.org/10.1093/acprof:oso/9780199203437.003.0005>.

[81] Forowicz (n 53) 152.

[82] Ibid 8.

[83] It has been viewed as incompatible with the universality of human rights. Furthermore, it has been regarded as inappropriate since the domestic authorities` interpretations are untrustworthy, and the application of this doctrine does not provide sufficient safeguards against "tyranny of majority", see Shany (n 79) 445.

[84] Müllerson R, 'The Efficiency of Individual Complaint Procedures: The Experience of CCPR, CERD, CAT and ECHR' in Arie Bloed and others (eds), *Monitoring Human Rights in Europe* (Brill-Nijhoff 1993) 41 <http://dx.doi.org/10.1163/9789004481893_006>.

[85] This specific interpretation approach can be seen as the Court`s development of its own vocabulary, see Nussberger (n 51) 104.

[86] Forowicz (n 53) 10.

[87] Nussberger (n 51) 78.

[88] Forowicz (n 53) 11, 14.

[89] See, for the tension between judicial restraint and judicial activism in the Court's approach, Ed Bates, 'Activism and Self-Restraint: The Margin of Appreciation's Strasbourg Career … Its "Coming of Age"?' (2018) 36 Human Rights Law Journal 261, p 264.

The judgments of the ECHR are binding, contrary to the views of the HRC.[90] This strict binding characteristic is exercised under the supervision of the CoM, as expressly provided by the text of the Convention.[91] The execution system of binding judgments is seen as the main advantage of the ECtHR system, compared to other international protection mechanisms, especially the HRC. For this reason, this execution system, a distinctive feature of the ECtHR in protecting and monitoring treaty rights, can be considered as an important monitoring means after the examination of individual complaints and inter-state cases. The CoM's enforcement procedure consists of the submission of a report on the implementation of the judgment by the State within a certain period of time, meetings held based on this report, and the termination of the reporting process or, if necessary, the follow-up of the execution with additional reports. During this process, if the CoM finally concludes that the State has failed to implement the judgment, it applies to the ECtHR. If the ECtHR finds that the CoM is right and that the State party has breached its obligation to implement the judgment, it sends the file to the CoM for sanctions to be imposed on the State concerned.

"The common public order" approach of the ECHR is also reflected in the binding nature of judgments, which in principle have individual consequences, but in some cases, they have effects beyond the individual and even beyond the State-party complained of. Where the breach of the ECHR arises from a concrete practice of State law, the Court's decision of course requires an individual measure. In cases where the breach in question is due to a gap in the State party's legal system or the incompatibility of existing law with the ECHR, the implementation of the judgment requires more than individual measures. Indeed, in such a case, the enforcement of the judgment will, in principle, be implemented at the individual level. However, given the binding nature of the Court's judgments and the strict enforcement regime explained above, the possible increasing number of future applications and violation judgments against the State concerned on similar issues obliges the State to make more general legal regulations or amendments. Similarly, the principles set by the Court in its judgments, in particular the procedural requirements, are taken into account by other States Parties not party to the case and encourage them to bring their legislation into compliance with the Convention.[92]

In sum, there are several differences between the ECtHR and the HRC, both in the weight of their mechanisms in monitoring activities, structural and functional characteristics, and in their approach to interpreting their treaties and thus fundamental human rights. Today, it can be said

[90] Müllerson (n 84) 36.
[91] ECHR art 46.
[92] Nussberger (n 51) 173; Müllerson (n 84) 35.

that both bodies play significant roles in the development and implementation of international human rights law.

CHAPTER II:
Case-Law on Personal Liberty and Security

Article 9 of the ICCPR and Article 5 of the ECHR are provisions guaranteeing the right to personal liberty and security. The ECHR was inspired by the same universal source as the ICCPR, the UDHR, but was written before the ICCPR. The two texts protect the same right in very similar terms but slightly differ from each other in some wordings. In addition, the interpretation of both provisions by the HRC and ECtHR, are key sources on how this right is protected by different mechanisms based on similar texts.

This chapter examines how these two mechanisms interpret the right to liberty and security under their individual complaint mechanisms. Important similarities in their approach to this essentially same right will be addressed, however, for the scope and aim of the research, the focus will be on the issues where their approaches differ.

This chapter closely follows the order of the paragraphs of both articles. It, first, discusses the approaches to the concepts of the "right to security" and the "right to liberty". Subsequently, it compares the scope of application of the right to liberty with the principles on the restriction of personal liberty. It then proceeds by the differences in approach to the rights of persons deprived of their liberty and the related standards according to the order of the concerned articles.

2.1. Concept of the Right to Security

Both treaty texts refer to the right to liberty and security of the person in the same terms: "*Everyone has the right to liberty and security of person...*"

However, the interpretation and application of the treaties about the concept of protection of these two rights are completely different. Both treaty articles include the right to security only in the sentence quoted above. Subsequent paragraphs of Article 9 of the ICCPR and Article 5 of the ECHR protect the rights of persons deprived of their liberty. Therefore, the protection of these articles appears to focus on the right to liberty. As can be seen from this, the basis for the difference in interpretation of the right to security is whether it is part of a compound concept with the right to liberty or whether it provides separate protection from that. The HRC interprets the right to security as an autonomous and separate right, independently from the right to

liberty.[93] However, it is also recognized that problems relating to the right to security often arise in cases of deprivation of liberty.[94] Nevertheless, the Committee has consistently stated its approach in this regard from its early views,[95] that there is no basis for narrowing the right to security to formal deprivation of liberty situations when interpreting the Convention and its scope of protection.[96] Thus, the HRC interprets the right to security as encompassing both the right to security in deprivation of liberty and the right to security of the person in other circumstances, but ultimately as a right independent of liberty.

The right to security, as interpreted by the HRC, means the right to be free from the "intentional infliction of bodily or mental injury".[97] Thus, the right to personal security inevitably entails a close relationship and interconnection with other fundamental rights. In some cases, for example, a violation of a detainee's right to security and a violation of the prohibition of torture appear to be closely linked.[98] Similarly, in some cases, the protection of the right to life and the right to security involves certain areas of overlap.[99]

HRC was concerned with both the prohibition of torture and the right to security in the individual complaint of a person who alleged that he had been tortured while in police custody and that, after his release, he was subjected to pressure and harassment by the police when he complained about the torture. In this case, *Rajapakse v Sri Lanka*,[100] the HRC found that, in the particular circumstances of the case, the treatment against the author during detention violated

[93] General Comment no 35 (n 47) para 9 (with references).
[94] Taylor Paul M, *Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press 2020) 247.
[95] *Paez v Colombia*, UN Doc CCPR/C/39/D/195/1985 (12 July 1990) para 5.5 : "*The first sentence of article 9 does not stand as a separate paragraph. Its location as a part of paragraph one could lead to the view that the right to security arises only in the context of arrest and detention. The travaux préparatoires indicate that the discussions of the first sentence did indeed focus on matters dealt with in the other provisions of article 9. The Universal Declaration of Human Rights, in article 3, refers to the right to life, the right to liberty and the right to security of the person. These. elements have been dealt with in separate clauses in the Covenant. Although in the Covenant the only reference to the right of security of person is to be found in article 9, there is no evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty. At the same time, States parties have undertaken to guarantee the rights enshrined in the Covenant. It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because that he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant.*"; see also *Dias v Angola*, UN Doc CCPR/C/68/D/711/1996 (20 March 2000) para 8.3.
[96] Taylor (n 94) 246; *Paez v Colombia* (n 95); *Chongwe v Zambia*, UN Doc CCPR/C/70/D/821/1998 (9 November 2000); *Dias v Angola* (n 95).
[97] General Comment no 35 (n 47) para 9.
[98] General Comment no 35 (n 47) para 56,58; see also connection CCPR `General Comment 20´ on the Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), adopted by the Committee at its 44th session (1992).
[99] Taylor (n 94) 247-248.
[100] *Rajapakse v Sri Lanka*, UN Doc CCPR/C/87/D/1250/2004 (5 September 2006).

the prohibition of torture. HRC assessed the right to security only in relation to the pressures and harassment to which the author was subjected after his release and found a violation of Article 9(1) of the Convention, finding that the State party had failed to take adequate measures to ensure the applicant's security and had failed to fulfil its obligations.[101]

The HRC has also dealt with complaints alleging violations of the right to life and the right to security and has reached different conclusions on this intersection. For example, in some cases involving life-threatening enforced disappearances, the HRC has found violations of both the right to life and the right to security.[102] In another case, the author who was seriously injured as a result of excessive use of force and shooting by the police, the HRC found violations of both the right to life and the right to security. The HRC considered the use of excessive force to the point of endangering life as a violation of the right to life, while it considered the fact that he was injured by the police was a violation of the right to security.[103] In some complaints based on similar facts, the HRC found a violation of the right to life but did not need to examine the right to security.[104] In any case, however, the HRC has noted that the right to security is a right that provides broader protection because it covers non-fatal injuries.[105]

In the HRC's views on the right to security, there is a strong emphasis on the positive obligation of the state to protect the security of individuals.[106] In *Rajapaksa v Sri Lanka*, the State was considered to have failed to conduct an effective investigation and to take adequate and appropriate measures concerning the persecution and violence suffered by the applicant, despite providing her with police protection.[107] The intentional inflictions of bodily or mental injury, death threats,[108] abduction cases,[109] etc., are particularly important in terms of demonstrating the state's responsibility to conduct investigations and take effective measures against the actions of non-state actors. In this line, according to Schabas, this approach to the right to security aims to "develop the obligation of States to protect horizontal violations, by non-State

[101] ibid para 9.2.
[102] *Guezout v Algeria*, UN Doc CCPR/C/105/D/1753/2008 (19 July 2012) para 8.4-8.7; similarly *Millis v Algeria*, UN Doc CCPR/C/122/D/2398/2014 (06 April 2018).
[103] *Chongwe v Zambia* (n 96), para 5.2-5.3.
[104] Taylor (n 94) 247 (with references).
[105] General Comment no 35 (n 47) para 55.
[106] for the first and more comprehensive interpretation, see again *Paez v Colombia* (n 95) para 5.5.
[107] *Rajapakse v Sri Lanka* (n 100) para 9.2.
[108] State`s failure to investigate death threats to the author and his family after custody, see *Silva Gunaratna v Sri Lanka*, UN Doc CCPR/C/95/D/1432/2005 (23 April 2009) para 8.4; State`s failure to investigate death threats of police officers to the author, see *Njaru v Cameroon*, UN Doc CCPR/C/89/D/1353/2005 (19 March 2007) para 6.3; see Taylor (n 94) 248.
[109] *Nzo Mambu v Democratic Republic of Congo*, UN Doc CCPR/C/118/D/2465/2014 (3 November 2016) para 9.2.

actors".[110] In addition to that, under the right to security, the HRC also addresses the negative obligation of the state to refrain from acts prejudicial to the security of the person.[111] In particular, the legitimacy of state actions based on a particular use of force in terms of the right to security is discussed in a manner similar to that in comparable situations under the right to life. However, given that its scope of application is considered broader than that of the right to life, the State, in this respect, has broader negative obligations than those relating to the right to life.[112]

The ECtHR's approach to the right to security under Article 5 of the ECHR is completely different. First, the ECtHR interprets the right to security under Article 5 as not being of a character independent of the right to liberty. This interpretation, as set out in an early decision of EComHR,[113] is based on the historical context of its drafting process and the legislative context. According to that, Article 5 specifies that the "right to security" is meant to safeguard individuals from being arbitrarily arrested. Moreover, in other provisions of the Convention of a similar designation, the first paragraph of the provision recognizes and protects the right, while the second paragraph sets out the criteria for how that right may be restricted. Thus, it has been interpreted that Article 5 essentially protects the right to liberty, while security refers to its means of protection or its procedural dimension.[114]

Thus, in essence, it can be said that the ECtHR interprets the right to security under Article 5 ECHR as procedural safeguards to protect the person from arbitrary deprivation of liberty. A claim of violation of the right to security under Article 5 by an applicant whose village was bombed and whose house was damaged by security forces in a counterterrorism conflict was rejected by the Court on the grounds mentioned above.[115] The approach of the ECHR is the same as this, regarding death threats and personal safety. For example, in *Hajduva v Slovakia*, the Court, the applicant was threatened and attacked both verbally and physically by her ex-husband. She claimed that the denial of her request for her ex-husband`s detention violated her

[110] William A Schabas, *European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 228.
[111] General Comment no 35 (n 47) para 9: "*They should also prevent and redress unjustifiable use of force in law enforcement, and protect their populations against abuses by private security forces, and against the risks posed by excessive availability of firearms.*".
[112] Taylor (n 94) 247.
[113] *East African Asians v United Kingdom* (1981) E.H.R.R. 76.
[114] Rhonda Louise Powell, 'The Right to Security of Person in European Court of Human Rights Jurisprudence' [2006] SSRN Electronic Journal 3-4 <http://dx.doi.org/10.2139/ssrn.959257>.
[115] ibid 5; *Mentes and Others v Turkey [GC]*, App no 23186/94 (ECHR, 28 November 1997).

right to security. The Court found the applicant's claim inadmissible on the same grounds, referring to its previous judgments.[116]

Although the Court maintains its approach on this issue, there are decisions in which it is arguable that it has considered the right to security separately from the right to liberty. One of the first notable judgments in this regard is *Öcalan v Turkey*. The applicant, a Turkish citizen accused of being the founder and leader of a terrorist organization (PKK), was arrested on Kenyan territory and brought to Turkey without being subjected to the extradition procedure. The Court examined the allegation that the legal procedures and guarantees relating to the arrest were not fulfilled during this process. The Grand Chamber considered that what was at stake is the right to security as well as the right to liberty.[117] In later decisions, the right to security was also mentioned and addressed by the Court in applications concerning cases of disappearance and suspicions of secret executions.[118] There are some arguments among scholars saying that, in this case, the ECtHR has considered the right to security separately from the right to liberty.[119] In my opinion, cases of disappearance resulting from the failure to hear from persons for whom there is data on their detention and/or the failure to provide certain safeguards in this regard are matters of the protection of the person from arbitrary detention and the procedural aspect of detention. Thus, it is still in line with the basic approach taken by the ECHR since its early days. But it is also clear that these decisions deserve a different kind of attention under the subject matter. Indeed, the important development in the Court's approach is that in these cases, it has clarified that the State has a positive as well as a negative obligation to protect the person from arbitrary detention, i.e., to protect individuals` safety.[120] Accordingly, it is declared that the State has a responsibility on such a basis to take measures and conduct effective investigations concerning the fate and safety of the person.[121] Indeed, the Court maintains this

[116] *Hajduova v Slovakia*, App no 2660/03 (ECHR, 30 November 2011) para 53-56, especially para 54 to see that the Court maintained its previous approach: "...*The phrase "security of the person" must also be understood in the context of physical liberty rather than physical safety (see East African Asians v. the United Kingdom, no. 4626/70 et al., Commission's report of 14 December 1973, Decisions and Reports 78, p. 67, § 220 and Zilli and Bonardo v. Italy (dec.), no. 40143/98, 18 April 2002). The inclusion of the word "security" simply serves to emphasise the requirement that detention may not be arbitrary.*".

[117] *Öcalan v Turkey*, App no 46221/99 (ECHR, 12 May 2005) para 85: "*An arrest made by the authorities of one State on the territory of another State, without the consent of the latter, affects the person concerned's individual rights to security under Article 5 § 1.*".

[118] *Tanis v Turkey*, App. No.65899/01 (ECHR, 2 August 2005); for further examples see Powell (n 114) 8

[119] Powell (n 114) 7-8.

[120] ibid 9; Schabas (n 110) 228-229.

[121] *Osmanoglu v Turkey*, App no 48804/99 (ECHR, 24 January 2008); *Enzile Özdemir v Turkey*, App no 54169/00 (ECHR, 08 January 2008).

approach to the State's protection obligations under the right to security under Article 5 in relation to disappearances and suspicions of secret executions.[122]

Nevertheless, the ECtHR has addressed state responsibility regarding the acts of non-state actors, as the HRC did, for example in human trafficking cases. However, in these cases, where smuggling involves deprivation of liberty, the Court's approach to the right to security is also linked to the right to liberty, but with an emphasis on the obligation to protect from non-state action.[123] Thus, these practices of the Court were also confined to deprivation of liberty situations.

The protection guaranteed by the HRC in relation to the right to security under Article 9 of the ICCPR in cases of death threats, hatred, intimidation, etc., may not be considered by the ECtHR under Article 5 of the ECHR, but under Article 8, which protects the right to privacy to the extent that it is relevant, or under the prohibition of torture if such circumstances exist.[124] Furthermore, some argue that since the other`s security can be a legitimate aim for State interference, for some rights, the right to security is still "fundamental" under the ECHR system.[125] However, the same applies to the ICCPR system and does not provide the same protection as a direct guarantee. It is, therefore, appropriate to just note here that in sum, in the context of the right to liberty and security of a person, the ECtHR has not interpreted the right to security of a person as a right independent of the right to liberty.

2.2. Right to Liberty

Article 9 of the ICCPR and Article 5 of the ECHR guarantee the right to liberty in similar terms but slightly differ, to some extent, in its scope and protection.

Article 9(1) of the ICCPR states that:

“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

Article 5(1) of the ECHR states that:

[122] Peter Ramsay, *Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press 2012) 115.
[123] Schabas (n 110) 229.
[124] Powell (n 114) 17.
[125] Ramsay (n 122) 120.

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

2.2.1. Scope of the Deprivation of Liberty

Both treaties have a similar approach to the scope of personal liberty. Relevantly, personal liberty is defined as freedom from physical restraint. In this context, although it is clear that both provisions include arrest and detention in the classical sense, the scope of deprivation of liberty is not limited to them. Administrative detention, house arrest, imprisonment based on a conviction, compulsory hospitalization, etc., are interpreted as deprivation of liberty for the purposes of both treaty provisions.[126] In addition to that, both treaty systems recognize that freedom of the person differs in principle from the freedom of movement protected by Article 12 of the ICCPR and Article 2 of Protocol No. 4 of the ECHR. This difference is mainly due to the fact that interference with personal liberty restricts the person more severely than interference with freedom of movement. In other words, to talk about a restriction of personal freedom rather than freedom of movement, the person must be more severely and intensely restricted.[127] However, this distinction is not always clear, and it is sometimes difficult to

[126] General Comment no 35 (n 47) para 5 (with references); ECHR, Guide on Article 5 (Right to Liberty and Security), Council of Europe/European Court of Human Rights (2023) para 19 (with examples).
[127] General Comment no 35 (n 47) para 5; ECHR Guideline (n 126) para 8.

determine which right the interference is directed against, so which right it falls under.[128] Beyond this distinction, sometimes it is even difficult to determine the scope of the application of personal liberty on its own, in other words, whether there has been a "deprivation of liberty". Although the criteria and approaches of the HRC and the ECtHR in this context are generally similar, there are certain differences, at least in their jurisprudence.

The HRC assesses whether the interference can be considered to fall within the scope of personal liberty on the basis of whether the person is restricted in a narrower space, his or her subjective experience, whether he or she is free to leave, and whether there are certain characteristic circumstances.[129] The ECtHR, on the other hand, makes a similar assessment based on objective and subjective dimensions.[130] In this respect, the intensity is also an important criterion to determine it. On the other hand, both treaties inherently condition the deprivation of liberty on the lack of free consent.[131] However, in some cases, the ECtHR recognizes the existence of interference with personal liberty, even in the presence of consent, based on the importance of the right to liberty and security in a democratic society.[132] Therefore, it can be said that approaches to the "consent" factor of these bodies sometimes differ from each other.

In a complaint before the HRC, a 14-year-old minor was invited to the police station for identification in the context of a burglary investigation, based on witnesses' statements. After his statement was taken by the police, witnesses identified him and he was formally arrested and charged with the crime concerned. The HRC held that he could not be considered to have been deprived of liberty until he was formally arrested, based on the view that he had come to the police station of his own choice, and that he was free to leave until he was formally arrested.[133]

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[128] Schabas (n 110) 226.
[129] General Comment no 35 (n 47) para 5, 60.
[130] ECHR Guideline (n 126) para 8-11 (with references).
[131] General Comment no 35 (n 47) para 6: "*Deprivation of personal liberty is without free consent. …*"; ECtHR uses the term "valid consent", *Stanev v Bulgaria [GC]*, App no 36760/06 (ECHR, 17 January 2012) para 117 (with further references): "*...A person can only be considered to have been deprived of his liberty if, as an additional subjective element, he has not validly consented to the confinement in question*.".
[132] *N v Romania*, App no 59152/08 (ECHR, 28 November 2017) para 165; *Stanev v Bulgaria [GC]*, App no 36760/06 (ECHR, 17 January 2012) para 119: "*The Court has also held that the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention (see De Wilde, Ooms and Versyp v. Belgium, 18 June 1971, §§ 64-65, Series A no. 12), especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action.*".
[133] *Jessop v New Zealand*, Un Doc CCPR/C/101/D/1758/2008 (29 March 2011) para 7.9-7.10.

In a similar case before the ECtHR, the applicant, who voluntarily went to the police station in an investigation of violence and robbery and testified as a witness, was held at the police station until he was formally charged and arrested. In this case, despite the Government's objection that he was free to leave until the moment of his formal arrest and that he was there of his own free consent, the Court held that this was unrealistic and in effect deprived the applicant of his liberty.[134] The ECHR later held in another case,[135] where the applicant was invited to give evidence at a police station in an insurance fraud investigation and was subsequently formally charged and arrested, that it was unrealistic to assume that the applicant was free to leave the police station until the moment of his formal arrest, leaving aside the question of whether he had been coerced not to do so. In this case, the ECHR, noting the importance of personal liberty in a democratic society, commented that deprivation of liberty can occur even where a person is present in a place with his or her consent. It further stated that the Court must determine the realities behind appearances. It, thus, decided that the period up to the moment of formal accusation and arrest should also be considered as deprivation of liberty.[136]

The differences in approach to the scope of deprivation of liberty can also be seen in the case of "solitary confinement". The HRC considers further restriction of a person already deprived of liberty to be another deprivation of liberty. For example, the use of physical restraining devices on a person being held for psychiatric treatment is a deprivation of liberty in this context.[137] Similarly, the ECtHR considers the physical restraint of a person held for psychiatric treatment as a deprivation of liberty.[138] However, in the case of, for example, solitary confinement of a detainee, although the HRC considers the matter primarily in the context of the "rights of the detainee"[139], which is not covered by the ECHR, it considers this further restriction, which cuts off contact with the outside world, as also a deprivation of liberty.[140] On the other hand, the ECtHR distinguishes this from the isolation of a person held for psychiatric purposes. Accordingly, the ECtHR considers interventions such as the imposition of solitary confinement on a person already held in prison as administrative measures affecting only prison conditions and excluded from the scope of the right to liberty and security under Article 5 of

[134] *I.I. v Bulgaria*, App no 44082/98 (ECHR, 09 June 2005) para 84-87.
[135] *Venskutė v Lithuania*, App no 10645/08 (ECHR, 11 December 2012).
[136] ibid para 71-74.
[137] General Comment no 35 (n 47) para 5.
[138] *Schneiter v Switzerland*, App no 63062/00 (ECHR, 31 March 2005).
[139] ICCPR art 10; Related examples for violation of Article 10 of the ICCPR, *Samathanam v Sri Lanka*, UN Doc CCPR/C/118/D/2412/2014 (28 October 2016); *Bagale v Nepal*, UN Doc CCPR/C/130/D/2777/2016 (02 November 2020).
[140] General Comment no 35 (n 47) para 5.

the ECHR.[141] Thus, while both mechanisms agree that this practice primarily concerns the conditions of detention, and even though the HRC also specifically assesses this issue under Article 10 of the ICCPR protecting the rights of detainees, the ECtHR does not consider this further restrictive measure to be a deprivation of liberty in nature, while the HRC considers it to fall into this category, at least in principle.

Another difference in interpretation of the scope of deprivation of liberty arises, to a certain extent, when asylum seekers are held at borders or airport transit zones for identity verification. The HRC considers the detention of persons for this purpose in transit zones and at borders to be a deprivation of liberty in nature.[142] The ECtHR, on the other hand, evaluates this action not on its nature but based on the four criteria set out in its jurisprudence.[143] By assessing these criteria, the detention of persons for the same purpose may, in some cases, be considered a deprivation of liberty. In contrast, in other cases, it may not, and the right to liberty and security of a person may therefore be held not to be applicable. In a case examined by the Grand Chamber of the ECtHR,[144] applicants, who arrived at an airport in Russia, requested asylum, and were held in the transit area for varying periods of time, starting from five months, for identity verification, were considered to be deprived of liberty. In that case, the Court recognized that the State had the right to verify the identity of persons arriving at its border and seeking entry and to take the necessary administrative steps, including the right to make them wait for a certain period of time. However, it held that the measure fell within the scope of deprivation of liberty, relying in particular on the failure of the Russian authorities to provide sufficiently clear legal provisions on the duration and procedure of these measures and on the fact that the applicants were not practically free to travel to any country other than Russia and their country of origin.[145] In another case heard on the same day before the Grand Chamber of the ECtHR, the Court, departing from the Chamber's judgement in which a similar assessment

[141] *Stoyan Krastev v Bulgaria*, App no 1009/12 (ECHR, 06 October 2020) para 52-53.
[142] General Comment no 35 (n 47) para 5: "*...Examples of deprivation of liberty include …, confinement to a restricted area of an airport, as well as being involuntarily transported. …*", para 60: " *The liberty of movement protected by article 12 of the Covenant and the liberty of person protected by article 9 complement each other. Detention is a particularly severe form of restriction of liberty of movement, but in some circumstances both articles may come into play together. Detention in the course of transporting a migrant involuntarily, is often used as a means of enforcing restrictions on freedom of movement. Article 9 addresses such uses of detention in the implementation of expulsion, deportation or extradition.*".
[143] *Z.A. and Others v Russia [GC]*, App no's 61411/15 - 61420/15 - 61427/15 - 3028/16 (ECHR,21 November 2019), para 138: "*...the factors taken into consideration by the Court may be summarised as follows: i) the applicants' individual situation and their choices, ii) the applicable legal regime of the respective country and its purpose, iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants*.".
[144] *Z.A. and Others v Russia* (n 143).
[145] ibid para 133-156.

was made, held that the situation of the applicants, whose asylum claims were rejected within a few hours in the land-border transit zone in Hungary and who were held there for 23 days during the appeal process, could not be considered a deprivation of liberty on the basis that, unlike the other case, the domestic law contained adequate regulations limiting the duration and prescribing the procedure and that the State had complied with it.[146] For these reasons, it held the application under Article 5(1) of the ECHR was inadmissible *ratione materiae*.

The ECtHR thus does not characteristically consider the detention of asylum-seekers in transit areas or at borders as a deprivation of liberty. It assesses whether a deprivation of liberty exists under four criteria. However, where certain legal clarity and safeguards are provided, it does not make a categorical assessment, so persons in such situations, even who are detained for 23 days for the purpose of extradition, may not be covered by the protection Article 5 of the ECHR.

2.2.2. Lawfulness, Permissible Grounds and Non-Arbitrariness

The ICCPR and the ECHR do not protect personal liberty as an absolute right. Both treaties allow for the restriction of liberty in certain circumstances. Nevertheless, these two treaty texts set the criteria for the compatibility of the restriction with their provisions in different terms as can be seen where quoted above.

The common prior criterion clearly laid down by both treaties is legality. Legality, as stated in their texts, refers to compliance with domestic law. Accordingly, the grounds and procedural practice of detention must be regulated in domestic law. Only in this condition can the state benefit from the permissible limits.[147] Accordingly, under both treaties, detention is unlawful if its basis is not expressly laid down in domestic law, if it is not carried out in accordance with the rule of law, or if it is carried out in violation of domestic law.[148]

Whereas the ICCPR merely states that personal liberty may be restricted on certain grounds in accordance with domestic law with the phrase "such grounds", the ECHR explicitly counts these grounds by an exhaustive list. Both the existence of an accepted ground, together with compliance with domestic law, form part of the "lawfulness" requirement.

The justification of an arrest or detention also depends on it not being arbitrary. Arbitrariness takes place differently in the treaty texts. Undoubtedly, the fundamental function of the right to

[146] *Ilias and Ahmed v Hungary [GC]*, App no 47287/15 (ECHR, 21 November 2019) para 210-249.
[147] Taylor (n 94) 252.
[148] ibid 251 (with references); Schabas (n 110) 230 (with references).

liberty and security is to protect the person from arbitrary detention.[149] While the ICCPR explicitly mentions the prohibition of arbitrary detention in the first paragraph of ICCPR Article 9, the ECHR does not. Indeed, the ECtHR has, on several occasions, stated that arbitrary detention cannot be compatible with the ECHR's article on the right to liberty and security, expressing this protection similar to the wording of the ICCPR.[150] However, the ECtHR considers protection against arbitrariness to be essentially part of the lawfulness criterion.[151] The fact that the ICCPR distinguishes between arbitrariness and lawfulness is also reflected in the views of the HRC. In some cases, the HRC has found violations on the question of lawfulness alone,[152] in some others, it has focused on the question of arbitrariness or both arbitrariness and lawfulness.[153] Nevertheless, despite the existence of the prohibition of arbitrariness under both systems, the HRC and the ECtHR similarly interpret arbitrariness as "broader than illegality and lawfulness".[154] Both mechanisms can therefore find violations by finding that a lawfully applied measure of detention is arbitrary.

The HRC defines arbitrariness in terms of unreasonableness, unnecessity, or disproportionality, as well as inappropriateness, unfairness, unpredictability, and incompatibility with due process.[155] On the other hand, ECtHR considers this in terms of the relationship to the legitimate grounds listed under Article 5(1) of the ECHR, authorities' manner being in bad faith or not, necessity, and proportionality.[156] In addition, both bodies require authorities to periodic review and justification to ensure that continuing deprivation of liberty is not arbitrary, except for the execution of judicially imposed fixed-term sentences.[157] Thus, for both the HRC and the ECtHR, the legitimate grounds for detention provided for by their treaties are of primary

[149] Schabas (n 110) 232.
[150] *ibid*; *S., V. and A. v Denmark [GC]*, App no 35553/12 36678/12 36711/12 (ECHR, 22 October 2018) para 74; *A. and Others v the UK [GC]*, App no 3455/05 (ECHR, 19 February 2009) para 164.
[151] ECHR Guideline (n 126) para 39-42.
[152] *Arshidin Israil v Kazakhstan*, UN Doc CCPR/C/103/D/2024/2011 (31 October 2011) para 9.2; *Umarova v Uzbekistan*, UN Doc CCPR/C/100/D/1449/2006 (19 October 2010) para 8.4.
[153] *Kurbonov v Tajikistan*, UN Doc CCPR/C/86/D/1208/2003 (16 March 2006) para 6.5; *Coronel et al v Colombia*, UN Doc CCPR/C/76/D/778/ 1997 (24 October 2002) para 9.4.
[154] General Comment no 35 (n 47) para 12 (with further references); *Crenga v Romania [GC]*, App no 29226/03 (ECHR, 23 February 2012) para 84; *A. and Others v the United Kingdom* [GC], App no 3455/05 (ECHR, 19 February 2009) para 164.
[155] General Comment no 35 (n 47) para 12.
[156] *James, Wells and Lee v the UK*, App nos 25119/09 57715/09 57877/09 (ECHR, 18 September 2012) para 191-195; see also similar expressions in *S. V. and A. v Denmark [GC]*, App nos 35553/12 36678/12 36711/12 (ECHR, 22 October 2018) para 76: "*One general principle established in the case-law is that detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities (see, for example, Bozano v. France, 18 December 1986, § 59, Series A no. 111; Saadi, cited above, § 69; and Mooren v. Germany [GC], no. 11364/03, §§ 77-79, 9 July 2009) or where the domestic authorities neglected to attempt to apply the relevant legislation correctly (see Benham v. the United Kingdom, 10 June 1996, § 47, Reports 1996-III; Liu v. Russia, no. 42086/05, § 82, 6 December 2007; and Marturana v. Italy, no. 63154/00, § 80, 4 March 2008).*".
[157] General Comment no 35 (n 47) para 12 (with references); ECHR Guideline (n 126) para 41-42.

importance in the assessment of lawfulness and arbitrariness. This is because an illegitimate ground, or inadequate or inappropriate relationship with a legitimate ground, can lead to arbitrary detention without the need for further assessment.[158]

At first glance, the fact that the ICCPR, like the ECHR, does not provide a list of grounds for deprivation of liberty suggests the potential for incompatibility between the two systems in terms of what grounds are considered legitimate, but it should be noted that these systems have largely overlapping approaches to permissible grounds. The grounds set out in Article 5(1)(a-f) of the ECHR are presumed to be legitimate in the HRC's General Comment No. 35 on Article 9, where it clarifies the expression "such grounds".[159]

The differences between the HRC and the ECtHR in their approaches to the protection against arbitrary detention are difficult to analyze separately on the grounds of lawfulness and arbitrariness. These elements, besides their definitional and theoretical interrelationship, often seem to be intertwined in their practical application. On the other hand, while these two bodies, despite differences in the text of the treaties, and although they see these elements as largely of similar meaning and importance, there are practical examples where the assessment of arbitrariness and unlawfulness on concrete grounds and their approach to the justification of detention differ. Therefore, their assessments on non-arbitrariness and lawfulness need to be compared and analyzed under such issues and grounds as below.

Security Detention

Security detention (also known as `internment´) is one area where some differences between the two bodies` approaches can be observed. Notwithstanding the HRC's previous and last general comment upholding detention on security grounds,[160] the ECtHR has until recently found this practice incompatible with the foundations of Article 5(1) of the ECHR, in particular paragraph 5(1)(c), except in exceptional circumstances.[161]

Security detention, also known as administrative detention or internment, occurs due to the State's concern to protect public security when the State detains a person without imprisonment

[158] *James, Wells and Lee v the UK*, App nos 25119/09 57715/09 57877/09 (ECHR, 18 September 2012) para 191-195; General Comment no 35 (n 47) para 12-14.
[159] General Comment no 35 (n 47) para 5, 14.
[160] ibid para 15; Doug Cassel, `*International Human Rights Law and Security Detention´* [2009] 40 Case Western Reserve Journal of International Law 3, 388; Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (Oxford University Press 2016) 121; Burchill and Conte (n 3) 112.
[161] Cassel (n 160) 390; *Lawless v Ireland*, App no 332/57 (ECHR, 1 June 1961).

and without concrete charges. Such detention is considered to have significant risks of violations under these treaties.

The HRC requires that such detentions cannot be arbitrary, recalling the risk of violations involved, and must provide the procedural rights protected under the following paragraphs of Article 9 of the ICCPR. Besides, it is again mandatory that the measure is prescribed by law. Moreover, this type of detention cannot be applied in situations where the criminal justice system and any effective measures are available and applicable. It can only be applied in very exceptional circumstances when there is a direct, concrete, and immediate threat to security.[162] General grounds such as "public safety", including political or military unrest, are not accepted. The burden of proof is on the State to prove the danger to the person and the justification of the measure.[163]

The ECtHR states that, in principle, security detentions are contrary to the ECHR. However, in exceptional circumstances, such as war, it may be considered in conformity with the Convention if a derogation has been declared.[164] It appears to be close to the 5(1)(c) under the ECHR, although that ground requires the application of criminal law, and indeed cannot be justified by a general security concern or criminal tendency, such as "mafia", but requires a concrete and specific security threat.[165] Moreover, perhaps one of the most important aspects regarding this extraordinary concept of such detention and its arbitrariness, which is highly risky on treaty guarantees and requires proportionality and necessity even in the case of derogation, is the applicability of ordinary or other alternative measures. In its early judgments[166], the ECHR discussed the availability of other alternatives, as envisaged by the HRC and stated in its General Comment No. 35, while in two recent Grand Chamber judgments[167], in which it reached different conclusions, the ECHR does not, however, seem to have given much weight to the assessment of necessity and proportionality. In *Al Jedda v the UK*,[168] following the invasion of Iraq by the US-led military coalition, a British military force mandated by the UN Security Council to maintain security and tranquillity held the applicant in preventive detention for allegedly posing a security threat. In this case, the ECtHR examined the case under Article 5 of the ECHR, despite the UK's derogation notification. The Court found

[162] General Comment no 35 (n 47) para 15.
[163] *Ibid.*
[164] Hill-Cawthorne (n 160) 121.
[165] Cassel (n 160) 390-391.
[166] *Lawless v Ireland* (n 161); for further examples, Cassel (n 161) 391-393.
[167] *Al Jedda v the UK [GC]*, App no 27021/08 (ECHR, 07 July 2011); *Hassan v the UK [GC]*, App no 29750/09 (ECHR, 16 September 2014).
[168] *Al Jedda v the UK [GC]* (n 167) para 97-110.

no conflict between the duty imposed on the UK by the UN Security Council and the obligation imposed by Article 5 of the ECHR and held that the applicant's preventive detention without charge constituted a violation. In *Hassan v the UK*,[169] a British military force in Iraq, again under a UN Security Council mandate, preventively detained the applicant on security grounds and subjected him to security screening. In this case, unlike in Al Jedda, the Court found the ground for the detention in the Third and Fourth Geneva Conventions, with particular reference to international humanitarian law texts. In this framework, the Court, applying a relatively limited review, found this excessive use of force to be compatible with the ECHR and held that there was no violation.

Thus, just as there is a difference between the approaches of the two bodies, particularly with regard to the practice of security detention, there is also a notable difference between two important Grand Chamber decisions of the ECtHR. Hill-Cawthorne attributes this difference to the approach to the relationship between human rights law and humanitarian law. In this respect, he explains the difference between these two ECtHR judgments in terms of whether or not there was an international conflict at the time of the facts of the case.[170] Accordingly, in the *Hassan* case, the Court was confronted with the facts of an international conflict where detailed humanitarian law rules existed, whereas in *Al-Jedda* case it was not faced with these two disciplines under the facts of a non-international conflict. When it comes to this relationship or conflict, it should be remembered that international human rights law is also applied in international conflicts. Nevertheless, the difference in whether security detention requires a derogation on treaty grounds, the general principles applied on this ground, and finally the recent ECtHR judgments show that the HRC is more inclined to apply the requirements of Article 9 of the ICCPR in any event.

Post-Conviction Preventive Detention

Preventive detention within criminal sentencing to protect the public is one of the controversial issues on which the HRC and the ECtHR have differed sometimes within their own mechanisms[171] and with respect to each other.

In its general comment No. 35, the HRC describes preventive detention as “the non-punitive period following the punitive period of a conviction to protect the safety of other individuals”. While recognizing this detention in principle and in practice, the HRC sets out a number of

[169] *Hassan v the UK [GC]* (n 167) para 96-111.
[170] Hill-Cawthorne (n 160) 199.
[171] Taylor (n 94) 259.

requirements to prevent arbitrariness.[172] In addition to the basic requirement that there are compelling reasons arising from the nature and gravity of the offense committed by the person and the likelihood of future offenses, it also must be applied as a last resort and that regular periodic reviews must be carried out to ensure whether the social danger is continuing and the detention is justified. In any case, it emphasizes that the concept of such detention leads to the State's obligation to take the necessary measures for the rehabilitation and reintegration of the person concerned.[173]

In *Rameka et al v New Zealand*,[174] which is cited in the HRC's general comment and mostly referred to in its subsequent views on this issue, the authors were convicted of sexual offenses and sentenced to imprisonment and preventive detention. The preventive detention measure, which was applied in accordance with domestic law, was based on the nature of the offense committed and psychiatric reports taken before sentencing, which assessed the authors' likelihood of committing similar offenses. In this case, the HRC found the procedure and reasons for the practice to be in conformity with the ICCPR, emphasizing that the mandatory annual reviews by the Parole Committee after a ten-year period of non-parole under domestic law were also carried out and that the detention was not arbitrary.[175] However, this view was fundamentally criticized by some Committee Members because of the concept of preventive detention. In a joint dissenting opinion, it was criticized the likelihood of re-offend is "an assertion, rather than a demonstration".[176] In the other dissenting opinion, it was criticized such preventive detention as a punitive measure, while it should not have.[177]

In *Dean v New Zealand*,[178] the author, who had been convicted twice for sexual offenses and had been warned that preventive detention could be imposed, was sentenced to imprisonment and preventive detention on a repeat conviction for offenses of a similar nature. The HRC, while relying on its view on *Rameka et al v New Zealand* in the main aspects of this case, recalled that the State has a duty in cases of preventive detention “to provide the necessary assistance that would allow detainees to be released as soon as possible without being a danger to the community”. However, it held that the author's detention was not arbitrary, since he was

[172] General Comment no 35 (n 47) para 15.
[173] *Dean v New Zealand*, UN Doc CCPR/C/95/D/1512/2006 (17 March 2009) para 7.5.
[174] *Rameka et al v New Zealand*, UN Doc CCPR/C/79/D/1090/2002 (06 November 2003).
[175] Ibid para 7.2-7.4.
[176] Ibid, Dissenting Opinion by Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Glèlè Ahanhanzo and Mr. Hipólito Solari Yrigoyen.
[177] Ibid, Dissenting Opinion by Mr Walter Kälin.
[178] *Dean v New Zealand*, UN Doc CCPR/C/95/D/1512/2006 (17 March 2009).

responsible for the fact that he had not yet been released by not participating in such programs.[179]

Fardon v Australia[180] is a highly remarkable case in which the HRC found the violation and made important observations on the subject matter. In that case, the author had been sentenced to 14 years' imprisonment for sexual offenses and, just before completing his sentence, his detention had been extended under a preventive detention regime at the request of the Public Prosecutor's Office, due to a change in the law on conditional release. It is noteworthy that, although the HRC found violations on more than one ground in this case, it noted that each of these grounds alone could constitute a violation. Firstly, the author's continued detention in the same prison without a new sentence was characterized as a renewed period of incarceration, essentially as "a fresh term of imprisonment". Although the applicant had completed his prison sentence, the retroactive application of the law based on a new civil procedure was found to be contrary to the Covenant. Moreover, although the decision was subject to the right to a fair trial due to its nature as a civil process, the fact that these guarantees were not provided has also been considered in this sense. Importantly, the HRC has stated that the conviction that a person poses a danger to society as a reason for preventive detention should be based not only on a psychiatric report but also on an assessment of the crime committed and the likelihood of future crimes, together with the findings of the crime. Therefore, the court evaluating the evidence of the crime committed must determine, together with the psychiatric report, the likelihood of future crime and whether preventive detention is necessary. Furthermore, the HRC has stated that it is only possible to establish this measure that the aim of rehabilitation and reintegration of the person expected from preventive detention cannot be achieved by other less intrusive means than detention.[181]

On the other hand, the ECtHR examines preventive detention based on whether it fits with one of the grounds listed in Article 5(1). Depending on the relied ground, the scope, and justification examination varies.

In *M. v Germany*,[182] the applicant, who was given a preventive detention order for up to 10 years to follow the execution of his prison sentence, claimed that the detention exceeding 10 years was arbitrary as a retrospective practice. In this case, ECtHR accepted the detention for 10 years within the scope of Article 5(1)(a) of ECHR. Therefore, continuing its assessment on

[179] *ibid* para 7.4 -7.5.
[180] *Fardon v Australia*, UN Doc CCPR/C/98/D/1629/2007 (18 March 2010).
[181] ibid para 7.4.
[182] *M. v Germany*, App no 19359/04 (ECHR, 17 December 2009).

the justification of the period exceeding 10 years, the ECtHR considered that continued preventive detention could only be justified under Article 5(1)(e), but that the domestic court had not based its decision on such a ground. It, therefore, held that, in the absence of a legitimate basis, the continued detention violated Article 5(1) of the ECHR, further concluding that retrospective detention could not be justified in this context.[183]

In *Haidn v Germany*,[184] the applicant had been convicted of sexual offenses for which he had been sentenced only to imprisonment and then subjected to preventive detention in a retrospective application by the domestic court responsible for execution. In this case, the ECtHR held that the basis for the concrete preventive detention could not be considered to be a conviction under Article 5(1)(a) because the execution court did not make a decision on guilt. Furthermore, the ECtHR noted that the detention could not be based on Article 5(1)(e), as the German criminal law system regulates the hospitalization of mentally ill persons differently from the detention of dangerous prisoners, and that the applicant's request for hospitalisation, who was considered to be a dangerous prisoner, had been refused by the competent court.[185]

In the more recent case of *Ilnseher v Germany*,[186] was brought before the Grand Chamber, the applicant was held in preventive detention following his sentence, pursuant to a law that came into force close to the completion of a 10-year sentence imposed on account of his age in a sexually motivated murder case. The decision was based on an expert psychiatric report obtained during the applicant's trial. In this case, the Grand Chamber assessed the applicant's detention under 5(1)(e), as it was not included in the conviction sentence. Accordingly, it found the preventive detention order in the applicant's case to be in conformity with the Convention on the grounds of necessity in the circumstances of the case and on technical psychiatric grounds, and that the facility in which the applicant was held and the rehabilitation program he underwent were appropriate for the purpose of his detention. In its assessment, the Court, which did not examine whether the applicant's continued detention was justified on a regular and periodic basis, did not find the retrospective application contrary to the Convention and held that the detention was in conformity with Article 5(1)(e) of the Convention.[187] This has led to many dissenting opinions annexed, as the Court had dealt with more than one aspect of such a detention practice before the Grand Chamber. Especially Judge Pinto de Abuquerque and Judge Dedov, in their comprehensive dissenting opinion, strongly criticized particularly the Court's

[183] Ibid para 86-105.
[184] *Haidn v Germany*, App no 6587/04 (ECHR, 13 January 2011).
[185] ibid para 73-97.
[186] *Ilnseher v Germany [GC]*, App no 10211/12-27505/14 (ECHR, 04 December 2018).
[187] ibid para 127-157.

acceptance of the State`s retrospective application: "...The retrospective conversion of a time-limited punitive security measure into a potentially life-long pseudo-medical confinement measure imposed on convicted offenders with *ex nunc* established 'mental disorders' is a historically and dogmatically unreasonable, let us say it, abusive interpretation that not only goes beyond the nature and purpose of the measure of preventive detention, but circumvents the prohibition of *nulla poena sine lege praevia* guaranteed in a State governed by the rule of law.".[188]

Thus, by recognizing such preventive detention as a permissible basis, the HRC examines arbitrariness based on the strict necessity and proportionality of the measure and the existence of periodic reviews. The ECtHR, on the other hand, focuses a significant part of its examination on which the detention is based. Despite the similarity of their general principles, it can be said that the HRC and ECtHR differ in the scope of their general legitimacy assessment and their view of retrospective practice.

Imprisonment after conviction and severity of the sentence

In the case of the execution of a prison sentence, the HRC and the ECtHR have, at times, different approaches to the appropriateness of the severity of the sentence under the right to liberty and security of person. The ECtHR considers such detention to be a legitimate ground under Article 5(1)(a) of the ECHR. Similarly, the HRC interprets it as legitimate ground under the expression "such grounds" in Article 9 of the ICCPR.[189] Even if the duration of the prison sentence affects the duration of the detention, it is not subject to review by either mechanism.

The ECtHR has made it clear in several judgments that it is not for the Court to review the appropriateness of a sentence of imprisonment imposed by a competent court under Article 5(1)(a) in terms of the right to liberty and security. Accordingly, States must be enjoyed the "margin of appreciation" in this respect:

"...it is not its role to decide what is the appropriate term of detention applicable to a particular offence or to pronounce on the appropriate length of detention or other sentence which should be served by a person after conviction by a competent court."[190]

The only possible exception to this is discrimination-based penal enforcement policies and the practical problems associated with their execution.[191] However, while the HRC tends not to

[188] ibid, Joint Dissenting Opinion by Judge Pinto de Abuquerque and Judge Dedov, para 127.
[189] General Comment no 35 (n 47) para 5.
[190] *Vinter and Others v the UK [GC]*, App no 66069/09 -130/10 -3896/10 (ECHR, 09 July 2013) para 105.
[191] *Khamtokhu and Aksenchuk v Russia [GC]*, App no 60367/08 961/11 (ECHR, 24 January 2017) para 55-56.

question the appropriateness of the length of a sentence in detention based on the execution of a prison sentence imposed by national courts, it does, in certain situations, consider the relevance and appropriateness of the link between the reason for the conviction and the length of the imposed sentence.[192]

In *Anthony Michael Emmanuel Fernando v Sri Lanka*,[193] the applicant raised his voice to the judges at a hearing on an irrelated dispute, was warned that he could be punished for contempt of court and asked to apologize, but refused and was sentenced to one year of rigorous imprisonment and detained the same day. In this case, despite the existence of detention based on a conviction, the HRC found the detention to be arbitrary, finding the severity and reasonableness of the sentence imposed on the author for this single instance insufficient.[194] A similar position was taken a few years later in *Dissanayake v Sri Lanka*[195]. In this case, the applicant, who was a Minister in Sri Lanka, stated in his speech that 'they would not accept any shameful decision of the Supreme Court' in response to a question posed by the President. As regards the detention of the applicant, who was sentenced under domestic law to two years of rigorous imprisonment for contempt of domestic court for this statement, the HRC, noting some uncertainties in the sentencing process, concluded that the severity of the sentence rendered the detention arbitrary and in violation of Article 9(1) of the ICCPR.[196]

Immigration Detentions

The detention of migrants for unauthorized entry into the country is a long-standing and complex issue in the context of the right to liberty and security. The ECtHR has recognized two grounds for justified detention under Article 5(1)(f) of the ECHR. The former refers to detention related to border security, i.e. the "prevention of unauthorized entry into the country", while the latter refers to detention under the extradition procedure.[197] The HRC, in its general comment No. 35, also considers such detentions in the context of immigration control to be legitimate.[198] Both mechanisms are therefore considered legitimate and understandable for States to detain persons for certain periods of time and under certain conditions in the interests of border security and related matters. The HRC, however, unlike the ECHR, has divided detention for this purpose into initial arrest or detention, which is necessary for identification and related

[192] Taylor (n 94) 260.
[193] *Anthony Michael Emmanuel Fernando v Sri Lanka*, UN Doc CCPR/C/83/D/1189/2003 (31 March 2005).
[194] ibid para 9.2.
[195] *Dissanakye v Sri Lanka*, UN Doc CCPR/C/93/D/1373/2005 (22 July 2008).
[196] ibid para 8.3; see also Taylor (n 94) 260.
[197] Schabas (n 110) 244 (with further examples from ECtHR case law).
[198] General Comment no 35 (n 47) para 18.

administrative procedures for unauthorized entry into the country, and continued detention.[199] The difference in approach to the grounds for such detentions in this context might have important consequences for the justification criteria, particularly in the cases of asylum seekers.

The ECtHR examines both aspects of immigration control-based detention under the ECHR on the same criteria. The first case in which the Court clarified its approach to the first aspect, "prevention of unauthorized entry into the country", was *Saadi v the UK*,[200] which was brought before the Grand Chamber. In that case, the applicant, who had landed at an airport in the United Kingdom and applied for asylum, was detained for more than a year while his asylum claim was examined after several extensions of temporary admission to the country. The Court assessed this detention under the first aspect of Article 5(1)(f) of the ECHR. It then based its assessment of arbitrariness on four criteria identical to those for detention under the second limb of this subparagraph, namely for extradition procedure: the detention was carried out in good faith, the close connection with the purpose of preventing unauthorized entry into the country, the place and conditions were appropriate, and the duration was reasonable.[201] In this context, the Court held that the applicant's detention was acceptable under all four of these criteria and therefore could not be considered arbitrary and that there had been no violation of the Convention in this respect.[202] In a joint dissenting opinion annexed to the judgment, it was stated that the asylum-seekers shall be considered to be lawfully within the State territory, against the Court's approach to their situation as ordinary immigration control under the first limb of Article 5(1)(f) of the ECHR. Furthermore, it was criticized the application of the same proportionality test as for those considered under the second limb of the same subparagraph without distinction and stated that:

"...Hence, the judgment does not hesitate to treat completely without distinction all categories of non-nationals in all situations – illegal immigrants, persons liable to be deported, and those who have committed offences – by including them without qualification under the general heading of immigration control, which falls within the scope of States' unlimited sovereignty... Ultimately, are we now also to accept that Article 5 of the Convention, which has played a major role in ensuring controls of arbitrary detention, should afford a lower level of protection

[199] ibid para 18; *F.J. et al v Australia*, UN Doc CCPR/C/116/D/2233/2013 (22 March 2016) para 10.3-10.4.
[200] *Saadi v the UK [GC]*, App no 13229/03 (ECHR, 29 January 2008).
[201] ibid 74.
[202] ibid para 61-80.

as regards asylum and immigration which, in social and human terms, are the most crucial issues facing us in the years to come? Is it a crime to be a foreigner? We do not think so."[203]

In *Mahamed Jama v Malta*,[204] the Court found that the detention of the applicant, who was a minor at that time, for eight months during the assessment of his asylum claim had not violated his rights under Article 5(1)(f). While acknowledging the circumstances of his detention and the vulnerability of the applicant as a minor, it directly relied on the Grand Chamber's judgment in *Saadi v UK* and found that the detention was reasonable as to the basis and duration. It, therefore, held that the detention was not arbitrary and had not violated the ECHR. However, it found the applicant's detention for a further five days following the acceptance of his asylum application to be arbitrary, as it was not based on any grounds under the ECHR, and therefore found a violation of his right to security of liberty in this respect.[205]

In *Timothawes v Belgium*,[206] the Court noted that there has not been a sufficiently individualized assessment for the applicant, who had entered the country without authorization, applied for asylum, and was arrested. However, it found the applicant's allegations of mental illness to be unreliable and found his detention to be in compliance with the first limb of Article 5(1)(f) of the ECHR, considering the possibility of his extradition.

The HRC distinguishes such immigration control detentions as initial detention and continuing detention. It provides that initial detention should be ended within a short period of time after identity verifications and administrative procedures have been completed. The continued detention, on the other hand, should be subject to conditions such as concrete necessity based on individualized assessment, strict proportionality, and, in any event, the existence of procedural guarantees.[207]

In *D. E. v Australia*,[208] the author, who had been under investigation in Iran for appearing in pornographic films, had gone to Australia and sought asylum (together with his wife and two children) on related grounds, and was held in detention. Despite the national authorities' initial rejection of his asylum claim, the Committee found that the detention for a total of 3 years and 6 months from the initial arrest, which continued during the appeal process under the asylum

[203] Ibid, Joint Partly Dissenting Opinion by Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä.
[204] *Mahamed Jama v Malta*, App no 10290/13 (ECHR, 26 November 2015).
[205] Ibid para 136-159.
[206] *Timothawes v Belgium*, App no 39061/11 (ECHR, 04 April 2017).
[207] General Comment no 35 (n 47) para 18.
[208] *D.E. v Australia*, UN Doc CCPR/C/87/D/1050/2002 (11 July 2006).

procedure, was arbitrary, in particular since that it was not sufficiently justified in terms of continued detention and that the duration was too long.[209]

In *F.K.A.G. et al. v Australia*,[210] the HRC described the detention of a large number of migrants, after an acceptable initial arrest based on verification of identity and administrative procedure, as "indefinite detention" in terms of continued detention during the security assessment procedure, the related appeal process and the possible extradition procedure. It found, reiterating similar principles, that Australia's justification was insufficient based on the lack of a strict individual basis assessment of necessity and proportionality, and found that the detention was arbitrary.[211]

These different categorizations of the two aspects of detention under immigration control lead to different assessments of the justification of persons' continued detention after initial arrest, the reasonableness of the length of detention when examining asylum claims, and the weight of individual considerations in the ongoing process. The above-mentioned cases show that, while the HRC considers the initial detention of individuals to be reasonable, it seeks more concrete justifications for the prolongation and continuation of such detention and applies a stricter test of individual necessity and proportionality.

On the other hand, ECtHR was more lenient on the duration of the initial detention of persons for the possibility of extradition, as long as there was a close connection with the purpose. Notwithstanding this, it is possible to argue that the view expressed in the joint dissenting opinion of the Grand Chamber judgment in *Saadi v the UK*[212] has reflected to some extent in more recent Grand Chamber judgments, cited below, on the justification of detention periods. It might be seen as a tendency to be closer to the approach of the HRC. Although finding a violation was based on the lack of a clear legal basis, the Grand Chamber's judgment in *Khailifia and Others v Italy*, for instance, has strong emphases on individualized assessment and justification as well as on procedural guarantees.[213]

In a later case, *Z.A. and Others v Russia*,[214] the Grand Chamber has highlighted the provision of procedural safeguards, emphasizing that the domestic legal systems are obliged to provide not only a legal basis but also clear and detailed decisions on the grounds, duration, and

[209] Ibid para 7.2-7.3.
[210] *F.K.A.G. et al. v Australia*, UN Doc CCPR/C/108/D/2094/2011 (23 August 2013).
[211] Ibid para 10.3-10.4.
[212] *Saadi v the UK* (n 200), Joint Partly Dissenting Opinion by Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä.
[213] *Khlaifia and Others v Italy*, App no 16483/12 (ECHR, 15 December 2016) para 88-108.
[214] *Z.A. and Others v Russia* (n 143).

conditions of detention when masses of asylum seekers seek asylum at the border. In this case, the Court found that the applicants` detentions following the unlawful entry, ranging from 5 to 21 months, were arbitrary and violated the right to liberty on the grounds that the absence or insufficiency of the aforementioned reasons and the delays in the process could not be convincingly justified by the respondent State.[215]

Political Detentions and Legitimate Exercise of the Other Convention Rights

Criminal detention based on the legitimate exercise of conventional rights is another issue that can be observed in the differences in the approach of the HRC and the ECtHR to the assessment of its compatibility with their treaties. Both the HRC and the ECtHR prohibit the punishment for the legitimate exercise of the other treaty rights. Moreover, the ECHR also provides protection by a prohibitive provision under its article 18,[216] which the ICCPR text has not its corresponding provision. Accordingly, protection under Article 18 of the ECHR includes the prohibition of restriction of a person's liberty for purposes other than those set out in Article 5. This article can serve an important function, especially in cases of detention mainly on the grounds of political motivations, etc. In summary, it could be said that, in complaints in this context, the HRC conducts its examination under Article 9(1) of the ICCPR, while the ECtHR conducts its examination under Article 5(1), in particular Article 5(1)(c), and sometimes Article 18 of the ECHR.

The HRC considers criminal detentions based on the legitimate exercise of a treaty right, such as freedom of expression or peaceful assembly, to be arbitrary because they cannot be justified on a permissible ground. The ECHR, on the other hand, extends its examination under 5(1), in particular 5(1)(c), to the issue of whether there is reasonable suspicion. In fact, the assessment on this basis may in some cases appear narrower and more limited than the HRC's assessment of arbitrariness. Even if, in the end, complaints before both mechanisms on similar cases result in a finding of a violation in the individual sense, the difference between the approaches followed can also be reflected in the findings or observations in their reasonings.

In a case before the HRC, a journalist author was arrested and held in detention for 40 days on a charge of "material and continuous defamation and slander against the President of the Republic", which has its place under domestic law. The charge and detention were based on his accusations of the President of the Republic of incompetence, embezzlement, and corruption.

[215] ibid para 126-171.
[216] ECHR art 18: "*The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed*.".

The HRC found that the author's acts fell within the framework of freedom of expression, in particular freedom of the press, and that the detention was therefore arbitrary.[217] In another case, the author, who participated in unauthorized rallies against the activities of the law enforcement authorities in front of the Prosecutor's Office building in the capital, disobeyed police warnings and was arrested the following day on charges of participating in an unauthorized demonstration and resisting a lawful order of the police, which were regulated under domestic law. The HRC considered that the detention was based on activities falling within the scope of the freedom of peaceful assembly protected under the ICCPR and found that the detention was arbitrary.[218]

While the ECtHR has also found the detention on the grounds of the legitimate exercise of treaty rights to be incompatible with the right to liberty and security, the examination of the existence of reasonable suspicion on such complaints seems to allow for a relatively strict and limited assessment.

In *Deniz Ilker Yücel v Turkey*,[219] the applicant, who was a journalist in Germany, was arrested and detained in Turkey on a series of charges under domestic law, including membership of a terrorist organization for his published articles, which contained severe critical statements against the President of the Republic of Turkey, an interview with a PKK leader, and the fact that he had been sent a series of emails attributed to one of the ministers of the time which was published in Wikileaks. The applicant noted in his complaint that the President of the Republic and high-level officials stated in their speeches that he would not be released during their power and similar expressions. The Court, under ECHR 5(1)(c), assessed whether the detention was compatible with the Convention solely on the basis of whether there was a reasonable suspicion. In this respect, the Court was not convinced of the existence of a reasonable-level criminal suspicion and found that the detention had violated Article 5(1) of the ECHR. However, it has not made any reference to the fact that the legitimate exercise of treaty rights could not be grounds for detention, nor to the political motives for his continued detention and the obstruction of his journalistic activities.[220]

In *Sabuncu and Others v Turkey*,[221] the Court also dealt with an application concerning the arrest and detention of the applicants, who were writers for a newspaper, on charges under domestic law, such as propaganda for a terrorist organization, for their published articles. The

[217] *Marques de Morais v Angola*, UN Doc. CCPR/C/83/D/1128/2002 (29 March 2005) para 6.1-6.2.
[218] *Adelaida Kim v Uzbekistan*, UN Doc CCPR/C/122/D/2175/2012 (04 April 2018) para 13.10.
[219] *Deniz Ilker Yücel v Turkey*, App no 27684/17 (ECHR, 25 January 2022).
[220] ibid para 91-97.
[221] *Sabuncu and Others v Turkey*, App no 23199/17 (ECHR, 10 November 2020).

Court has considered the principle of the protection of the legitimate exercise of the treaty rights, however, it has concluded a violation predominantly on the basis of whether there was reasonable suspicion under ECHR 5(1)(c).[222]

A similar situation was applied to the case of *Navalnyy v Russia*[223] before the Grand Chamber. In that case, the applicant, who called for opponent protests and participated in various rallies in this regard, was arrested and detained more than once on charges of organizing unlawful gatherings, which was regulated under domestic law. The Court examined the lawfulness of the detention by protecting the legitimate exercise of treaty rights, but again focused on the level of suspicion under 5(1)(c) and found a violation.[224]

Although the ECtHR's examination on justification of detention under Article 5(1)(c) of the ECHR and related "reasonable suspicion" criterion seem to offer a limited possibility of review, in cases where the detention is implemented with another purpose behind it, the ECtHR makes its assessment in this regard through Article 18 of the ECHR,[225] which has no corresponding provision in the ICCPR. If the detention is essentially aimed at silencing, for example, a journalist or politician, it is also possible to find a violation of this article.

Article 18 of the ECHR is a subsidiary protection that applies exceptionally and is subject to a strict test. However, even if the substantive article, for example, the right to liberty and security, is found not to have been violated, the complaint under this article can still be examined separately, and found violation.

The ECtHR introduced and explained the current concept of testing and examination of Article 18 in relation to Article 5(1) of the ECHR in *Merabishvili v Georgia*,[226] a case before the Grand Chamber. In that case, the applicant, a former prime minister and the leader of the main opposition after the “Georgian Dream” movement came to power, was arrested and detained shortly after the elections on charges of abuse of power and some other offenses. The applicant was later taken out of his cell during the investigation and questioned again by the public prosecutor, who asked him questions about the death of the former Prime Minister and the President's banking activities. In this case, the applicant alleged both a violation of Article 5 and Article 18 in connection with his detention. He claimed that he was detained without

[222] ibid para 142-185.
[223] *Navalnyy v Russia [GC]*, App no 23199/17 (ECHR, 15 November 2018).
[224] ibid para 163-179.
[225] Article 18 of the ECHR as follows: “*The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.*”.
[226] *Merabishvili v Georgia [GC]*, App no 72508/13 (ECHR, 28 November 2017).

reasonable suspicion and his detention was in fact intended to remove him from the political scene.

The Grand Chamber examined the applicant's complaint under Article 5(1) based on whether there is reasonable suspicion under subparagraph (c), after having clarified the issue of legality on questions of immunity, etc. Accordingly, finding that the evidence submitted by the government could be interpreted as amounting to reasonable suspicion and that the detention was within the limits of the purpose of bringing the person before the competent authority, the Court held that there had been no violation of Article 5(1).[227]

As regards the alleged violation of Article 18, the Grand Chamber, after a general review of its previous judgments, developed an updated examination concept and test with a view to clarifying this article. First of all, the Court recalled that a violation of Article 5(1) does not by itself amount to a violation of Article 18 and that a separate assessment can only be applied where the purpose of the restriction is the central aspect of the case, and that a violation of Article 18 may be established even where the detention is in conformity with Article 5(1). It further noted that where the detention has more than one purpose, a question may arise under Article 18, although there is no violation of that Article due to the existence of a permissible basis in Article 5(1). In this context, it has sought to determine the predominance of the alleged ulterior purpose, taking into account the relevant circumstances, including its nature and degree of reprehensibility, and the possibility that it may change over time. Finding the standard level of proof sufficient to establish the overriding purpose, the Court assessed two overriding purposes in the applicant's case, finding the purpose to remove him from the political arena not sufficiently proven, but finding a violation of Article 18, being satisfied that the purpose was to obtain information from him about other persons during his pre-trial detention, or more precisely that the purpose evolved in that direction during his pre-trial detention.[228]

In this case, there were many dissenting opinions, in particular with regard to the newly introduced concept and assessment of Article 18. As an example, in their joint dissenting opinion, Judge Yudkivska, Tsotsoria, and Vehabovic stated that while the Court had recognized that Article 18 requires a delicate balance in the face of a politically neutral situation, the new concept provides the State with “the power to abuse the criminal justice system for political motivation through a vague and non-objective test”.[229]

[227] ibid para 181-208.
[228] ibid 264-354.
[229] ibid, Dissenting Opinion by Judge Yudkivska, Tsotsoria, and Vehabovic, para 36-38.

In subsequent cases, this judgment of the Grand Chamber has been considered as a fundamental reference and has been applied to different cases. For example, in *Navalnyy v Russia*, cited above, the Grand Chamber was convinced that the predominant purpose of the applicant's detention was to silence opponents and prevent protests,[230] whereas, in *Sabuncu and Others v Turkey*, it was not convinced that there was a predominant purpose other than criminal prosecution and the 5(1)(c) ground of silencing the allegedly opponent newspaper.[231] In *Ilker Deniz Yücel v Turkey*, according to the ECtHR, there was no need to consider Article 18, given the finding of a violation on ground 5(1)(c).[232]

The HRC's approach, on the other hand, seems to allow for the determination of the essential purpose at the level of Article 18 of the ECHR, as well as allowing for a more flexible and broader scope for arbitrariness review under Article 9(1) than under Article 5/(1)(c) of the ECHR. For example, in *Khadzhiyev and Muradova v Turkmenistan*, in relation to the complaint of Ms. Muradova, who was arrested on charges of gathering defamatory information with the intent to incite the public and illegally transferring firearms, claimed that the charges and her conviction were based on statements and calls by the government to silence her because of her journalistic and human rights activism. The Committee has relied on her submission and considered her detention as essentially being based on her human rights work and journalistic activities. Therefore, it held that the detention was arbitrary, also reiterating that the legitimate exercise of Covenant rights cannot justify detention.[233]

2.3. Right to be Informed

Both treaties protect the right of the person deprived of liberty to be informed of the reasons for her/his arrest and the charges against her/him. However, the wording of this is slightly different.

Article 9(2) of the ICCPR as follows:

"Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

Article 5(2) of the ECHR as follows:

[230] *Navalnyy v Russia [GC]*, App no 23199/17 (ECHR, 15 November 2018) para 163-176.
[231] *Sabuncu and Others v Turkey*, App no 23199/17 (ECHR, 10 November 2020) para 248-256, and see also the partly dissenting opinion of Judge Kuris related to the Court's assessment on Article 18 of the ECHR in this judgment.
[232] *Deniz Ilker Yücel v Turkey*, App no 27684/17 (ECHR, 25 January 2022) para 158-161, and see also the joint partly dissenting opinion of Judge Kuris and Judge Koskelo related to the Court's decision not to examine the complaint under Article 18 of the ECHR in this judgment.
[233] *Khadziyev and Muradova v Turkmenistan*, UN Doc CCPR/C/122/D/2252/2013 (06 April 2018) para 7.7.

“Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”

As it can be seen, the ICCPR states that a person has the right to be informed "at the time of arrest" of the grounds for arrest and the right to be "promptly" informed of the charges against him or her. The ECHR, on the other hand, does not distinguish between the two elements of the right, the grounds for arrest and the charges against him/her, in terms of timing and states that the person has the right to be informed "promptly" of both.

In the practical application of the treaties, the approaches of the HRC and the ECtHR are similar in many respects. Both bodies protect this right as a fundamental and a priori requirement of “the right to challenge the lawfulness of detention”[234].[235] This approach requires that both the reasons for arrest and the charges are provided in a language that the person can understand, in an understandable and non-technical manner, and that the charges do not need to be an exhaustive list of all charges but must be sufficient to allow the person to challenge the unlawfulness of his or her detention.[236] They, therefore, adopt similar principles in that they shall not be limited to the legal grounds or general context of the grounds for arrest and charges, but must include sufficient legal and factual information. In the event of a person's inability to defend himself/herself, both bodies also require a compulsory notification of his/her legal representative and/or family members.[237]

The difference between the treaty texts on the timing of notification is, to a certain extent, reflected in the practice of the HRC and the ECtHR. The HRC has been very strict in requiring notification of the “reasons for arrest, at the time of arrest”, with the exception of an allowance for minimal delays if police proceedings are suspended due to waiting for an interpreter to inform the person in a language he or she can understand.[238] The ECtHR has interpreted the fact that information about “the reasons for arrest” and “the charge against the person” takes place within a few hours as being compatible with the expression "promptly" in the article concerned.[239] It, therefore, interprets the two elements of the right largely in tandem, at least as regards timing, and considers them to be in line with the ECHR`s common expression "promptly". The interpretation of "promptness" is similar in the HRC and ECtHR, accordingly "within a few hours" complies with this expression. In sum, while the timing requirement for

[234] ICCPR art 9(4); ECHR art 5(4).
[235] General Comment no 35 (n 47) para 25; ECHR Guideline (n 126) para 160-161.
[236] General Comment no 35 (n 47) para 26-30; ECHR Guideline (n 126) para 168-172.
[237] General Comment no 35 (n 47) para 28; ECHR Guideline (n 126) para 165.
[238] Taylor (n 94) 266 (with further examples from HRC`s case law).
[239] Schabas (n 110) 246 (with further examples from the ECtHR`s case law).

notification of charges is similar between the HRC and ECtHR, it seems they differ in the timing to notify of the reasons for arrest.

Additionally, although both bodies do not require a specific form for notification, the HRC appears to give considerable weight to the existence of an arrest warrant, particularly in relation to notification of the grounds for arrest.[240] The ECtHR also pays attention to the existence of a warrant, in particular in cases provided for by domestic law and for the examination of the lawfulness of the arrest. On the other hand, in terms of the "right to be informed" under Article 5(2) of the ECHR, the Court sometimes presumes that a person is aware of the grounds for arrest, for example during interrogation after arrest or in some cases where it is expected that he or she would already be aware of them.[241] This could be particularly important in relation to the timing requirement of the right to be informed of the reasons for arrest.

In *Krasnova v Kyrgyzstan*,[242] a minor was arrested at 8 p.m. and interrogated at a police station in connection with an investigation of a just-committed murder. Although the author and his mother were not informed of the reasons for his arrest at the time of his arrest, the minor was interrogated in a room with the prosecutor investigating juvenile offenses within a few hours of his arrest, and his mother learned the reasons for his arrest from the relevant officials the morning after the overnight interrogation. As regards the minor, who was released 25 hours after his arrest, the HRC relied on his mother's submissions and found a violation of Article 9(2) of the ICCPR, accepting her complaint that they had not been informed of the reasons for his arrest for more than 24 hours.[243]

In *Özcelik and Karaman v Turkey*, despite the State's objection that the applicants, who had been arrested and detained on charges of being members of a terrorist organization, had been informed of the reasons for their arrest and the charges against them during interrogations at the police station and questioning at the prosecutor's office, the HRC found a violation of Article 9(2) of the ICCPR in the absence of any arrest warrant evidencing immediate notification and no record of the interview confirming the notification.[244]

On the other hand, in *Grubnyk v Ukraine*,[245] the applicant, who had been arrested and detained for alleged involvement in terrorist activity, was informed of the reasons for his arrest during

[240] Taylor (n 94) 264 (with further references).
[241] Schabas (n 110) 246 (with references); ECHR Guideline (n 126) para 167 (with references).
[242] *Krasnova v Kyrgyzstan*, UN Doc CCPR/C/101/D/1402/2005 (29 March 2011).
[243] ibid para 8.5.
[244] *Özcelik and Karaman v Turkey*, UN Doc CCPR/C/125/D/2980/2017 (26 March 2019) para 9.4.
[245] *Grubnyk v Ukraine*, App no 58444/15 (ECHR, 17 September 2020).

questioning and interrogation in the absence of his lawyer, then challenged the lawfulness of his detention. The ECtHR held that there had been no violation of Article 5(2) of the ECHR, even though the information could not be considered official information, as it had no adverse effect on the applicant's ability to exercise his right to appeal.[246]

The ECtHR generally takes very different approaches to determine whether the right to be informed has been provided "promptly", depending on the facts of the cases. In *Kaboulov v Ukraine*,[247] the police arrested the applicant on the grounds that he could not prove his identity and was causing a disturbance while intoxicated with alcohol, and subsequently deportation proceedings were initiated on the basis that he was a murder suspect in Kyrgyzstan. The applicant claimed that he was not informed of the reason for his arrest, that he was being held for the purpose of extradition to Kyrgyzstan until the court hearing was held 20 days after his arrest, while the State argued that it informed the applicant of the reasons for his arrest 40 minutes later. The Court was not convinced by the State's evidence in this case and concluded that there had been a violation. However, it held that 40 minutes did not *prima facie* raise an issue for notifying the reasons for arrest, under Article 5(2).[248] In *Saadi v the UK*, the oral notification of the applicant 76 hours after his arrest, when he was detained under the extradition procedure, was not sufficiently "prompt" and it was held that there has been a violation.[249] Thus, although the requirements of "promptly" may vary according to the specific circumstances of each case, it can be said that the ECtHR is not in favor of taking a very flexible stance. Nevertheless, as a general principle, it continues to refer to previous judgments and to state that "promptly" does not require that the person be informed of the reasons for the arrest, "at the very moment of arrest by police".[250]

2.4. Right to be Brought Before a Judge

Article 9(3) of the ICCPR and Article 5(3) of the ECHR protect two rights for persons deprived of their liberty on suspicion of a crime. According to these two similarly formulated paragraphs, firstly, persons arrested on the suspicion of committing a crime have the “right to be brought promptly before a judge or other officer authorized by law to exercise judicial power”.

Article 9(3) of the ICCPR states that:

[246] ibid para 94-100.
[247] *Kaboulov v Ukraine*, App no 41015/04 (ECHR, 19 November 2009).
[248] ibid para 143-148.
[249] *Saadi v the UK [GC]*, App no 13229/03 (ECHR, 29 January 2008) para 81-85.
[250] In addition to *Grubnyk v Ukraine*, *Kaboulov v Ukraine*, *Saadi v the UK*, see also *Khailifia and Others v Italy[GC]*, App no 16483/12 (ECHR, 15 December 2016) para 115; *L.M. v Sloveni*a, App no 32863/05 (ECHR, 12 June 2014) para 142-147.

"Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power…"

Article 5(3) of the ECHR states that:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power…"

The main purpose of this right is to bring the detention of the person under judicial control. The right has two main elements: First is the scope of the "other officer authorized by law to exercise judicial power" and the second is the meaning of "promptly" under these paragraphs.

The other officer to which the arrested or detained person is to be brought must, in accordance with the purpose of the right concerned, be an authority competent to release the person, able to examine the merits of the detention, and impartial and independent.[251] There is not much difference of interpretation between the HRC and the ECtHR with regard to the characteristics of the "other officer". There is, however, a difference of principle as to whether a public prosecutor can be recognized in this context.

The HRC considers that a public prosecutor cannot be considered as "other officer" under Article 9(3) of the ICCPR.[252] The HRC bases this assessment on its interpretation that the public prosecutor does not meet the requirements of "institutional independence and impartiality".[253] This general assessment of institutional independence remains a presupposition in the HRC's views over time. As an example, in *Manurbek Torobekov v Kyrgyzstan*,[254] the applicant, arrested on a criminal suspicion, complained that his detention was supervised by the public prosecutor because domestic law does not provide for judicial control otherwise. In this case, the HRC, referring to its previous jurisprudence, considered that the public prosecutor could not be considered institutionally independent and impartial and concluded that there had been a violation of Article 9(3) of the ICCPR.[255]

The ECtHR does not, in principle, exclude the public prosecutor from the term "other officer authorized by law". Accordingly, the public prosecutor can be said to fall within this category

[251] General Comment no 35 (n 47) para 32; ECHR Guideline (n 126) para 189-199 (with examples).
[252] General Comment no 35 (n 47) para 32.
[253] *Kulomin v Hungary*, UN Doc CCPR/C/50/D/521/1992 (6 May 1992), para 11.3.
[254] *Torobekov v Kyrgyzstan*, UN Doc CCPR/C/103/D/1547/2007 (27 October 2011).
[255] ibid para 6.2.

if the basic requirements are met in concrete cases and the legal systems concerned.[256] While this principle laid down by ECtHR`s early judgments[257] is still valid, it is difficult to find recent examples where the public prosecutor has been recognized as an "other officer" under Article 5(3) of the ECHR, as it is quite common for public prosecutors to raise doubts about their institutional and internal independence in legal systems. For example, in *Moulin v France*, the applicant was first brought before the public prosecutor. In determining the moment at which the applicant was brought before a competent under Article 5(3) of the ECHR, the Court assessed the institutional and functional independence and impartiality of the public prosecutor in the French legal system and concluded that the public prosecutor's office in France did not comply with the requirements of that provision.[258]

The second important aspect of the right is that the arrested person must be brought before a court "promptly". The meaning of "promptly" here is crucial in terms of how long an arrested person can be held in custody without independent judicial supervision. Both the HRC and the ECtHR emphasize the importance of the right to liberty and security in their treaty system and furthermore, they consider that detention without judicial supervision increases the risk of ill-treatment.[259]

The HRC and the ECtHR determine whether the requirement of "promptly" has been met according to the particular circumstances of concrete cases and require that the period without supervision be kept to a minimum.[260] Both mechanisms have, however, set objective time limits in this regard. The HRC, while noting that, in general terms, delays of more than a few days from the moment of arrest are contrary to the expression "promptly", is in favor of setting 48 hours as the objective limit. However, delays exceeding 48 hours should only be strictly excluded and justified under the circumstances of the case. Moreover, the HRC has limited this period to 24 hours in the case of children.[261] The ECtHR, on the other hand, apart from an assessment based on the specific circumstances of the case, sets the maximum period of unsupervised detention at four days.[262] Acknowledging the difficulties in investigating terrorist offenses in particular, the ECtHR has stated that a certain degree of tolerance can be shown for a detention period closer to this limit of 4 days, whereas, similarly to the HRC, the ECtHR is

[256] ECHR Guideline (n 126) para 184-185; *Schiesser v Switzerland*, App no 7710/76 (ECHR, 04 December 1979) para 28-29.
[257] *Schiesser v Switzerland*, App no 7710/76 (ECHR, 04 December 1979) para 28-29.
[258] *Moulin v France*, App no 37104/06 (ECHR, 23 November 2010).
[259] General Comment no 35 (n 47) para 33; *McKay v the UK [GC]*, App no 543/03 (ECHR, 13 October 2006), para 33.
[260]General Comment no 35 (n 47) para 33; *McKay v the UK* (n 259) para 33.
[261] General Comment no 35 (n 47) para 33.
[262] *McKay v the UK* (n 259) para 47; *Oral and Atabay v Turkey*, App no 39686/02 (ECHR, 23 June 2009) para 43.

more sensitive to the duration of detention of children, including in these investigations, and may find a violation of Article 5(3) of the ECHR for unsupervised detention periods of less than four days.[263]

In *Zhanna Kovsh v Belarus*, where the author was held in two different forms of unsupervised detention for 61 and 72 hours, the HRC applied the 48-hour limit, stating that detention should be exceptional, and concluded that the delay was not justified and that there had been a violation of Article 9(3) of the ICCPR. [264]

In *McKay v the UK* before the Grand Chamber,[265] the applicant was held in custody for three days. The Magistrats` Court decided to extend his custody on the second day, although the police had no objection to the applicant's request to be released on bail. Because the Magistrats` Court did not have jurisdiction to grant bail, and, therefore, on the third day he could be released on appeal. While noting the question of the competence of the judge who made the initial assessment and the possibility that the applicant could have been released within two days, the ECtHR ultimately concluded that there had been no violation of Article 5(3) of the ECHR as the objective limit of four days had not been exceeded.[266]

2.5. Right to be tried within a reasonable time or to be released

The second right recognized by Articles 9(3) of the ICCPR and 5(3) of the ECHR is the "right to be tried and released within a reasonable time". Like the first right protected by these paragraphs, this right is recognized for persons arrested on suspicion of a crime, in other words, based on a criminal charge. Both treaty texts recognize this right in similar terms. However, the ICCPR seems to elaborate a little more on the conditionality of release. Indeed, it is difficult to see a major difference in their text that would suggest a divergence in approaches to the nature and content of the right recognized.

Related part of Article 9(3) of the ICCPR as follows:

"Anyone arrested or detained on a criminal charge … and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should the occasion arise, for execution of the judgment."

[263] *Ipek and Others v Turkey*, App no 17019/02 30070/02 (ECHR, 03 February 2009) para 36-37.
[264] *Zhanna Kovsh v Belarus*, UN Doc CCPR/C/107/D/1787/2008 (27 March 2013) para 7.2-7.4.
[265] *McKay v the UK* (n 259).
[266] ibid para 48-51.

This right is guaranteed under Article 5(3) of the ECHR as follows:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article … and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

"The right to be tried or released within a reasonable time" refers to the right of the detained person to have his or her detention reviewed within a reasonable time or to be released. In any event, the release of the detained person may be subject to certain conditions, to appearance at the trial and possible execution of the sentence. The right is intended to protect those detained on a criminal charge and held in pre-trial detention under both treaties. Both the HRC and the ECtHR interpret pre-trial detention as the period between the moment of arrest and the judgment of the court of first instance.

According to both the HRC and the ECtHR, detention of persons awaiting trial shall be "the exception rather than the rule".[267] Therefore, from the moment the arrested person is ordered with the pre-trial detention by the judge until sentencing, his or her detention must be reviewed at reasonable intervals, routinely and "autonomously", and if continued detention is ordered, it must be justified.[268] Furthermore, both bodies provide that continued detention should be justified on the grounds on which the continued detention is based, not on the grounds in the initial detention order. Due to the exceptional nature of detention, and in line with the latter parts of Articles 9(3) of the ICCPR and 5(3) of the ECHR, the alternative conditions and guarantees instead of detention must be insufficient to meet the expected benefit.[269]

Within the framework of these principles, the determination of whether pre-trial detention is of reasonable duration, in other words, whether the person has been released within a reasonable time, is assessed according to the special circumstances of the concrete case.[270] However, there are certain differences between the criteria developed for their application by the HRC and the ECtHR.

The HRC examines the reasonableness of the time taken to bring a case before a court, based on the complexity of the case, the conduct of the accused in the process, and the manner in which the authorities have dealt with the matter. In the case of continued detention in

[267] General Comment no 35 (n 47) para 38; *Idalov v Russia [GC]*, App no 5826/03 (ECHR, 22 May 2012), para 140.
[268] General Comment no 35 (n 47) para 38 (with references); ECHR Guideline (n 126) para 202-210 (with examples).
[269] *Smantser v Belarus*, UN Doc CCPR/C/94/D/1178/2003 (23 October 2008) para 10.3; *Idalov v Russia [GC]*, App no 5826/03 (ECHR, 22 May 2012), para 140.
[270] General Comment no 35 (n 47) para 37; ECHR Guideline (n 126) para 203 (with examples).

proceedings before the relevant authority, the element of justification examined first is its "necessity". Accordingly, the judge, having considered all alternative measures, must demonstrate by concrete and specific reasons that none of them is sufficient. In this context, the HRC does not allow pre-trial detention to be made "compulsory for all persons charged with a specific type of offense".[271] Moreover, pre-trial detention cannot be justified by the amount of the sentence prescribed for the offense under trial. In the face of such justifications, the HRC seeks convincing explanations as to whether necessity exists in all the circumstances and that all alternatives would be insufficient. In this respect, it seems to strongly emphasize the exceptional nature of detention in all circumstances.

In *Cedeno v Bolivian Republic of Venezuela*,[272] the author, a wealthy businessman who was held in pre-trial detention for two years on charges of "smuggling by simulating the importation of goods and tax evasion" and who fled the country after his release, alleged that his detention violated article 9(3) of the ICCPR. The State party tried to justify the author's continued detention on the grounds that the prescribed penalty for the offense in question was over 10 years and that the author was a wealthy and influential businessman who was likely to flee. The HRC found a violation in this case on the grounds that, although the applicant had indeed absconded in the end, the suspicion of absconding was not concretely justified and there was insufficient explanation of the inadequacy of all alternatives.[273]

In *Smantser v Belarus*,[274] the author was arrested on charges of "having conspired criminally, with high-level officials, who had knowingly concluded unprofitable contracts with for the sale of the plant's production at a dumping price" and was detained for 13 months pending sentencing. The State party based this detention on the suspicion that the author might be able to influence the investigation and flee in the event of release on bail, as the offense was categorized as particularly serious, and the prescribed penalty was high. The HRC did not find these explanations to be convincingly clear and sufficient and also found a violation in the absence of a sufficient justification that all other alternatives to bail would have been inadequate, i.e. that detention was necessary in all the circumstances of the case.[275]

In *Teesdale v Trinidad and Tobago*, the author, who was charged with murder, had been detained for 17 months until he was convicted. Despite the seriousness of the charge, the HRC

[271] General Comment no 35 (n 47) para 38.
[272] *Cedeño v Bolivian Republic of Venezuela*, UN Doc CCPR/C/106/D/1940/2010 (29 October 2012).
[273] ibid para 7.8-7.10.
[274] *Smantser v Belarus*, UN Doc CCPR/C/94/D/1178/2003 (23 October 2008).
[275] ibid para 10.3-10.4.

concluded in that case that the period did not meet the "reasonable time" requirement and that there had been a violation of Article 9(3) of the ICCPR, as the State party could not submit any investigative process that could justify the 17 months after the evidence had been gathered.[276]

In assessing the lawfulness of pre-trial detention under Article 5(3) of the ECHR, the ECtHR differs to a certain extent from the HRC in its approach to the weight and validity of certain elements. The ECtHR may consider suspicion of flight, due to the severity of the offense with which the person is charged and the severity of the prescribed sentence, as a relevant factor in the justification of pre-trial detention, but not alone. Accordingly, the severity of the sentence, when considered in conjunction with the person's character, residence, family, occupation, and assets, may give rise to an acceptable suspicion of flight and justify pre-trial detention.

In *Merabishvili v Georgia*,[277] the severity of the offense with which the applicant was charged, together with specific elements such as the applicant's international connections, his wife's flight abroad immediately after being summoned for questioning, and the large sums of money and fake passports found during a search of his home, which was considered to be preparations for flight, were found to be acceptable grounds and it was held that there has been no violation of Article 5(3).[278]

In *Idalov v Russia*, concerning the applicant's pre-trial detention for one year and one month until his conviction, the Grand Chamber accepted that the offense and the sentence were "relevant" factors to the suspicion of flight. However, since the reasonings for his continued detention did not include an assessment of the various arguments presented by the applicant, the Court has found the justification "insufficient" and concluded that there had been a violation of Article 5(3) of the ECHR.[279]

Therefore, it can be observed that the weight of the consideration of alternative measures and the effect of severity of the charge differ between the HRC and the ECtHR`s approach. A connected aspect of this difference is related to “bail excluding clauses”. The HRC is clearly opposed to mandatory pre-trial detention for any type of offense. In this context, the HRC is concerned when the legal practice excludes some persons accused of a particular crime from the consideration of other possible measures, such as bail. The ECtHR has taken a similar approach, noting that “any automatic rejection, devoid of any judicial control” is incompatible

[276] *Teesdale v Trinidad and Tobago*, UN Doc CCPR/C/74/D/677/1996 (01 April 2002) para 9.3.
[277] *Merabishvili v Georgia [GC]*, App no 72508/13 (ECHR, 28 November 2017).
[278] ibid para 221-235.
[279] *Idalov v Russia [GC]*, App no 5826/03 (ECHR, 22 May 2012) para 139-149; see also *Becciev v Moldova*, App no 9190/03 (ECHR, 04 October 2005) para 62.

with Article 5(3) of the ECHR.[280] However, in *Grubnyk v Ukraine*,[281] for example, the domestic court rejected the applicant`s bail request and decided the continuation of his detention, since it could not order bail because of the type of offense he was charged with. The ECtHR, in this case, considered that the domestic court was competent to decide on detention, having considered the necessary and relevant circumstances and that in the concrete case, the applicant's detention was sufficiently justified by the seriousness of the offense as well as other factors, and that the reasons for its justification had evolved over time, for these reasons, it found the continued detention without bail assessment and alternative measures assessment to be in accordance with Article 5(3) of the ECHR.[282]

2.6. Right to have the lawfulness of the detention examined by a court

Article 9(4) of the ICCPR and Article 5(4) of the ECHR protect the right of a detained person to have the lawfulness of his or her detention examined by a court. This right is recognized as corresponding to the principle of *habeas corpus* and is protected under the right to liberty and security, independent of "the right to an effective remedy"[283] protected by both treaties.

This right is guaranteed under the ICCPR as follows:

"Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

It is protected under the ECHR as follows:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

Both paragraphs, differently from the preceding one, recognize this right to anyone detained on any ground. Thus, it is recognized for not only those detained on criminal charges but also those detained, for example, for compulsory psychiatric treatment or for deportation. Moreover, they also consider that this right does not require routine and autonomous examinations, unlike their previous paragraphs. It is therefore sufficient, in principle, for there to be no violation of the

[280] *Piruzyan v Armenia*, App no 33376/07 (ECHR, 26 June 2012) para 105.
[281] *Grubnyk v Ukraine*, App no 58444/15 (ECHR, 17 September 2020).
[282] ibid para 110-130.
[283] ICCPR art 2(3); ECHR art 13.

right that the person has the right to take proceedings before a court as described in the relevant articles, irrespective of whether he or she exercises it or not.

The remedy required by the right is defined in a similar way by both treaty bodies. Accordingly, the remedy must be legally established, judicial in nature, independent of the legislature and the executive, and have the power to release the person. However, these requirements are not interpreted as strictly as the "court" requirement of the right to a fair trial, although they are expected to fulfil these requirements in terms of their basic nature.[284]

The nature of the review is also interpreted similarly, with some minor differences in approach. The HRC requires that the review be authorized to examine the merits, including the factual basis for detention. However, it also considers that, in certain circumstances, reviews limited to "reasonableness" may also be acceptable.[285] The ECtHR, on the other hand, envisages an examination of the substantive and procedural aspects of detention that concern its "lawfulness". The ECtHR uses this review of lawfulness in the sense of "lawfulness" under Article 5(1) ECHR and the grounds listed therein.[286] It should be noted, however, that both mechanisms interpret the lawfulness to be examined as encompassing its conformity with its treaties, and not limited to compliance with domestic law.

This right requires that the review be concluded "without delay" in the words of the ICCPR and "speedily" in the words of the ECHR. The HRC notes that this right is activated from the moment of arrest and that, in any event, the determination of the appeal should be completed "as expeditiously as possible". In *Timoshenko v Belarus*, the HRC found the 10-day delay in dealing with the applicant's appeal to be contrary to ICCPR 9(4), taking into account that domestic law provides for a 72-hour period, but citing general grounds.[287] Thus, it can be said that the HRC's approach to the speed of the proceeding is normally strict.

However, the HRC has found more tolerable the time that would elapse if domestic law allowed a right of appeal against the decision upon this review, although ICCPR 9(4) does not require it. In *J.S. v New Zealand*, the applicant, who was detained under compulsory psychiatric examination, challenged the lawfulness of his detention, his application was decided within eight days, the appeal before the court was decided after three weeks, and the subsequent appeals was not decided for two months and one day. In this case, the HRC found the

[284] General Comment no 35 (n 47) para 45; ECHR Guideline (n 126) para 251.
[285] General Comment no 35 (n 47) para 39.
[286] ECHR Guideline (n 126) para 250.
[287] *Viktor Timoshenko v Belarus*, UN Doc CCPR/C/114/D/1950/2010 (22 July 2015) para 7.3.

application inadmissible on the grounds that the delay was prolonged due to the rights of appeal provided for in domestic law and that the speed of the initial assessments was appropriate.[288]

The ECtHR has similarly stated that the decision taken upon the review under Article 5(4) of the ECHR is not required to be appealable. Similarly, the ECtHR has stated that review by higher courts is considered more tolerable regarding the timing if domestic law provides for such a right of appeal. However, it can be said that the ECtHR has still considered the time elapsed on appeal under the requirement of Article 5(4) of the ECHR. This assessment, like any review under this paragraph, may yield quite different results depending on the particular circumstances of the case.

In *Abdulkhakov v Russia*, the applicant, who had sought asylum in Russia but had been detained pending a return procedure, appealed against the decision to detain him on different dates and appealed against the decisions. The ECtHR reiterated its general approach above but held that, under the circumstances of the case, the periods of 82 and 35 days in the separate appeal procedures did not meet the concept of "speedily" in Article 5(4) of the ECHR.[289] However, for example, in *Ilnseher v Germany*, cited above, the Grand Chamber held that the 8 months and 23 days taken by the applicant, who was detained on psychiatric grounds following a murder conviction, together with the appeal proceedings of the preventive detention order, did not constitute a violation in view of the complexity of the case.[290] In *Mehmet Hasan Altan v Turkey*, the applicant, a journalist and an academician, claimed that his appeal against his continued detention on charges of membership of a terrorist organization before the Turkish Constitutional Court, which was not decided for 14 months and 3 days, violated Article 5(4) of the ECHR. The Court emphasized that in this case, the delay was not acceptable in normal circumstances, even before the Constitutional Court, but, noted that the applicant's application concerning freedom of opinion and personal liberty following the attempted military coup was a complex complaint. Therefore, the ECtHR did not consider that the delay constituted a violation. It further noted that the applicant's detention was automatically assessed in short intervals under ECHR 5(3), the Court held that this period was acceptable in all the circumstances of the case.[291]

[288] *J.S. v New Zealand*, UN Doc CCPR/C/104/D/1752/2008 (26 March 2012) para 6.3-6.4.
[289] *Abdulkhakov v Russia*, App no 14743/11 (ECHR, 02 October 2012) para 196-218.
[290] *Ilnseher v Germany [GC]* (n 186) para 251-277.
[291] *Mehmet Hasan Altan v Turkey*, App no 13237/17 (ECHR, 20 March 2018) para 151-167.

2.7. Right to Compensation

Articles 9(5) of the ICCPR and 5(5) of the ECHR entitle the victim to effective mechanisms to seek redress in the event of a violation of the right to liberty and security protected by the preceding paragraphs of the same articles. Accordingly, the ICCPR guarantees this right as follows:

"Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

It is guaranteed under the ECHR as follows:

"Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

While the ICCPR defines the right holder as a person "who is the victim of unlawful arrest or detention", the HRC, in line with the ECtHR, also considers the persons subjected to a violation of the procedural rights recognized in Article 9 of the ICCPR, in the same context. The right to compensation provided for therein refers to the right to financial compensation, both pecuniary and non-pecuniary.

Both the HRC and the ECtHR require that this right must be recognized and provided by theoretically and practically effective means and legal remedies as an enforceable right, irrespective of whether the person chooses to invoke it or not.[292] It is required, however, that the authority assessing the claim should be able to assess and compensate the person for both pecuniary and non-pecuniary damage, 'without excessive formalism'.[293] Both the HRC and the ECtHR allow this to be interpreted as compensation for actual damage rather than as an automatic and necessary consequence of the existence of a violation.[294] Furthermore, it is not considered that the acquittal of, for example, a person who has been held in pre-trial detention for a period of time necessarily renders the previous detention arbitrary or unlawful.[295] The violation subjected to compensation may be established by domestic courts or by treaty mechanisms. If no such finding has been made by the domestic authorities, the violation of the right to compensation will be assessed on the basis of the violation of the fundamental or procedural aspects of the right to liberty and security in the same complaint.[296]

[292] General Comment no 35 (n 47) para 50; ECHR Guideline (n 126) para 297, 299.
[293] General Comment no 35 (n 47) para 50-52; ECHR Guideline (n 126) para 300.
[294] General Comment no 35 (n 47) para 52; ECHR Guideline (n 126) para 304-305.
[295] General Comment no 35 (n 47) para 51; ECHR Guideline (n 126) para 295.
[296] ECHR Guideline (n 126) para 292-293; Taylor (n 94) 277.

An important difference between the HRC and the ECtHR in the application of the right concerns the amount of compensation payable by domestic authorities under this right. The HRC, in its views on individual communications finding a violation of the applicant's right, states that the State should pay adequate compensation to the applicant. If the ECtHR finds a violation in the case before it, it determines the compensation to be paid to the applicant in accordance with Article 41 of the ECHR. Thus, the ECtHR requires that the compensation payable by the State under Article 5(5) ECHR must be proportionate to the amount it has paid in similar cases under Article 41 ECHR.[297] The HRC, on the other hand, does not provide a benchmark in terms of the amount to be paid but only requires that the compensation system should work effectively in practice.

In *Vasilevsky and Bogdanov v Russia*, one of the applicants received EUR 324 for pecuniary and non-pecuniary damage for 119 days of unlawful detention and the other EUR 3320 for pecuniary and non-pecuniary damage for 472 days of unlawful detention. In this case, although the ECtHR considered that the domestic courts had acted in good faith and in their capacities, it found these amounts to be very low in relation to the amounts awarded by the Court in similar cases and thus disproportionate. It therefore found a violation of Article 5(5) ECHR.[298] However, in *Mehmet Hasan Altan v Turkey*, the ECtHR considered that the amount paid to the applicant was low compared to the amounts awarded by the Court in similar cases but nevertheless concluded that the difference did not amount to manifest disproportionality and declared the complaint inadmissible.[299]

In the case of *Gunaratna v Sri Lanka* before the HRC, the author complained of 21 days of unlawful detention and related violations of his rights to liberty and security of person, as well as the inadequacy of the compensation awarded by the Court of Appeal in the amount of Rs. 5000 (approximately USD 50) for the violation of these rights. In this case, the HRC found that the author had been subjected to arbitrary detention and that there had been a violation of Article 9(1) of the ICCPR, but that it was not in a position to examine the amount of compensation awarded and declared the complaint under Article 9(5) inadmissible.[300]

In *Corinna Horvath v Australia*, the HRC made a relatively general assessment of the "effectiveness" of the State's response to the claims of the author, who complained of the

[297] *Selami and Others v the former Yugoslav Republic of Macedonia*, App no 78241/13 (ECHR, 01 March 2018) para 102; *Cristina Boicenco v Moldova*, App no 25688/09 (ECHR, 27 September 2011) para 43; *Ganea v Moldova*, App no 2474/06 (ECHR, 17 May 2011) para 22.
[298] *Vasilevsky and Bogdanov v Russia*, App no 52241/14 - 74222/14 (ECHR, 10 July 2018).
[299] *Mehmet Hasan Altan v Turkey* (n 291) para 174-177.
[300] *Gunaratna v Sri Lanka*, UN Doc CCPR/C/95/D/1432/2005 (17 March 2009) para 7.4.

absence of a mechanism by which she could obtain adequate compensation under ICCPR 9(5) for her arbitrary detention, and asked whether adequate compensation had been awarded in cases similar to the author's case.[301]

Another important developing difference in the practice of the HRC and the ECtHR concerns the nature of the compensation. The HRC states that compensation under paragraph 9(5) of the ICCPR is of a financial nature.[302] The ECtHR, on the other hand, while considering that compensation is "primarily" financial in nature,[303] has found it compatible with Article 5(5) of the ECHR if the domestic authorities reduce the penalty by recognizing the respective violation. In *Porchet v Switzerland*, the applicant was held in custody for 16 days, contrary to the legal limit of 48 hours. The domestic court recognized this unlawfulness and reduced his imprisonment sentence by 8 days. The ECtHR held that this method applied by the domestic court, considering the domestic court recognized the unlawfulness, is compatible with Article 5(5) of the ECHR. Therefore, the Court declared the complaint inadmissible, finding that the reduction of the sentence was comparable to the application of Article 41 of the ECHR and that in the concrete case the applicant could no longer claim to be a victim of Article 5(5) of the ECHR.[304]

[301] *Corinna Horvath v Australia*, UN Doc CCPR/C/110/D/1885/2009 (27 March 2014) para 8.7.
[302] General Comment no 35 (n 47) para 49.
[303] *Włoch v Poland (no 2)*, App no 33475/08 (ECHR, 10 May 2011) para 32; ECHR Guideline (n 126) para 301.
[304] *Porchet v Switzerland*, App no 36391/16 (ECHR, 08 October 2019).

CHAPTER III:
Multi-layered Protection of Human Rights and The Implementation of Universal Standards

In the first chapter, the general structural and functional characteristics of the HRC and the ECtHR were examined. It was followed by the comparison of the jurisprudence of these bodies on the right to liberty and security. Building on the previous chapters, this chapter mainly discusses how to ensure effective protection of higher standards. To this end, it first outlines the concept of multi-layered human rights protection and the relationship between the HRC and the ECtHR. Then, it explores the reasons behind the inconsistencies between the jurisprudence of these bodies identified in Chapter II. Lastly, it discusses how the effective implementation of higher standards can be ensured.

3.1. Multi-layered Protection and Relationship between the HRC and the ECtHR

As human rights increasingly have become a global issue, several international human rights systems have been established.[305] The fact that the state is the primary protector of human rights is paradoxical in that it is also the greatest violator of human rights in history.[306] Especially after the tragic experiences of the Second World War, the universal moral concept of human rights has influenced legal practice and many international human rights treaties have been adopted.[307] These treaty systems have mostly established their guardian institutions and monitoring mechanisms. Thus, today, human rights are protected not only in the relationship between the individual and the state but also within different levels composed of nation-states, and regional and universal international systems.[308] Therefore this multilayered protection concept refers to

[305] Park H-C and Song S-Y, *Global constitutionalism and multi-layered protection of Human Rights: Exploring the possibility of establishing a regional human rights mechanism in Asia* (Constitutional Court of Korea 2016)18; Brudner A, 'The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework' (1985) 35 The University of Toronto Law Journal 219, p 219.
[306] Katrien Meuwissen, 'NHRIs and the State: New and Independent Actors in the Multi-layered Human Rights System?' (2015) 15(3) Human Rights Law Review 441, 441 <http://dx.doi.org/10.1093/hrlr/ngv019>.
[307] Olivier De Schutter, 'The Formation of a Common Law of Human Rights', *Human Rights Tectonics* (Intersentia 2018) 5 <http://dx.doi.org/10.1017/9781780688060.003>; Stephanie Schiedermair, 'International Cooperation' in Christina Binder and others (eds), *Elgar Encyclopedia of Human Rights*, vol 3 (2022) 163; Jonas Christoffersen, *Fair balance: Proportionality, subsidiarity and primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 7.
[308] Steven Wheatley, 'The Idea of International Human Rights Law', *The Idea of International Human Rights Law* (Oxford University Press 2019) 190 <http://dx.doi.org/10.1093/oso/9780198749844.003.0005>.

the existence of multiple sources and levels of human rights law and multiple actors and institutions that can protect and enforce human rights.

The existence of multiple sources and actors in human rights protection inevitably leads to inconsistencies.[309] These inconsistencies can often arise between domestic legal traditions and the approaches of international protection systems, as well as between different international layers and systems.[310] While there is often agreement on what constitutes a fundamental right in the abstract, there can be various differences in how a right should be interpreted and applied.[311] In particular, the development of human rights law from a progressive movement to a normative specification makes these inconsistencies the more crucial.[312] Therefore, the concept of multi-layered protection in this context, also involves interaction and cooperation between actors at different levels.[313]

The relationship between the different actors can be simply divided into two parts: interaction between national and international actors, and interaction between actors at different levels of international protection. The relationships between international protection institutions and States are usually formed and developed within a treaty relationship.[314] Such relationships are therefore more explicit and can be established directly in a variety of ways. In this context, international treaty bodies provide supervision to their State Parties and carry out monitoring activities through various mechanisms under the authority granted by the treaty.[315] In this way, international protection systems contribute to the effective protection and promotion of human rights at the national level. In addition, States recognize various statuses to the treaties in which they are parties within their own legal systems, and, as a result, treaty provisions can be directly referenced by domestic authorities.[316] Moreover, treaty systems may encourage the

[309] De Shutter (n 307) 35; Sancin (n 12) 300; For the general frame of the fragmentation of international law, including human rights law, see 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law', *Report of the International Law Commission* (UN 2006) 75-82 <http://dx.doi.org/10.18356/ad144936-en>.

[310] Some name this inconsistency as the inter-layer `irritation´ or `disorder of normative orders´, see Colm O'Cinneide, 'Human Rights and within Multi-Layered Systems of Constitutional Governance: Rights Cosmopolitanism and Domestic Particularism in Tension' [2009] SSRN Electronic Journal 39, p 19-21 <http://dx.doi.org/10.2139/ssrn.1370264>.

[311] ibid 25.

[312] Carozza PG, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 American Journal of International Law 38, p 59.

[313] Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World?* (Cambridge University Press 2012) p 303 <http://dx.doi.org/10.1017/cbo9780511627088.011>.

[314] Wheatley (n 308) 194.

[315] Brudner (n 305) 219.

[316] Alain Brudner explains two techniques for incorporating international treaties into domestic law: "One is the method of 'general transformation,' whereby a constitutional provision automatically incorporates ratified treaties into the law of the land. This method, which presupposes ratification by a legislative body, is used in the United

establishment of local institutions and mechanisms for the effective fulfilment of treaty obligations.[317] This relationship can also work in the opposite direction. Some protection systems can base their interpretations on references to local practices,[318] in recognition of the influence of the state consent factor,[319] or they may develop mutual cooperation as a kind of consultation model to determine the implementation of treaty obligations and human rights.[320] This mutual relationship through a variety of means is known as judicial dialogue[321] and helps to promote harmonization and consistency in interpretations of human rights and treaty obligations, and the effectiveness of human rights protection.[322]

The principle of subsidiarity also plays an important role in the structural nature of the relationship between the State Party and the treaty bodies.[323] The principle of subsidiarity, in a sense, represents a balancing relationship with the sovereignty of the State party.[324] The requirement of exhaustion of domestic remedies in individual complaints to international treaty bodies is a procedural aspect of this relationship.[325] The fact that complaints before treaty bodies shall not be considered as a fourth instance, but are limited to whether treaty rights have been violated, can also be considered in this vein.[326] From a responsibility perspective, the State is primarily responsible for the protection of human rights, and the treaty bodies have a

States, France, the Netherlands, and the Federal Republic of Germany. In these states, a ratified treaty, provided it is 'self-executing,' becomes a rule of municipal law binding on domestic tribunals. The other technique is the one used in the United Kingdom and Canada. Known as the method of 'special transformation,' it consists in the domestic implementation of treaties by appropriate and separate legislation.", see Brudner (n 305) 221; In light of Articles 26 and 27 of the VCLT, Anthony Aust indicates that the treaties that provide rights to persons 'can usually be given effect only if they are made part of the domestic law of each party, and with provisions for their enforcement'. He explains the two main approaches to how states perform a treaty in domestic law: monist and dualist approaches. The monist approach refers to the concept that a treaty concluded in accordance with the Constitution of a state becomes part of its domestic law without the need for legislation. In the dualist approach, on the other hand, the Constitution does not provide treaties with a special status. Therefore, they need to be incorporated into domestic law by legislation to become fully effective in domestic law. He also notes that these two approaches are not mutually exclusive and that it is often possible to find elements of both in constitutions. See Aust A, "Treaties and Domestic Law", *Modern Treaty Law and Practice* (3rd edn Cambridge University Press 2013) 159-177.

[317] For example, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment obliges State parties to establish National Preventive Mechanisms. Similarly, see the ECtHR`also encourage State parties to strengthen the individual complaint mechanisms before the Constitutional Courts, see speech of Mr Dean Spielmann, former President of the ECtHR, on the best practices of individual complaint to the Constitutional Courts in Europe, available at <https://www.echr.coe.int/documents/d/echr/Speech_20140707_Spielmann_ENG>.

[318] For example, ECtHR`s application of margin of appreciation doctrine.

[319] Andreas Follesdal, 'The principle of subsidiarity as a constitutional principle in international law' (2013) 2(1) Global Constitutionalism 37, p 55-56 <http://dx.doi.org/10.1017/s2045381712000123>.

[320] It can be seen in this context that the State parties can submit their observations on the HRC`s general comments.

[321] Lemmens P, 'The European Court of Human Rights—Can There Be Too Much Success?' (2022) 14 Journal of Human Rights Practice 169, p 178.

[322] Regarding the role of consensus and harmonisation, see Bates (n 89) p 267.

[323] Carozza (n 312) 46-49.

[324] Kumm (n 313) 291; From the ECtHR`s perspective, see Christoffersen (n 307) 227-230.

[325] Carozza (n 312) 62, 67.

[326] Follesdal (n 319) 55-56.

complementary review power when the domestic authorities failed to protect treaty rights.[327] On the other hand, the principle of subsidiarity also has a function to strengthen the effective protection of human rights at the national level. Human rights are ultimately best realized in the closer and smaller units.[328] Moreover, these closer and smaller units are better able to assess the common goods and specific circumstances.[329] In this framework, and in keeping with the binding character of the treaty relationship, but also in keeping with the universal nature of human rights, treaties (and treaty bodies) set out certain minimum standards, i.e. the minimum level of implementation of certain standards to a certain scope and in a certain manner.[330] However, it is provided that the minimum standards set by treaties shall not be interpreted in such a way as to limit the higher standards of protection provided by States parties under their legal systems or other treaty relationships.[331]

The fact that the relationship between the state party and the treaty system is essentially an international treaty relationship raises the importance of the consent of the state party. It appears that the principle of subsidiarity also supports, to some extent, this reality. However, although human rights treaties may also allow for reservations that are not contrary to their object and purpose,[332] it has been indicated on various occasions that human rights treaties are in a different position from general international treaties governing obligations between States.[333] It can be further observed in the interpretation of the substance of the rights protected by the treaties. In the interpretation of a term of a human rights treaty, considerable weight is given to the object and purpose of the treaty, besides the ordinary meaning of that term.[334] This approach, namely the *pro homine* principle, shifts and develops the focus of treaty interpretation from the consent of the state, which is the main factor in general international law, to the effective protection of

[327] Samantha Besson, 'Subsidiarity in International Human Rights Law - What Is Subsidiary about Human Rights' (2016) 61 Am J Juris 69, p 72, 78.
[328] As Eleanor Roosevelt famously expressed: "*Where, after all, do universal human rights begin? In small places, close to home so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere*.".
[329] Carozza (n 312) 73.
[330] O'Cinneide (n 310) 32.
[331] ICCPR art 5(2); ECHR 53.
[332] VCLT art 19(3); 'Guide to Practice on Reservations to Treaties', *Report of International Law Commission* (UN 2011) para 3.1-3.2 <https://doi.org/10.18356/06b6e669-en>.
[333] CCPR `General Comment no 24: Reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant´ Adopted at the 52nd Session of the Human Rights Committee, on 11 November 1994' (1994) para 8; see generally I Ziemele and L Liede, 'Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6' (2013) 24(4) European Journal of International Law 1135 <http://dx.doi.org/10.1093/ejil/cht068>.
[334] Wheatley (n 308) 194.

the individual.[335] In line with this principle, which recognizes that the object and purpose of human rights treaties is the effective protection of human rights, the meaning or interpretation of treaty terms and rights may change and evolve over time.[336] As such, it has an essential place in the relationship between the State party and the international treaty bodies, and in the interpretation of human rights treaties.

The relationship between the different international human rights bodies is relatively more problematic due to the absence of a treaty relationship, clear boundaries, or hierarchy.[337] On the other hand, the multiplicity in international human rights law, particularly in the interpretation of rights and the adoption of normative standards, requires a certain degree of commonality, or at least convergence or cooperation, between the different international treaty bodies.[338] This is also because the universality of human rights, both morally and legally, may include, in some aspects, the claim of universal justification.[339] Thus, while these different international bodies initially developed in a more isolated system within their respective jurisdictions and areas of interest, they seem to have improved their communication and cooperation with each other over time.[340] In this context, the interaction and cooperation in various ways between different international treaty bodies are established in order to avoid plurality among international human rights bodies on similar issues and to legitimize or strengthen the evaluative interpretation of human rights.[341]

Such a relationship also exists between the HRC and the ECtHR. A procedural aspect of this relationship between the HRC and the ECtHR is reflected in the admissibility criteria of individual complaints before the ICCPR and the ECHR.[342] Both treaties provide for their respective mechanisms to declare inadmissible a substantially identical application pending or already examined before another international investigation or settlement procedure.[343] Thus, a complaint on a matter under consideration before the HRC would be found inadmissible before the ECtHR and vice versa. However, there are cases where the same applicant's complaint,

[335] Dilton Ribeiro and Valerio De Oliveira Mazzuoli, 'The Pro Homine Principle as a fundamental aspect of International Human Rights Law' (2016) 17 Meridiano 47 - Journal of Global Studies p 1-7 <http://dx.doi.org/10.20889/m47e17003>.
[336] Wheatley (n 308) 194.
[337] For the HRC and the ECtHR, see De Shutter (n 307) 27; regarding the general complexity, see O'Cinneide (n 310) 26; more generally, see Besson S, 'Human Rights as Transnational Constitutional Law' [2017] Handbook on Global Constitutionalism, p 235-244.
[338] Wheatley (n 308) 192-193.
[339] De Shutter (n 307) 6; for together with opposite arguments, see Besson (n 337) 239.
[340] Forowicz (n 53) 189.
[341] De Shutter (n 307) 6.
[342] Forowicz (n 53) 155.
[343] OP-ICCPR art 5(2)(a); ECHR art 35(2)(b).

sometimes concerning different legal issues based on essentially the same matter, has been accepted by the HRC and the ECtHR. There are also cases in which different complainants took part in the same domestic proceeding applied to these bodies separately. While these complaints were concerned essentially the same issue and problem, they have been found admissible by these bodies.[344] Nevertheless, it must be said that this admissibility criterion is applied very strictly "to avoid inconsistency and plurality between the international mechanisms in the same case".[345]

The substantive aspect of the relationship between the HRC and the ECtHR is the references they make to each other in the interpretation of rights.[346] As noted in Chapter 1, the HRC is reluctant to refer to the jurisprudence of other international bodies, although it has done so on some occasions.[347] By contrast, the ECtHR has reiterated on several occasions that it must take into account the international law background and instruments on some particular issues.[348] In this regard, there are several judgments in which it has referred to the approaches of other bodies such as the HRC, the IACtHR, and even the ILO. For example, the ECtHR, which previously did not find the refusal of States Parties to provide for the right to conscientious objection incompatible with freedom of religion, has changed its approach, following the HRC's position to the opposite. Although the ECtHR explained this change of position mainly in terms of the consensus developed among States Parties, it has also explicitly referred to the HRC's general comment, jurisprudence, and the international consensus in this regard.[349]

Freedom of religion, which was at stake in the abovementioned example, is guaranteed in similar wordings in the ICCPR and the ECHR. On the other hand, the ECtHR has strengthened its mechanism of interim measures with reference to the practice of the HRC and the IACtHR, although there is no provision for interim measures in the ECHR. The ECtHR has changed its previous position that interim measures are not binding, referring to these and other

[344] Forowicz (n 53) 155-158 (with examples).
[345] Ibid 157; ; For a comparative analysis that shows the ECtHR is stricter than the HRC, see Christophe Deprez, 'The Admissibility of Multiple Human Rights Complaints: Strasbourg and Geneva Compared' (2019) 19(3) Human Rights Law Review 517, 517-536 http://dx.doi.org/10.1093/hrlr/ngz022.
[346] In other words, ECtHR refers to the HRC`s approach "in order to clarify or harmonise the ECHR with the Covenant", see Forowicz (n 53) p 154.
[347] Hennebel (n 4) 375-377; De Shutter (n 307) 22-23.
[348] *Bayatyan v Armenia[GC]*, App no 23459/03 (ECHR, 07 July 2011) para 102; *Demir and Baykara v Turkey[GC]*, App no 34503/97 (ECHR, 12 November 2018) paras 23, 60, 70; *Saadi v the UK[GC]*, App no 13229/03 (ECHR, 29 January 2008) para 62-63.
[349] *Bayatyan v Armenia[GC]*, App no 23459/03 (ECHR, 07 July 2011) para 109: "…in defining the meaning of terms and notions in the text of the Convention, the Court can and must take into account elements of international law other than the Convention and the interpretation of such elements by competent organs. The consensus emerging from specialised international instruments may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.".

international bodies, and has held that they shall be considered binding in the light of the object and purpose of the Convention, in order to protect individuals from irreparable harm.[350]

However, the ECtHR is not always so open to the approach of the HRC. On some issues, such as whether the individuals` wearing the burqa in public violates their freedoms of religion and expression, the ECtHR clearly diverges from the HRC's approach. Whereas the HRC in a view that France's prohibition of the wearing the burqa in public schools and the refusal to accept a photograph of a woman wearing a turban for official use violated freedom of religion, the ECtHR held that France could enjoy a margin of appreciation in complaints against France on very similar issues and that there was no violation of freedom of religion.[351] Thus, although the ECtHR reiterates that it is open to taking into account the approach of different international bodies, it can be said that it takes different positions in changing its approach with reference to the HRC, i.e. in following the HRC's approach on similar issues.[352]

The relationship between the HRC and the ECtHR is not limited to the admissibility criteria in question and references to other body's case law. As explained in Chapter I, the HRC's issuing of general comments and sending drafts to regional mechanisms for their observations also provides an area of mutual interaction with the ECtHR.[353] On the other hand, this dialogue can

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[350] *Mamatkulov and Askarov v Turkey[GC]*, App nos 46827/99 46951/99 (ECHR, 04 February 2005) para 124: "In this context, the Court notes that in the light of the general principles of international law, the law of treaties and international case-law, the interpretation of the scope of interim measures cannot be dissociated from the proceedings to which they relate or the decision on the merits they seek to protect. The Court reiterates in that connection that Article 31 § 1 of the Vienna Convention on the Law of Treaties provides that treaties must be interpreted in good faith in the light of their object and purpose (see paragraph 39 above), and also in accordance with the principle of effectiveness. The Court observes that the ICJ, the Inter-American Court of Human Rights, the Human Rights Committee, and the Committee against Torture of the United Nations, although operating under different treaty provisions to those of the Court, have confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law. Indeed it can be said that, whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending (see, *mutatis mutandis*, *Soering*, cited above, p. 35, § 90).".

[351] HRC, in its Concluding Observation, recommended France to re-examine the Act regulating the prohibition of turban and similar religious insignia in some public places. The Committee was in a view that application of this Act would violate the freedom of religion. However, ECtHR had dealt with related issues and, after the Committee`s observations, held that France enjoys a margin of appreciation in this application of its secular principles. After the ECtHR`s decisions, the HRC, upon individual complaints, found a violation of the freedom of religion and therefore confirmed its previous concluding observations. For the Committee's concluding observations, see UN Doc CCPR/C/FRA/CO/4, (2008), para 23. For the ECtHR`s decisions, see *Mann Singh v France*, App no 24479/07 (ECHR, 13 November 2008); *Jasvir Singh v France*, App no 25463/08 (ECHR, 30 June 2009), Legal Summary; *Ranjit Singh v. France (dec.)*, App no 27561/08 (ECHR, 30 June 2009), Legal Summary. For the Committee`s view on this matter, see *Bikramjit Singh v France*, UN Doc CCPR/C/106/D/1852/2008 (01 November 2012) para 8.2-8.7. See generally, De Shutter (n 307) 32-33; for an analysis on this matter with more recent decisions, see Stephanie Berry, `The UN Human Rights Committee Disagrees with the European Court of Human Rights Again: The Right to Manifest Religion by Wearing a Burqa´ (*Blog of the European Journal of International Law*, 3 January 2019)<https://www.ejiltalk.org/the-un-human-rights-committee-disagrees-with-the-european-court-of-human-rights-again-the-right-to-manifest-religion-by-wearing-a-burqa/>.

[352] De Shutter (n 307) 34.

[353] Hennebel (n 4) 370.

also be established through other types of consultations between the two treaty bodies to exchange opinions on various issues.[354]

3.2. Critics on the HRC`s Views and the ECtHR`s Judgements

The differences in the HRC and ECtHR's approach to the right to liberty and security are analyzed in Chapter II. As explained under the previous heading, the treaty bodies' interpretation of the treaty contains normative standards as well as the recognition of the right.[355] Thus, it is possible to evaluate these inconsistencies between their approaches in two aspects: what should be understood by the right to liberty and security, and how it should be applied.[356]

Inconsistencies in the concept of the right to security and the scope of application of the right to liberty can be considered in the first category. Although the right to security is protected in identical wording, it is clear that the HRC's approach to its conception and scope of application provides broader protection than that of the ECtHR.[357] The structural context of the Convention and the intentions of the States Parties during the drafting process have been influential in the ECtHR maintaining its approach that differs from the HRC's interpretation. Therefore, it can be said that the ordinary meaning of the treaty term is interpreted in light of the intentions of the parties rather than the object and purpose of the treaty.[358] According to the VCLT, the "intention of the parties" can only be used as a supplementary means.[359] Moreover, the ECtHR's approach does not seem to be in line with the principle of effectiveness and *pro homine* with regard to the object and purpose of the treaty. The fact that death threats and non-fatal injuries are considered differently in the two bodies' approaches to the scope of protection makes this issue of practical relevance.[360]

The scope of application of the right to liberty is more complicated. On the issue of the existence of free consent, the ECtHR has been observed to have a more detailed and protective approach to the "real situation" than the HRC.[361] However, with regard to the confinement of migrants at borders and the imposition of solitary confinement on prisoners, the HRC's system of protection

[354] Sancin (n 12) 305.
[355] Carozza (n 312) 59.
[356] O'Cinneide (n 310) 25; The reason for this distinction, on the other hand, is that the former relates to how the term "treaty" is interpreted, while the latter relates to the more normative or, as some would call it, "law-making" nature of international human rights law, for instance, see Wheatley (n 308) 195.
[357] see the cases referred at n 93-121.
[358] see *East African Asians v United Kingdom* (cited n 113)
[359] VCLT art 32.
[360] General Comment no 35 (n 47) para 55.
[361] See the cases referred at n 132-135.

is more open and inclusive. The consideration of the detention of migrants at borders is related to the distinction between the right to deprivation of liberty and interference with freedom of movement. The interpretation that such detention may not amount to deprivation of liberty, particularly in some cases where asylum seekers are held at borders for long periods of time, significantly weakens the Convention guarantee.[362] Solitary confinement of prisoners can be considered in a similar vein. While there are situations in which the ECtHR has considered further restrictions of a certain degree of restraint as deprivation of liberty, the fact that it considers the solitary confinement of prisoners to be an "administrative measure" dangerously weakens treaty protection for these individuals, leaving administrative practice outside of treaty obligations concerning those individuals` right to liberty and security.[363]

The other aspect of the inconsistency between the approaches of the HRC and the ECtHR concerns how the right to liberty and security should be implemented. Implementation standards concern the grounds for detention and the assessment of arbitrariness, as well as the procedural safeguards provided. In cases of inconsistencies concerning the grounds and justification of detention, it can be said that, in general, the ECtHR leaves more margin of appreciation to States. Conversely, this can also be explained by the fact that the HRC has applied certain aspects of the principle of subsidiarity less often.[364] The difference in approach to whether the severity of a prison sentence can be assessed is a clear example of this.[365] In a similar vein, the ECtHR's relatively limited review in cases of detention based on criminal suspicion can also be seen in the same light. Particularly in the case of detentions under immigration control, the ECtHR has been observed to leave considerably more room for states' concerns for border security than the HRC and to limit to a certain extent its own competence to assess the justification of detention.[366] On the other hand, the HRC can be said to set the applicability limit of the Convention in such a way as to broaden the scope of its own assessment. Thus, in general, it can be said, to some extent, that the HRC's assessment of arbitrariness has broader applicability and is stricter, interpreting justified detention more narrowly and the right to liberty of individuals more broadly.

[362] For instance, *Ilias and Ahmed v Hungary* (n 146), where detention for 23 days for the purpose of extradition did not amount to a deprivation of liberty.
[363] see *Stoyan Krastev v Bulgaria* (n 137).
[364] Substantial aspect of the principle of subsidiarity refers to the content and intensity of the international treaty bodies` reviews. In this regard, whereas The ECtHR applies the margin of appreciation and the “fourth instance” doctrine, the HRC does not apply the margin of appreciation and applies the fourth instance in a relatively more limited fashion. See Besson (n 319) 79-82.
[365] see *Vinter and Others v the UK [GC]* (n 190); *Khamtokhu and Aksenchuk v Russia [GC]*, (n 191); *Anthony Michael Emmanuel Fernando v Sri Lanka* (n 193); *Dissanakye v Sri Lanka* (n 195).
[366] see *Saadi v the UK* (n 200*); Mahamed Jama v Malta* (n 204).

Inconsistent approaches of the HRC and the ECtHR to procedural implementation, i.e., standards of a more normative nature, appear to be more varied and complex. The difference in the timing of the right to be informed of the reasons for arrest appears to be due to differences in treaty texts rather than differences in interpretation.[367] Nevertheless, although the two bodies interpret this right in parallel as aiming at the effective exercise of the right to appeal, the ECtHR seems, in some circumstances, to put this functional aspect of the right ahead of the right itself.[368] On the other hand, the HRC seems to treat the right to be informed in its own right.[369] The difference between the maximum time limits for bringing an arrested person before a judicial authority, i.e. the period of custody without judicial review, is based on the difference in the two bodies' hypothetical assessments of the time required. There is also a difference in approach between the "certainty" or "openness to interpretation" of the maximum limits set. The maximum limit set by the ECtHR seems to be relatively close to interpretation, whereas that of the HRC expresses a limit that should not be exceeded in ordinary situations, but may be justified in exceptional circumstances.[370] In this respect, it can be said that the HRC shows a more progressive tendency to shorten this time limit in a normative manner.

It can be argued that the difference in how the principle of subsidiarity is applied has a crucial impact on the main differences in approach between the HRC and the ECtHR. The principle of subsidiarity finds a specific place in the relations of both bodies with their States parties. However, they differ as to which aspects of this principle are used and in which ways.[371] Therefore, some inconsistencies can be explained by the role of the ECtHR's application of the margin of appreciation doctrine and the European public order approach in the substantive direction of the subsidiarity principle in the ECHR system. It also affects the Court`s proportionality assessments[372] and, some argue, gives too much discretion to States on the public safety and national security concerns.[373]

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[367] While Article 5(2) of the ECHR puts the timing at `promptly after arrest´, Article 9(2) of the ICCPR uses the phrase of `at the time of arrest´.
[368] see *Grubnyk v Ukraine* (n 245).
[369] see *Krasnova v Kyrgyzstan* (n 242).
[370] General Comment no 35 (n 47) para 33; see *McKay v the UK* (n 259) and *Oral and Atabay v Turkey* (n 262)
[371] "...even before human rights treaty bodies, if procedural subsidiarity is usually respected, it is not the case with substantive subsidiarity or only in a very limited fashion, and clearly not the case with remedial subsidiarity. This may be explained by reference to the lack of legally binding force of these bodies' views and observations, but also, a contrario, by reference to the specificities and importance of judicial reasoning in the human rights context." See Besson (n 327) 79.
[372] For a comprehensive analysis of the relationship between the proportionality assessment and the principle of subsidiarity, see Christoffersen (n 307) 192-227.
[373] Donna Cline, 'Deprivation of Liberty: Has the European Court of Human Rights Recognised a 'Public Safety' Exception?' (2013) 29(76) Utrecht Journal of International and European Law 23, p 33-38 <http://dx.doi.org/10.5334/ujiel.bl>; S D Bachmann & J Sanden, 'The Right to Liberty and Security according to

Detention under immigration control is one of the issues where this effect is most evident. The ECtHR's leaving a wide margin of appreciation to States-parties leads to substantial divergences from the HRC's approach.[374] Ümit Kilinc[375] has argued that the ECtHR's allowance of this discretionary power to the state has resulted in tolerance for prolonged detentions and that the number of applications to the HRC from European countries in this context has tended to increase.[376] In such cases, where the jurisdiction of the ECtHR and the HRC overlap, it is particularly remarkable that such a trend has developed, despite the advantage of the binding nature of ECtHR judgments.

A similar situation arises with respect to criminal detention, which is alleged to be used primarily as a means of political repression. The ECtHR's assessment under the right to liberty of the person shows a strictly subsidiary character to the question of whether a criminal suspicion exists. In addition, the test developed by the Court for the examination of complaints based on a violation of Article 18 of the ECHR in relation to the right to liberty is very strict and can be considered as significantly weakening the Convention's protection against arbitrary detention on political or other illegitimate grounds.[377] Ümit Kilinc comments that this is because the binding judgments are subject to a strict execution regime supervised by the Committee of Ministers and that the Court, as a judicial body, avoids these very severe conclusions to very exceptional cases.[378] On the other hand, Günal Kursun[379] argues that the reserved attitude of the ECtHR against increased governmental behavior contrary to democracy and the rule of law, despite its various instruments, undermines human rights practice in the country concerned and confidence in the protection of the ECtHR. Nevertheless, he noted that the importance of the ECtHR from the perspective of victims remains, given that it is not possible to apply to both organs at the same time in terms of admissibility criteria, and that the HRC's enforcement system and influence on the state authorities is weaker than that of the ECtHR.[380]

Article 5 of the European Convention on Human Rights and Facing Threats to Public Safety and National Security' (2017) 2017 J S Afr L 333, p 325-332.

[374] see *Timothawes v Belgium* (n 206), *Mahamed Jama v Malta* (n 204); particularly *Saadi v the UK* (n 200) Joint Partly Dissenting Opinion by Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä (cited n 203).

[375] Assoc Prof- Faculty Member at the Strasbourg University, Former case processing lawyer at the ECtHR; Attorney at Law in Strasbourg Bar Association.

[376] Conducted interview with Ümit Kilinc (Interview no 3).

[377] *Merabishvili v Georgia [GC]*, App no 72508/13 (ECHR, 28 November 2017), Dissenting Opinion by Judge Yudkivska, Tsotsoria and Vehabovic, para 36-38.

[378] Conducted interview with Ümit Kilinc (Interview no 3).

[379] PhD, Director of Human Rights Agenda Association Ankara Office, Member of Amnesty International Turkey

[380] Conducted interview with Günal Kursun (Interview no 1).

On the other hand, there may arise questions about the sufficiency of the legal reasonings in the HRC's views compared to the ECtHR`s judgments.[381] As a matter of fact, in the Committee`s views examined, it was observed that its consideration of the merits concerning the complaint in question is usually set out in one or two paragraphs. These short reasonings include a brief review of the specific submissions of the parties, a summary of the Committee's general principles on the substantial matter, and its conclusion in the concrete case. These give, at times, an unclarity in the Committee's consideration and affect the persuasiveness of its legal argumentations.[382]

The question of the reasonings in the Committee's views, or in other words the quality of its legal arguments, is affected by a number of factors. Not least of these is the strict word limit imposed on every document produced by the Committee.[383] In addition, members of the Committee only meet at certain times of the year to deal with the periodic reporting processes of States and the finalization of numerous individual communications, facing a heavy backlog under limited resources and time. In this regard, Patrick Mutzenberg[384] is of the view that the Committee, considering it is not a permanent court, does excellent work with limited funds, resources, and time.[385]

On the other hand, in the large number of Committee communications examined, it was observed that the State parties did not cooperate with the Committee in the communication processes and did not respond to the authors' complaints. In these cases, the Committee concludes its assessments based on the authors' submissions, if they are sufficiently substantiated and admissible. In the absence of competing arguments, it can be argued that this might lead the Committee to construct its assessment based on limited information and one-sided arguments, and thus to relatively less detailed legal argumentations.

[381] For some criticisms in this regard, see Burchill and Conte (n 3) 14; Laura-Stella Enonchong, 'Public prosecutors and the right to personal liberty: An analysis of the jurisprudence of the UN Human Rights Committee and the European Court of Human Rights' [2022] Netherlands Quarterly of Human Rights 092405192211152, 242 <http://dx.doi.org/10.1177/09240519221115280>.
[382] This concern was also indicated by some Committee members in their separate opinions, as an example, see *Griffiths v Australia*, UN Doc CCPR/C/112/D/1973/2010 (21 October 2014), Individual Opinion of the Committee Member Víctor Rodríguez Rescia and Fabián Salvioli, para 1.
[383] Sancin (n 12) 309.
[384] PhD, Director of the Centre for Civil and Political Rights, a Geneva-based NGO that facilitates civil society interaction with the Committee.
[385] Conducted interview with Patrick Mutzenberg (Interview no 2).

3.3. Full Implementation of Human Rights and Function of Coordination

The differences between the approaches of the HRC and the ECtHR to the right to liberty and security and its standards should concern us in some respects. The need for the unity and legal certainty of international human rights law can be recognized as one of these concerns.[386] But this mainly concerns whether the rights to liberty and security are universally protected by certain standards. Indeed, the ultimate aim or function of the multi-layered protection concept is more effective protection of human rights, rather than the creation of unity and coherence.[387] As such, the standards set by the HRC based on its mandate to protect and promote human rights at the universal level would also need to be protected under the jurisdiction of the ECtHR.

In fact, the ECHR provides that it cannot be interpreted in such a way as to limit the higher standards that the state party is obliged to protect under other treaties.[388] Thus, state parties to both treaties continue to be bound to implement each one`s protection standards. However, while the ECtHR`s judgments are binding and it has a strong enforcement system, the HRC has a weaker response from governments.[389] Patrick Mutzenberg has commented on this issue, after reiterating that these two bodies belong to independent systems, that if one wants to establish a hierarchy, the ECtHR could be considered higher because of its binding effect on States.[390] Günal Kursun also mentioned that even in cases where ECtHR protection is lower than that of the HRC, the ECtHR`s protection is more frequently invoked and expected by victims and lawyers because of its enforceability.[391] As such, ECtHR judgments can play a key role in ensuring that the universal standards set by the HRC are effectively implemented in Council of Europe countries.

As treaty bodies of different protection systems, they are not subject to any hierarchy and it is not possible to argue that the decisions of one of them are binding on the other. Therefore, the

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[386] Wheatley (n 308) 189; De Shutter (n 307) 35; regarding the need for consistency between UN treaty bodies for coherent implementation of treaty obligations, see also Navanethem Pillay, *`Strengthening the United Nations human rights treaty body system´* (June 2012), p 25, available at <https://www.ohchr.org/sites/default/files/HCReportTBStrengthening.pdf>.

[387] Carozza (n 312) 43; O'Cinneide (n 310) 20.

[388] Article 53 of the ECHR: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.".

[389] Brudner (n 305) 222; Forowicz (n 53) 154; This is evident from the very low cooperation performance of States Parties in the examined individual communications before the Committee. Furthermore, the issue of insufficient compliance by States parties with their reporting obligations can also be considered in the same context, see Sancin (n 12) 302.

[390] Conducted interview with Patrick Mutzenberg (Interview no 2).

[391] Conducted interview with Günal Kursun (Interview no 1), he further noted that this dilemma ultimately prevents individuals in Turkey from benefiting from effective international protection. This is because, according to him, although protection before the HRC is relatively more favorable, it has created great despair that victims still feel the need to turn to the ECHR for effective protection and do not access similar protection there.

HRC views can be seen as the inspiration for the ECtHR in its interpretation of the Convention.[392] Moreover, it is possible to argue that the HRC views have a particular position compared to any other foreign human rights jurisprudence, given the universal validity of the standards set by the HRC. Then one would expect the ECtHR jurisdiction to adopt higher standards and a more protective approach, taking into account regional specificities, not lower ones. Of course, it is not possible to argue for any kind of subsidiarity, shared responsibility, or complementary relationship between these two bodies.[393] However, the idea behind the principle of subsidiarity, namely that the closer and smaller unit has a more effective role and capacity in the protection of human rights, may also have a certain relevance between the HRC and the ECtHR. The ECtHR has the ability to take specific measures and develop approaches to more effective protection of human rights in line with the shared legal traditions, history, and challenges.[394] In doing so, however, it should be expected not to provide protection below the universal standards set by the HRC.

Although the ECtHR gives considerable weight to the consensus among its State parties when interpreting treaty rights, it is possible to say that the HRC views are a de facto part of this consensus. This is because almost all Council of Europe states are also parties to the ICCPR.[395] According to Article 53 of the ECHR mentioned above, it can be said that the ICCPR - and therefore the authoritative interpretations of the HRC - constitute a sufficient consensus ground among the State parties to the ECHR system. This should be also the case with regard to the interpretation and procedural requirements of the right to liberty and security. Besides, where the HRC provides higher protection standards, this situation can be more considerable than the consensus among domestic applications in light of the *pro homine* principle.

In any event, the persuasiveness of the HRC`s views is important for the ECtHR to be able to rely on the HRC's approach and the standards it sets, and thus to justify its own jurisprudence by reference to the HRC. In this context, the relative weakness of the HRC's legal argumentation

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[392] De Shutter (n 307) 35; `The Place of the European Convention on Human Rights in the European and International Legal Order´, *Report of the Steering Committee for Human Rights (CDDH)* (Council of Europe, 2019) para 330, available at <https://rm.coe.int/place-of-the-echr-in-the-european-and-international-legal-order/1680a05155>.

[393] However, Patrick Mutzenberg commented, the fact that the HRC can consider complaints of the applicants that were found inadmissible by the ECHR on very low level of reasoning shows how a universal system can develop a complementary role over a regional system. In such situations, according to him, the HRC can be a very good plan B for the victims, Conducted Interview with Patrick Mutzenberg (Interview no 2); Even if this is considered as a complementary role, it further supports the following argumentation.

[394] For generally, concerning the relationship between universal and regional human rights bodies, see Carozza (n 312) 67; Joseph Drew and Bligh Grant, 'Subsidiarity: More than a Principle of Decentralization—a View from Local Government' (2017) 47(4) Publius: The Journal of Federalism 522, 523 <http://dx.doi.org/10.1093/publius/pjx039>.

[395] Currently, only Moldova and Macedonia are not parties to the ICCPR.

at times may be an important issue. In the face of emerging challenges, the question of the HRC's modus operandi, which at times affects the quality of its legal argumentations, is certainly a matter in this regard. The full-time work of the HRC as a permanent Committee,[396] changing or lifting the strict word limit pressure for its views, would contribute significantly to a more effective response to emerging issues and to a more persuasive argumentation in its views. Such a reform could provide an important legitimate base for the ECtHR to develop its approach to the interpretation of the right to liberty and security, with more reference to the HRC`s views.

In addition to direct reference to its case law, or to facilitate it, consultative briefings and dialogues between the HRC and the ECtHR have a significant potential to contribute. These meetings are particularly important for contemporary challenges, and emerging or mass issues.[397] For example, detention under immigration control and post-conviction preventive detention measures can be considered in this context. Both bodies can be said to have similar cooperation with their State parties. For instance, the ECtHR organizes meetings with the Constitutional Courts and other legal authorities of the Council of Europe States in order to strengthen and improve domestic implementation.[398] It is evident that further strengthening the dialogue between the HRC and the ECtHR would contribute to the effective implementation in the region and the development of universal standards, especially in the face of current challenges.

In the end, the inconsistency, to some degree, in the jurisprudence of these two bodies is inevitable, even on the right to liberty and security protected in similar wording in their treaties. Indeed, it should not be expected, since full harmonization also would bring its own disadvantages.[399] In light of the common background and current problems of the region, it is important that in specific cases the ECtHR independently assesses the rights and the standards it requires, based on the Convention.[400] However, the ECtHR shall not fall below the universal standards of protection provided by the ICCPR, of which almost all Council of Europe countries

[396] Schiedermair (n 307) 167; Sancin (n 12) 311; The coherence between the HRC and other UN treaty-bodies can also be seen as an effect with from perspective of the ECtHR and CoE Member States, see Steering Committee for Human Rights (CDDH) report (n 392) para 332-333.
[397] Such consultation organizations may happen in cases where any extra-budgetary resources are donated by certain states or available within the relevant body, see Sancin (n 12) 309; UN former High Commissioner for Human Rights, Navanethem Pillay`s report is noteworthy in this regard, although it is focused on the interaction between the Committee and State parties. Use of new technologies such as video conference, is high potential to facilitate also the interaction between the HRC and the ECtHR, see Navanethem Pillay (n 386) p 88-92.
[398] e.g. Superior Courts` Network of the ECtHR, see <https://prd-echr.coe.int/en/web/echr/superior-courts-network>.
[399] Carozza (n 312) 77.
[400] De Shutter (n 307) 35-36.

are parties, and its guardian, the HRC. So will individuals in the region be able to enjoy effective protection of their rights to liberty and security within a multi-layered protection system.

CONCLUSION

The current research, first, aimed to identify the inconsistencies between the jurisprudence of the HRC and the ECtHR on the right to liberty and security. Based on the review of the relevant case law in Chapter II, it can be concluded that although their approaches are mostly similar in fundamental principles, there are still several issues in which they differ. Accordingly, the HRC extends the protection of the right to security beyond formal deprivation of liberty situations to freedom from bodily or mental injuries, while the ECtHR does not. They also differ in determining the scope of application of the right to liberty. In this sense, it has been observed that the ECtHR approaches more sceptically the existence of free consent or its effect on the concrete situation. Another related difference that has been observed is in solitary confinement measures. HRC considers solitary confinement of a person who is already detained as further deprivation of liberty, while the ECtHR does not. The last observation regarding the scope of the right to liberty is that the HRC considers the confinement of asylum-seekers in the airport transit zones or at the borders as a deprivation of liberty in principle, while the ECtHR does not in some situations. Furthermore, they differ in examining the lawfulness and arbitrariness of detentions on various grounds. Accordingly, security detentions, post-conviction preventive detentions, and detentions in the immigration context are the areas in which the HRC applies more inclusive and protective approaches than the ECtHR. The ECtHR`s examination is stricter but more limited than the one of the HRC on politically motivated detentions or detentions based on the legitimate exercise of treaty rights. It has been also observed that the HRC is stricter on the timing and manner of the right of the arrested person to be informed of reasons for arrest. Furthermore, the HRC sets higher standards for the maximum limit of custody period without judicial supervision. Importantly, it also appears that the HRC`s approach is stricter on the justification of the length of detention. In terms of the right to compensation, on the other hand, the ECtHR has more detailed criteria and provides more protection regarding the amount of compensation. In sum, it can be concluded that the HRC provides relatively higher standards in many aspects, while the ECtHR has more detailed criteria and principles set by its jurisprudence. Therefore, the findings of this research confirmed its first presumption that the HRC provides higher protection than the ECtHR in some aspects.

The current research, secondly, aimed to identify the reasons behind the inconsistency of approaches of the HRC and the ECtHR. The reasons have been explained by the institutional characteristics and functioning of these bodies. Accordingly, the HRC is not a court and its views on individual complaints are not binding in the classical sense as court judgments. It

functions to promote human rights as a supervisory body, which is why its main mechanism is constructive dialogue through periodic reporting. This gives the Committee certain flexibility in its views and allows it to adopt an approach aimed at developing existing standards or progressing the treaty protection. However, it has been observed that its views include relatively weak and insufficiently substantiated reasonings. In this sense, the strict word limit on the HRC documents, its working method, and the workload it faces have been found important factors in this issue. Moreover, it was argued that the unwillingness of the State parties to cooperate with the Committee and submit their arguments might lead the HRC to construct its assessment based on limited information and one-sided arguments, and thus to relatively less detailed legal argumentations. The ECtHR, on the other hand, is a judicial body, and its judgments are binding with a strong enforcement mechanism. Hence, it has a very detailed caselaw on complex issues and its well-established jurisprudence is highly effective in deciding on concrete cases. Furthermore, the ECtHR is institutionally more connected to the Council of Europe and considers common ground among its parties such as by applying the margin of appreciation doctrine. It, therefore, has a more cautious approach to interpreting the rights and setting standards, especially when it comes to public safety and national security concerns.

The current research, lastly, aimed to analyze the identified inconsistencies and their reasons, under the multi-layered protection of human rights for the more effective protection of higher standards. In this sense, it demonstrated the functions of the multi-layered protection concept, the prevailing interpretation principles of the human rights treaties, and the relationship between the HRC and the ECtHR. Accordingly, the procedural aspect of their relationship is that if a complaint concerning substantially the same matter is pending or has already been examined before one of these bodies, it is declared inadmissible by the other body. The substantive aspect of this relationship is their references to each other`s jurisprudence. In this regard, it was demonstrated that while there are issues where the ECtHR has changed its approach with reference to the HRC's jurisprudence, there are also issues where their jurisprudence conflicts. It was argued the *jus commune* doctrine and *pro homine* principle within the multilayered protection system. Individuals face a dilemma when considering which international complaint mechanism to address: The HRC provides higher protection, while the ECtHR provides more effective protection. In this regard, this research confirmed its expectation that ECtHR's binding judgments play a key role in ensuring the full implementation of universal standards. In light of all these, it was argued how to ensure more effective protection in the face of the inconsistent approaches of the HRC and the ECtHR. The HRC and the ECtHR are different treaty systems and have no direct relationship. However, coordination between the two bodies is of significant

importance for the effective implementation of universal standards. Thus, it would be important that the ECtHR considers the HRC as an inspiration or reference where the latter provides a higher protection standard. In this context, the fact that almost all Council of Europe States are also parties to the ICCPR can be interpreted by the ECtHR that a certain consensus ground is already in place. On the other hand, the persuasiveness of the legal argumentations in the HRC's views is crucial in strengthening this relationship and its effectiveness. In this regard, it was argued that issues related to the Committee`s working methods and capacity highly affect the quality of legal argumentation. In addition to referencing decisions, it is essential to strengthen consultative dialogue to exchange opinions for the effective protection of human rights, especially in the face of contemporary challenges, in order to ensure more effective protection of higher standards at every level.

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List of Interviews

Interview no 1:

Interviewee : Dr. Günal Kursun
Occupation and Field : Human Rights Agenda Association, Representative to Ankara
Focus of the Interview: Litigant perspective about the co-existence of the HRC and the ECtHR
Date : 21 July 2023
Place : Online (via Zoom)
Duration : 1h 5 min

Interview no 2:

Interviewee : Dr. Patrick Mutzenberg
Occupation and Field : Director of the Centre for Civil and Political Rights, a Geneva-based NGO that facilitates civil society interaction with the Committee
Focus of the Interview: Committee`s perspective and its relationship with the ECtHR
Date : 28 July 2023
Place : Online (via Zoom)
Duration : 35 min

Interview no 3:

Interviewee : Dr. Ümit Kilinc
Occupation and Field : Attorney at Law (Strasbourg Bar Association), Faculty member at the University of Strasbourg-Faculty of Law, former case processing lawyer at the ECtHR
Focus of the Interview: ECtHR`s perspective and its relationship with the HRC
Date : 31 July 2023
Place : By phone
Duration : 35 min