THE FORMATION OF A COMMON LAW OF HUMAN RIGHTS

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The Formation of a Common Law of Human Rights

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ABSTRACT

This paper describes the practice of borrowing, from court to court, doctrines that gradually define the interpretation of human rights law. The shift is from rules-based adjudication, in which the interpretation of the text takes place *within the legal system in which the interpreter operates*, to a form of adjudication in which the task of the court is to express the consensus that emerges from a transnational dialogue between jurisdictions as to what the appropriate interpretation of human rights should be, *across different legal systems*. The paper first describes the origins of the development of human rights law in the form of a human rights *jus commune* (II). It then distinguishes this phenomenon from other scenarios, in which human rights bodies refer to one another, but where such cross-references have other justifications, and thus do not illustrate the phenomenon of human rights *jus commune* as such (III). It then highlights what is specific about the development of a human rights *jus commune*. It shows in particular how this can strengthen the legitimacy of human rights adjudication, allowing judicial and non-judicial human rights bodies to move together, and faster, in the protection of human rights (IV). At the same time however, the practice of relying on precedents set by other human rights bodies is at times inconsistent, and external observers may see it as *ad hoc*, as a form of "cherry-picking", and therefore ultimately as poorly justified -- in fact risking to undermine the legitimacy of human rights courts or expert bodies, when it was intended to strengthen it (V). In order to rescue the current practice from the risk of suspicion, this paper describes what a dialogic approach could consist in, explaining why case law "external" to the legal system which the "receiving" body belongs to cannot be treated as binding precedent, but nevertheless should not be simply ignored or dismissed as irrelevant (VI). It ends with a brief conclusion (VII).

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I. Introduction

A silent revolution has taken place since the 1980s in the world of human rights. The revolution has two, inter-related dimensions. First, in the interpretation of human rights instruments, the pendulum has shifted from a focus on literal interpretation and on the original intention of the drafters, to a focus on contextual factors, by which the judge ensures the evolution of human rights doctrine to changing circumstances. Second and more recently, whereas in the past the bodies tasked with the enforcement of human rights law based their assessment on the particular instrument on the basis of which they were established and that defined their jurisdiction, whether that instrument was an international treaty or a domestic legislative or constitutional instrument, they now increasingly refer to each other's case-law. They were working in relative isolation from one another: they now are all participants in the shaping of the common law of human rights.

This contribution takes stock of the first of these developments, and it examines in greater detail the significance of the second. It proceeds in six steps. It first describes the origins of the development of human rights law in the form of a human rights *jus commune* (II). It then distinguishes this phenomenon from other scenarios, in which human rights bodies refer to one another, but where such cross-references have other justifications, and thus do not illustrate the phenomenon of human rights *jus commune* as such: this is the case in particular where comparative law analyses allow to identify the emergence of a consensus on how a certain issue should be addressed (in which case the case-law is treated as an empirical fact, rather than as normative authority); or where one body refers to the views expressed by another body, established in order to provide an authoritative interpretation of the instrument applied (III). It then highlights what is specific about the development of a human rights *jus commune*, showing in particular how this can strengthen the legitimacy of human rights adjudication, allowing judicial and non-judicial human rights bodies to move together, and faster, in the protection of human rights (IV).

The practice of relying on precedents set by other human rights bodies is inconsistent, however: external observers often see it as *ad hoc*, as a form of "cherry-picking", and therefore ultimately as poorly justified -- in fact risking to undermine the legitimacy of human rights courts or expert bodies, when it was intended to strengthen it (V). The chapter describes what a dialogic approach could consist in, explaining why case law "external" to the legal system which the "receiving" body belongs to cannot be treated as binding precedent, but nevertheless should not be simply ignored or dismissed as irrelevant (VI). It ends with a brief conclusion (VII).

II. International human rights treaties as "living instruments" and the formation of a *jus commune*

The debate concerning the role of courts in interpreting the text they apply in order to adapt its meaning to changing circumstances has accompanied the rise of constitutional adjudication almost since it was inaugurated. Justice John Marshall famously declared in *McCulloch v. Maryland* that 'it is a constitution we are expounding', and that the constitution is an instrument which is 'to be adapted to the various crises of human affairs'.[1] As implied by this dictum, the role of courts in updating the meaning of the constitution is particularly important where the instrument is difficult to amend, due to the special majorities required to that effect, and where the text bears the mark of the times when it was initially adopted: the text then may appear ill-suited to provide answers to the new questions that emerge many decades later, and the burden inevitably falls on the interpreter to ensure its continued relevance.

[1] 17 US (4 Wheat.) 316, 407, 415 (1819).

The rise of international human rights since the Second World War simply led to transpose this debate into a new arena. Human rights instruments, after all, often rely on highly abstract and general language, meant as much to inspire as to provide detailed guidance ; they are the result of diplomatic negotiations that often lead to adopt wording that is ambiguous and chosen precisely in order to accommodate different interpretations ; and, while they are meant to last, they are very rarely amended, at least as far as substantive provisions are concerned, both because of the unanimity requirement for such a revision to proceed and because they are seen to embody values that are both universal and timeless. It was therefore entirely predictable that the classic divides between those who believe the text should be read according to its original meaning and those who insist on the role of the interpreter in adapting that meaning to an evolving context, or between the partisans of an interpretation centred on the 'original intent' of the drafters and those who insist, instead, on basing the interpretation on the 'purpose' of the text (the overall philosophy of the document, or the set of values, principles or objectives that the wording itself only imperfectly embodies), should be transposed to the field of international human rights.

But this first shift is now leading to a second one, which is both more innovative and more remarkable: the practice of borrowing, from court to court, doctrines that gradually define the interpretation of human rights law.[2] The shift is from rules-based adjudication, in which the interpretation of the text takes place *within the legal system in which the interpreter operates*, to a form of adjudication in which the task of the court is to express the consensus that emerges from a transnational dialogue between jurisdictions as to what the appropriate interpretation of human rights should be, *across different legal systems*.

A rules-based approach to interpretation is fully compatible with a certain form of judicial activism, for instance where the court prioritizes 'evolving meaning' over fidelity to original intent or to established precedent, or grounds interpretation in the values or objectives pursued by the document, rather than in a literal understanding of its wording. Yet, however inventive (and indeed, at times, controversial) these choices may be, they nevertheless are choices made *within the system* in which the court operates -- it is *this country*'s history, for instance, that the court shall invoke in order to justify departing from precedent,[3] or it is, conversely, the absence of a competing jurisprudence *within this court* that will justify holding firm to another precedent despite the strong criticism it may have given rise to.[4]

Instead, what is specific and new to the kind of interpretation that is now becoming dominant, is that the answers to the questions of interpretation that arise are sought *outside* the legal system in which the court operates: the regional human rights jurisdiction, for instance, shall seek inspiration from how other regional or international courts have addressed the problem it is confronted with, and the constitutional court shall look at what foreign courts have done in situation similar to which it faces. Human rights law looks less like a body of rules that were adopted by a 'principal' (the framers of the constitution, the governments having negotiated the treaty), for the court, the 'agent', to apply as faithfully as possible; it looks more like a natural language that evolves incrementally, by the succession of judgments that may be seen as 'speech acts', each of which contributes to the general development of the language of human rights.

The classic understanding of interpretation is vertical: whether the emphasis was on a textual (or 'literal') reading, on the search for the 'original intent', or on fidelity to the 'spirit' of the rule, rule-application operates from the top down, from the body of rules and principles applicable to the particular case at hand. Although this formalistic understanding has been widely denounced as a myth, as it ignores the

[2] The expression "from court of court" is used here for ease of exposition: as will become clear below, the argument put forward here extends to the interpretation by human rights treaty bodies, insofar as these expert bodies exercise quasi-judicial functions.
[3] See, e.g., *Lawrence and Garner v. Texas*, 539 U.S. 558 (2003) (noting that 'there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter', as one of the reasons why the precedent established in *Bowers v. Hardwick*, 478 U.S. 186 (1986), where the Court upheld a Georgia statute making it a criminal offence to engage in sodomy, should be overruled).
[4] See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

creative role of judicial interpretation,[5] it nevertheless remains at the heart of the judicial function and, as its founding fiction, the main source of its legitimacy: this is what Dworkin referred to when, in a famous article published in 1977, he referred to the postulate of the 'single right answer'.[6] Instead, with the new interpretative technique that has emerged, the legitimacy of the court is grounded in the fact that it is part of a human rights community of interpretation, that collectively has concluded that a certain solution provides a better 'fit' with the values embodied in human rights law than other, competing solutions. The 'right answer', in this approach, is the product of a process of collective deliberation -- of a conversation in which various judicial and quasi-judicial bodies engage as quasi-equals. It is more about invention than it is about discovery. And it is always provisional, since the criterion of what is 'right' is permanently shifting.

Both international and regional jurisdictions or expert bodies and domestic courts take part in the dialogue leading to the emergence of the human rights *jus commune*. The important consequence that follows is that human rights law increasingly develops as a hybrid between constitutional law and international law. Even when they do not apply international human rights treaties directly, domestic courts apply the bills of rights included in their constitutions by taking into account the fact that such bills of rights derive from the Universal Declaration of Human Rights,[7] and thus should be read in accordance with the interpretative consensus on human rights that emerges across various jurisdictions: by doing do, they aggrandize their power, freeing themselves from the strictures of their own, domestic tradition of constitutional interpretation. At the same time, international courts supervising compliance with human rights treaties feel empowered to set aside rules of interpretation or doctrines of international law, in the name of the unique character of human rights.[8] For instance, the extent to which reservations to treaties may be authorized and the consequences that are attached to reservations being found invalid,[9] or the weight to be given to the principle according to which the State cannot be bound beyond what it has consented to, whether by ratifying a treaty or by failing to oppose the formation of a customary rule of international law,[10] shall increasingly take into account the specific nature of human rights treaties.

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[5] This was, of course, at the heart of the critique of the Legal Realists in the early 20th century in the United States. It was also central to the school of the "free interpretation" led by François Gény in France, and it was to a large extent a characteristic of the *Interessenjurisprudenz* promoted in Germany by Rudolf von Jhering. The literature on these different schools of jurisprudence is too overwhelming to be cited. In the United States, Benjamin Cardozo's book of 1921, *The Nature of the Judicial Process* (New Haven: Yale University Press), as well as Karl Llewellyn's *Bramble Bush. On Our Law and Its Study* (New Yok; Oceana Publ., 1930) and *The Common Law Tradition. Deciding Appeals* (Boston and Toronto: Little, Brown and Co., 1960), are perhaps the most representative. R. von Jhering's *Der Kampf ums Recht*, originally published in 1872 (Frankfurt am Main : Klostermann, 1872) and François Gény's *Méthodes d'interprétation et sources en droit positif* (Paris: L.G.D.J., 2nd ed. 1919), summarize the views of these authors on judicial interpretation.

[6] R. Dworkin, 'No Right Answer?', in P.M.S. Hacker & J. Raz (eds), *Law, Morality, and Society: Essays in Honour of HLA Hart* (Oxford, Clarendon Press, 1977), pp. 58–84.

[7] For an early overview of the influence of the Universal Declaration of Human Rights on domestic constitutions, see H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', *Georgia Journal of International and Comparative Law*, vol. 25 (1995/96), pp. 287-397, at pp. 292-316.

[8] On the specific nature of human rights treaties in international law, see inter alia E. Schwelb, 'The Law of Treaties and Human Rights', *Archiv des Völkerrechts*, vol. 16(1) (1973-1975), pp. 14-26 ; M. Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law', *European Journal of International Law*, vol. 11(3) (2000), pp. 489-519. See also, more generally, on the deviations from classic international law that result from the rise of human rights, Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press, Oxford, 1989).

[9] See, on the status of reservations to human rights treaties (also referred to as treaties of a 'humanitarian' nature), International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion* (28 May 1951), ICJ Rep. 1951, p. 19; Inter-American Court of Human Rights, Advisory Opinion OC-2/82 of 24 September 1982 on *the effect of reservations on the entry into force of the American Convention on Human Rights (Arts. 74 and 75)*, Series A, No. 2; European Court of Human Rights, *Belilos v. Switzerland*, judgment of 29 April 1988, Series A No. 132; Human Rights Committee, *General Comment No. 24: Issues relating to 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*, 4 November 1994 (CCPR/C/21/Rev.1/Add. 6).

[10] The cases of *Demir and Baykara v. Turkey* before the European Court of Human Rights (Appl. No. 34503/97, judgment of 12 November 2008), and of *International Federation for Human Rights (FIDH) v. France* before the European Committee of Social Rights (Complaint No. 14/2003, decision on the merits of 8 September 2004), provide illustrations. In *Demir and Baykara*, the Grand Chamber of the European Court of Human Rights concluded that Article 11 of the European Convention on Human Rights protected the right of public servants to form unions and to collective bargaining, a novel interpretation

The chief justification for carving out this specificity of human rights treaties is that the primary aim of such treaties is not to establish reciprocal rights and duties between States, but rather to grant to individuals under the jurisdiction of the States parties rights that they may assert against the State, just as individuals are protected by constitutional protections in domestic law. This was noted already by the International Court of Justice, in its 1951 Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*:

> In such a convention [such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, adopted for a purely humanitarian and civilizing purpose] the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention. Consequently, in a convention on this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.[11]

In other terms, it is the quasi-constitutional nature of human rights treaties that allows their application to deviate from the classic approach of international law. Because it brings this quasi-constitutional nature of human rights treaties to the fore, the formation of a human rights *jus commune* reinforces the tendency for human rights to establish themselves as a separate regime of international law, one which increasingly borrows its methodology, including its methods of interpretation, to domestic constitutional law.[12]

III. Cross-jurisdictional dialogue: a typology of scenarios

Though it is visible in the practice both of international bodies and of domestic courts, this shift occurs at different levels and in different institutional settings. There exists therefore a certain confusion about the phenomenon -- what it consists in, and which are the specific challenges and opportunities it presents. In order to understand the formation of the common law of human rights and to assess its consequences,

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which, the Court stated, seeks to "take account of the perceptible evolution in such matters, in both international law and domestic legal systems" (§ 153). The Court cited, among other sources, Article 6 § 2 of the European Social Charter, which "affords to all workers, and to all trade unions, the right to bargain collectively, thus imposing on the public authorities the corresponding obligation to promote actively a culture of dialogue and negotiation in the economy, so as to ensure broad coverage for collective agreements" (para. 49). This provision was referred to despite Turkey having deliberately chosen not to accept it as part of its commitments under the European Social Charter (States acceding to to the European Social Charter select among its provisions, within certain parameters, those that they will accept as binding). Rather similarly, in *FIDH v. France*, the European Committee of Social Rights decided to extend the protection of the right to social and medical assistance (under Article 13 of the Revised European Social Charter) and the right of children and young persons "to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities" (under Article 17 of the same instrument), to children of undocumented migrants, despite the fact that according to Paragraph 1 of the Appendix to the Revised Social Charter, these provisions apply to foreigners "only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned". The European Committee of Social Rights justifies setting aside this restriction to the scope of application *ratione personae* of the Charter by the consideration that the European Social Charter "was envisaged as a human rights instrument to complement the European Convention on Human Rights" (para. 27) and that such a restriction, "in the circumstances of this particular case, ... treads on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being. Furthermore, the restriction in this instance impacts adversely on children who are exposed to the risk of no medical treatment" (para. 30).

[11] International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, 28 May 1951, p. 15, at p. 23.

[12] Both for this reason and because they have developed their own specialized institutions, human rights therefore provide a good illustration of the problem of fragmentation of international law into a number of self-contained regimes, each with their own norms and dispute-settlement mechanisms, and relatively autonomous both *vis-à-vis* each other and *vis-à-vis* general international law (on this debate, see in particular, B. Simma, 'Self-Contained Regimes', *Netherlands Yearbook of International Law*, 16 (1985), 111; and the Report of the Study Group of the International Law Commission (chaired by Martti Koskenniemi), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. doc. A/CN.4/L.702, 18 July 2006 (also reproduced in the Report on the work of the fifty-eighth session (1 May-9 June and 3 July-11 August 2006) of the International Law Commission to the UN General Assembly, Official Records, sixty-first session, Supplement No. 10 (A/61/10), chapter 12)).

it may be useful to distinguish this specific phenomenon from other situations in which human rights bodies may rely in their reasoning on a doctrine developed by another such body. Indeed, depending on the context, other rationales may provide a better explanation for such a practice, and raise therefore a different set of questions. It is with the formation of a human rights *jus commune* that we are concerned here. But in order to highlight this specific phenomenon, we first must refer to three other scenarios in which case law developed by one jurisdiction influences another jurisdiction, even in the absence of a hierarchical link between the two, but which fall outside our inquiry.

1. Comparative law analysis as a means of identifying an emerging consensus

A first situation in which comparative analysis may be relied on, leading one court to ground its reasoning on the position adopted by other courts having faced a similar question of interpretation, is where a regional or international court, in its interpretation of a human rights treaty, takes into account the views expressed by domestic courts in the States parties to the specific treaty concerned. This is a common practice of the European Court of Human Rights, which routinely relies on the emerging 'European consensus' in support of its dynamic interpretation of the European Convention on Human Rights by referring to the jurisprudence of the highest courts of the domestic legal orders of the Council of Europe member States.[13]

The practice is not without its pitfalls. The Court may be accused of manipulating the information collected as, in identifying this 'European consensus', it does not feel bound to follow any mathematical average. It may appear to the external observer that the Court uses a comparative law analysis to arrive at a pre-conceived conclusion. Nevertheless, it generally does serve to enhance the 'substantive legitimacy' of its decision, in other terms, its acceptability by the States parties to the Convention and thus the standing of the Court in the eyes of governments.[14] Indeed, basing the interpretation of an international treaty on such comparative analysis finds some support in the Vienna Convention on the Law of Treaties, which lists among the considerations that may guide the interpretation of international treaties 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[15]

Though this practice certainly constitutes a remarkable example of the use of comparative law in international jurisprudence, it does not illustrate, strictly speaking, the shift towards a human rights *jus commune*. When an international mechanism established by a treaty refers to the practices of the States bound by the said treaty, such references remain *internal* to the system under which the mechanism operates: it is not equivalent to a court borrowing from sources *external* to that system. It therefore lies outside the scope of our inquiry.

2. Domestic courts referring to the interpretation of a specialized monitoring body established under a human rights instrument for the application of that instrument

[13] For a systematic analysis, see C. Rozakis, 'The European Judge as a Comparatist', *Tulane Law Review*, vol. 80(1) (2005), pp. 257-279; or, more recently, K. Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights', *Public Law*, n°3 (2011), pp. 534-553; K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge Univ. Press, 2015). Like the article foreshadowing its conclusions (K. Dzehtsiarou and L. Lukshevich, 'Informed Decision-Making: The Comparative Endeavours of the Strasbourg Court', *Neth. Quarterly of Human Rights*, vol. 30(3) (2012), pp. 272-298), this volume builds on an empirical study, based in particular on a number of interviews with judges of the European Court of Human Rights and members of the Court's registry, to document the role of comparative law analysis in the jurisprudence of the Court.

[14] Such 'substantive legitimacy' may be distinguished from the 'procedural legitimacy' that is grounded on the fact that the court follows certain rules related to the decision-making process; both differ from 'outcome legitimacy' which stems from the fact that the particular solution adopted by the court is seen as appropriate and workable in practice. On these different sources of legitimacy of international decision-making, see T.M. Franck, 'Why a Quest for Legitimacy', *UC Davis Law Review*, vol. 21(3) (1987), pp. 535-548, at p. 543; K. Dzehtsiarou and L. Lukshevich, 'Informed Decision-Making: The Comparative Endeavours of the Strasbourg Court', cited above, pp. 275-278.

[15] Article 31 § 3, b) of the Vienna Convention on the Law of Treaties (signed on 23 May 1969 and in force since 27 Jan. 1980, *U.N.T.S.*, vol. 1155, p. 331).

A second situation occurs where a domestic court takes into account the case-law of of a regional or international monitoring body -- whether judicial or not --, established in order to supervise compliance with a treaty to which the forum State is a party. This situation too should not be seen as illustrating the formation of a human rights *jus commune*. By taking as authoritative the interpretation provided by the regional or international monitoring body, the domestic court simply seeks to avoid engaging the responsibility of the State of which it is an organ.[16] For the national courts of the Council of Europe member States for instance, the case law emanating from the European Court of Human Rights simply provides the latest and the most authoritative reading of the European Convention on Human Rights. It is thus the best predictor of how that court would assess whether or not a violation has occurred in the case presented before the national authorities: by ignoring the jurisprudence of the European Court of Human Rights, or by treating it as a mere source of inspiration rather than as authoritative, the domestic judge would quite deliberately run the risk of violating the Convention.[17]

In this situation, reference to international jurisprudence is not as much a matter of choice as it is a matter of duty: although we do see one court borrowing a solution from another court, this occurs *within* the supervisory system established by the human rights treaty in question. The distinction between such a situation and the formation of a human rights *jus commune* is not always clear-cut, however. First, where the authoritative nature of the jurisprudence emanating from the monitoring bodies established under the international instrument concerned is contested, as is the case for many human rights treaty bodies set up by the core United Nations human rights instruments or for the ILO expert committees (the Committee on Freedom of Association and the Committee of Experts on the Application of Convention and Recommendations), the pronouncements from such monitoring bodies shall be treated as merely persuasive: they will be seen not as constraining the domestic court, but rather as expressing one view that the said court may (or may not) choose to seek inspiration from.[18]

Secondly, in dualist domestic legal systems, which deny the competence of the domestic courts to apply directly international human rights law, international human rights law (and the jurisprudence developed at international level) shall be treated as little more than as a guide to the interpretation of domestic constitutional or legislative provisions. It is to the extent that domestic rules can be interpreted in accordance with the requirements imposed on the State under international law instruments that courts may take such instruments into account: such was for instance the status of the European Convention on Human Rights before the British courts prior to the adoption of the 2000 Human Rights Act,[19] and

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[16] For a detailed exposition in the context of the European Convention on Human Rights, see Olivier De Schutter, "La coopération entre la Cour européenne des droits de l'homme et le juge national", *Revue belge du droit international*, 1997, pp. 21-68.

[17] Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 2 October 2013, provides for the highest courts and tribunals of the Contracting Parties to be able to request the European Court of Human Rights to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or the protocols thereto. The protocol thus acknowledges the authoritative nature of the interpretation provided of the ECHR by the European Court of Human Rights.

[18] The debate concerning the weight to be given to concluding observations or final views adopted by the UN human rights treaty bodies remains lively. The Committee on International Human Rights Law and Practice of the International Law Association found that domestic courts afford 'considerable weight' to the interpretation of human rights treaties by the expert bodies that these treaties establish (see its Final Report on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals, adopted at the 2004 Berlin Conference). Particularly in countries where international law is considered to be directly applicable under relatively loose conditions, this tendency may be further strengthened by the position adopted in recent years by the International Court of Justice (see, in particular, the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where the Court stated that it would in principle consider, in its interpretation of human rights treaties, the views expressed by the expert bodies established under such treaties (Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, 136, paras. 108-110); and the Case of *Ahmadou Sadio Diallo*, in which the International Court of Justice established a presumption that it would, in principle, follow the interpretation given by such expert bodies to the treaties concerned (International Court of Justice, Case of *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo*, judgment of 30 November 2010, para. 66)).

[19] See, e.g., *Salomon v. Commissioner for Customs and Excise*, (1967) 2 QB 116, 143 (international treaties as a source of interpretation of domestic legislation adopted in order to implement the said treaties in the domestic legal order); *R. v. Secretary of State for the Home Department, ex parte Brind* (1990) 1 All E.R. 469, 477 ("when the terms of primary legislation are fairly

such is still largely the case of international human rights law in general in Canada.[20] In monist legal systems, which treat directly applicable international law as equivalent to domestic rules, there is generally no need to rely on such a doctrine of conform interpretation, although this obviously can help harmonize the understanding of human rights as stipulated in national legislative or constitutional instruments with that of international instruments to which the State is a party: such a practice is occasionally prescribed in the domestic constitution.[21]

Thirdly, situations may occur in which the domestic court has a certain degree of discretion to exercise as to the interpretation to give to the human rights treaty invoked by the alleged victim (for instance, because the "authoritative" interpretation provided by the international supervisory body is ambiguous), and then turns to comparative law to assess the answer of other domestic courts, confronted with the same question. The 2010 *Cadder* case provides an illustration.[22] The United Kingdom Supreme Court was asked in that case to re-examine the earlier position of the British courts concerning the right of a person detained by the police to have access to a lawyer upon being first questioned. The European Court of Human Rights had affirmed such a right for the first time in the *Salduz* case of 2008, where it found a violation of Article 6 § 3 (c) (right to legal assistance) of the European Convention on Human Rights, in conjunction with Article 6 § 1 (right to a fair trial), on account of the applicant's lack of legal

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capable of bearing two or more meanings and the court, in pursuance of its duty to apply domestic law, is concerned to divine and define its true and only meaning, ... various prima facie rules of construction have to be applied. ... To these can be added, in appropriate cases, a presumption that Parliament has legislated in a manner consistent, rather than inconsistent, with the United Kingdom's treaty obligations" (Lord Donaldson, MR)) (as cautioned by Lord Bridge in the proceedings on appeal of this judgment, however, "the presumption whereby the courts prefer [the interpretation] which avoids conflict between our domestic legislation and our international treaty obligations is a mere canon of construction which involves no importation of international law into the domestic field" (*Brind and Others v. Secretary of State for the Home Department*, (1991) 1 All E.R. 720). For attempts to systematize the case-law, see Peter Duffy, "English Law and the European Convention on Human Rights", *International and Comp. L. Quar.*, 1980, pp. 585-618; or Colin Warbrick, "Rights, the European Convention on Human Rights and English Law", *European Law Rev.*, 1994, pp. 34-46. For an overview, see O. De Schutter, *Fonction de juger et droits fondamentaux* (Bruxelles: Bruylant, 1999), pp. 282-291.

[20] See in particular A.G. Canada v. A.G. Ontario (The Labour Conventions Case), □1937□□A.C. 355 (P.C.); Bancroft v. The University of Toronto (1986), 24 D.L.R. (4th) 620 (Ont.H.C.); Re Vincent and Min. Employment and Immigration (1983), 148 D.L.R. (3rd) 385 (F.C.A.); *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313. For instance, in *R. v. Keegstra* (**[1990] 3 SCR 697 (judgment of 13 December 1990))** a case concerning the compatibility with freedom of expression of the criminalization of hate propaganda to which we return below, the Supreme Court of Canada considers the prescriptions imposed under the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, two instruments to which Canada is a party, simply to note that these treaties 'demonstrate that the prohibition of hate-promoting expression is considered to be not only compatible with a signatory nation's guarantee of human rights, but is as well an obligatory aspect of this guarantee' (Dickson, C.J., for the majority). Though the Supreme Court remarks that 'the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the *Charter* itself', and that 'international human rights law and Canada's commitments in that area are of particular significance in assessing the importance of Parliament's objective under s. 1 [of the Charter, which requires that restrictions to the rights and freedoms be justified]', absent from the reasoning of the Court is any clear commitment to follow the requirements of these instruments as well as the jurisprudence of its monitoring bodies, unless they converge with the prescriptions of the Charter; indeed, the ICERD and the ICCPR are treated no differently in the Supreme Court's judgment than the European Convention on Human Rights, despite the fact that Canada is a party to the former instruments and not to the latter. That international human rights instruments should be treated as mere sources of inspiration for the interpretation of the Canadian Charter is a broadly held view: it is telling perhaps that, in his dissenting opinion to *Keegstra*, McLachlin, J., refers to the ICERD and the ICCPR to *distinguish* the Canadian Charter's approach to freedom of expression as being specific: 'The guarantees of free expression in those documents explicitly permit a wide variety of limitations on free expression -- limitations which the person asserting the right of free expression must observe. By contrast, the Canadian guarantee of free expression is more comprehensive'. On the relationship of the United Kingdom and Canada to international human rights law, see generally Christopher Peter Michael Waters, *British And Canadian Perspectives on International Law* (Martinus Nijhoff Publ., 2006).

[21] For instance, Article 10 paragraph 2 of the 1978 Spanish Constitution provides that: 'The principles relating to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain'. Similarly, Article 39 of the 1996 Constitution of South Africa (in force since 4 February 1997) provides that "When interpreting the Bill of Rights, a court, tribunal or forum ... (b) must consider international law; ...".

[22] Supreme Court of the United Kingdom, *Cadder (Appellant) v Her Majesty's Advocate (Scotland) (Respondent)* [2010] UKSC 43 (judgment of 26 October 2010).

assistance while he was in police custody.[23] The European Court of Human Rights concluded that, in principle, "access to a lawyer should be provided as from the first interrogation of a suspect by the police, *unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right*" (emphasis added): "The rights of the defence", it stated, "will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction".[24] The UK Supreme Court therefore had to decide which weight was to be recognized to the *Salduz* jurisprudence and, taking into account the 'unless' formula of the European Court, whether safeguards provided for the detainee in Scotland, that the European Court of Human Rights by definition could not have considered in *Salduz*, could compensate for the absence of a lawyer during the first interrogation.

In answering the first question, the UK Supreme Court recalled that, under section 2(1) of the Human Rights Act 1998, British courts deciding a question arising in connection with a Convention right must 'take into account' any decision of the European Court of Human Rights. This principle had been reiterated in the case law of the Supreme Court itself (or, as it was then, the House of Lords),[25] although that same court did not hesitate to depart from precedents set in Strasbourg where it considered that the British legal system had been misunderstood, or the specificities of the common law not considered.[26] But perhaps more noteworthy is that the Supreme Court sought guidance from the case law that followed the *Salduz* judgment in other member States of the Council of Europe: prompted by an amicus brief submitted by the non-governmental organisation Justice, it referred specifically to the position of the Dutch Supreme Court, as well as to the position of the highest judicial bodies in France, including the Constitutional Council (Conseil constitutionnel), and concluded from this comparative analysis that 'if Scotland were not to follow the example of the others it would be almost alone among all the [Council of Europe] member states in not doing so'.[27]

In the *Cadder* case therefore, comparative law served to support reliance of the UK Supreme Court on the jurisprudence of the European Court of Human Rights, insofar as such an analysis demonstrated the authority that such jurisprudence had exercised on other supreme judicial tribunals in Europe. Again however, this scenario does not illustrate the formation of a human rights *jus commune* as such, as the product of judicial dialogue across jurisdictions. It represents, rather, a hybrid: it is still the European Convention on Human Rights, as made applicable before British courts under the Human Rights Act, that is the source applied, and it is because foreign jurisdictions had to interpret the Convention (rather than similarly worded norms from their domestic legal systems) that they are cited as authorities.

3. International courts referring to the interpretation of the specialized monitoring body established under a human rights instrument for the application of that instrument itself

Our third situation is in a way the reverse of the previous one. It occurs when an international court with a general competence (i.e., with a jurisdiction not limited to any particular international instrument) takes into account the interpretation given to a human rights treaty by the monitoring body specifically established to supervise compliance with that treaty. Consider again the position adopted by the International Court of Justice in the *Ahmadou Sadio Diallo* Case.[28] Mr. Diallo was a Guinean businessman who had filed various claims against the Democratic Republic of Congo where he had located his activities, as well as against a company of which the DRC was a shareholder. He had been arrested, detained and subsequently expelled by the authorities of the DRC. The Republic of Guinea alleged that this had led to the violation of a number of rules of international law, including various

[23] *Salduz v. Turkey* Grand Chamber judgment of 27 November 2008 (Appl. No. 36391/02).
[24] Id., § 55.
[25] See *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, para 26 (per Lord Slynn of Hadley); *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837, para 18 (per Lord Bingham of Cornhill).
[26] See *Cadder*, § 45.
[27] *Cadder*, § 49.
[28] The case was referred to above, in fn. 18.

provisions of human rights treaties to which both States were parties: the expulsion of Mr. Diallo was denounced as a breach of Article 13 of the International Covenant on Civil and Political Rights,[29] as well as of Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights of 27 June 1981,[30] and his arrest and detention were said to have violated Article 9, paragraphs 1 and 2, of the Covenant, and Article 6 of the African Charter. In addition, Mr. Diallo was alleged to have suffered conditions of detention amounting to inhuman or degrading treatment as prohibited by international law.

In assessing the claims of the Republic of Guinea, the International Court of Justice first provides its own interpretation of the Covenant. It then adds, however, that its reading 'is fully corroborated by the jurisprudence of the Human Rights Committee established by the Covenant to ensure compliance with that instrument by the States parties' and which since it was created 'has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its "General Comments"'.[31] This 'case law', the Court notes, should be given great weight in the interpretation of the ICCPR:

> Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.[32]

The World Court takes a similar approach to the African Charter on Human and Peoples' Rights, its interpretation of which is corroborated by the jurisprudence of the African Commission on Human and Peoples' Rights.[33]

Whereas this attitude of the International Court of Justice is certainly such as to favor legal certainty by ensuring a consistent interpretation of the instruments binding upon States, it would not qualify as illustrating the phenomenon of human rights *jus commune* as such. We do not have, here, a situation in which one instrument, applicable to the case presented before a monitoring body, is read in the light of the interpretation given to another instrument, by another body with which there exists no institutional link. No transplantation, or borrowing from one system to another, has taken place: what the example illustrates is simply that a division of labour is gradually emerging between various mechanisms that are tasked with the interpretation of the same legal instrument.

In the judgment it delivered in the *Ahmadou Sadio Diallo* case, the Court goes further, however. It 'also notes that the interpretation by the European Court of Human Rights and the Inter-American Court of Human Rights, respectively, of Article 1 of Protocol No. 7 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and Article 22, paragraph 6, of the American Convention on Human Rights — the said provisions being close in substance to those of the Covenant and the African Charter which the Court is applying in the present case — is consistent with what has

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[29] International Covenant on Civil and Political Rights, opened for signature in New York on 16 December 1966, in force on 23 March 1979 (*U.N.T.S.*, vol. 999, p. 171).
[30] African Charter on Human and Peoples' Rights, opened for signature on 27 June 1981, in force on 21 October 1986 (OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *U.N.T.S.*, vol. 1520, p. 217).
[31] International Court of Justice, Case of *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, judgment of 30 November 2010, para. 66.
[32] Id.
[33] See id., para. 67: '...when the Court is called upon, ... to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question. In the present case, the interpretation given above of Article 12, paragraph 4, of the African Charter is consonant with the case law of the African Commission on Human and Peoples' Rights established by Article 30 of the said Charter.'

been found in respect of the latter provisions'.[34] In contrast the its reliance on the case-law of the Human Rights Committee and of the African Commission on Human and Peoples' Rights, these references do illustrate the contribution of the International Court of Justice to the emergence of a human rights *jus commune*. Neither the European Convention on Human Rights nor the American Convention on Human Rights were applicable to the case before it. Yet, the International Court of Justice refers to these instruments, and to the interpretation given to them by specialized courts, because of the similarity of language, and because these instruments derive -- as do the ICCPR and the African Charter -- from the Universal Declaration of Human Rights. That is the common law of human rights.

IV. Developing the human rights *jus commune*

In contrast to the three situations which the previous section has outlined, it is indeed the formation of a human rights *jus commune* as such that we witness where international courts of expert bodies refer to one another, simply as a means to strengthen the legitimacy of the views they express, and *although they belong to different systems and apply different treaties*. For ease of expression, reference shall be made here therefore to 'foreign jurisprudence'. The phrase serves to indicate that human rights *jus commune*, properly conceived, consists in one human rights body borrowing from the interpretation of human rights law by another body, in the absence of any formal link between the two bodies concerned. The borrowing jurisdiction and the source jurisdiction operate separately from another. In the kind of scenario explored here therefore, the 'receiving' human rights body seeks inspiration in, or feels bound by, the interpretation made of a human rights norm by another human rights body, which faced a similar question of interpretation in a different material and institutional context. How 'binding' should such an interpretation be for the 'receiving' body, or should the authority of such interpretation be merely persuasive? Which difficulties would the 'receiving' body face, if it endeavoured to follow such interpretation?

To illustrate, consider how human rights bodies gradually affirmed a duty of States parties to comply with the provisional measures recommended by the judicial or quasi-judicial bodies established under human rights treaties, when such bodies receive individual applications or communications from individuals allegedly at risk. The major international human rights treaties are silent about the possibility for these bodies to grant such interim measures. However, the idea has progressively emerged that this power of human rights bodies is inherent in their jurisdiction, and that it should be recognized in the name of the effectiveness of the protection of human rights. This development is almost entirely the combined result of expert bodies asserting a power they were not explicitly attributed under the treaties establishing them, and of the strength of the human rights *jus commune*.

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provided the departure point.[35] When, acting in accordance with Article 18(2) of the Convention, the Committee against Torture adopted its Rules of Procedure, it included a Rule 108 § 9 enabling it to adopt provisional measures in proceedings brought by individuals alleging a violation of the Convention against Torture.[36] In the case of *Cecilia Rosana Núñez Chipana v. Venezuela*, it took the view that non-compliance with such provisional measures should be considered a violation of the Convention, as 'the State party, in ratifying the Convention and voluntarily accepting the Committee's competence [to examine individual communications] under article 22, undertook to cooperate with it in good faith in applying the procedure. Compliance with the provisional measures called for by the Committee in cases

[34] Ibid., para. 68.
[35] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed in New York on 10 December 1984, in force on 26 June 1987 (*U.N.T.S.*, vol. 1465, p. 85).
[36] See Rule 108 § 9 of the Rules of Procedure (CAT/C/3/Rev.3) (13 July 1998). This is now Rule 114(1) in the most recently update version of the Rules of Procedure (CAT/C/3/Rev.6) (1 Sept. 2014): "At any time after the receipt of a complaint, the Committee, a working group, or the Rapporteur(s) on new complaints and interim measures may transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations".

it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee'.[37]

Acting under the International Covenant on Civil and Political Rights, the Human Rights Committee followed this lead. Under Rule 92 of its rules of procedure, which the Human Rights Committee adopted in accordance with Article 39(2) of the International Covenant on Civil and Political Rights, the Human Rights Committee 'may, prior to forwarding its views on the communication to the State party concerned, inform that State of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation'.[38] In the case of *Dante Piandiong, Jesus Morallos and Archie Bulan v. The Philippines*, which it decided in 2000, the Human Rights Committee considered that a refusal of a State to comply with such measures, 'especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol [providing for the possibility of individual complaints filed by alleged victims of violations of the ICCPR]'.[39] It has repeated this statement since,[40] confirming its view that the States parties to the Covenant could be under an obligation to comply with the interim measures indicated by the Committee. Just like the Committee against Torture, the Human Rights Committee did so despite the fact that the power to adopt such interim measures was not attributed to the Committee under the text of the Covenant itself.

As long as these statements remained those of expert bodies, whose authority to deliver binding statements to the States parties remains contested, they may not have attracted much attention. In 2005 however, in the case of *Mamatkulov and Askarov v. Turkey*, the European Court of Human Rights itself considered for the first time in a final judgment that a refusal by a State party to the European Convention on Human Rights to comply with an interim measure indicated by a Chamber of the Court or its President on the basis of Article 39 of the Rules of the Court constitutes a violation of Article 34 of the Convention, which imposes an obligation on the Contracting Parties 'not to hinder in any way the effective exercise' of the right to individual application.[41] This represented a shift in attitude from the part of the Court. In its previous case-law, while finding that there existed a general practice of States parties to the Convention to comply with such interim measures, the Court fell short from identifying the emergence of a rule of a customary nature in the application of the European Convention on Human Rights.[42]

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[37] Committee against Torture, *Cecilia Rosana Núñez Chipana v. Venezuela*, final views of 10 November 1998 Communication No. 110/1998 (CAT/C/21/D/110/1998). Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment describes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to the jurisdiction of States parties to the Convention who claim to be victims of a violation by a State Party of the provisions of the Convention, provided the State concerned has made a declaration to that effect.

[38] Rules of Procedure of the Human Rights Committee (CCPR/C/3/Rev.10) (11 Jan. 2012).

[39] Human Rights Committee, final views adopted on 19 October 2000 on the Communication n°869/1999 (CCPR/C/70/D/869/1999), *Annual Rep.* I, p. 181.

[40] See, e.g., Human Rights Committee, *Weiss v. Austria*, communication n°1086/02, final views of 8 May 2003 (CCPR/C/77/D/1086/2002).

[41] Eur. Ct. HR (GC), judgment of 5 February 2005 in the case of *Mamatkulov and Askarov v. Turkey*, Appl. N°46827/99 and 46951/99.

[42] See, e.g., Eur. Ct. HR, *Cruz Varas v. Sweden* judgment of 20 March 1991, Series A no. 201, § 100 ('The practice of Contracting Parties in this area shows that there has been almost total compliance with Rule 36 indications [indications given by the European Commission of Human Rights or its President that, in the interest of the proceedings, the parties should refrain from adopting certain measures, based on Rule 36 of the Rules of Procedure of the European Commission of Human Rights]. Subsequent practice could be taken as establishing the agreement of Contracting States regarding the interpretation of a Convention provision (see, mutatis mutandis, [the *Soering v. the United Kingdom* judgment of 7 July 1989], Series A no. 161, pp. 40-41, § 103, and Article 31 § 3 (b) of the Vienna Convention of 23 May 1969 on the Law of Treaties) but not to create new rights and obligations which were not included in the Convention at the outset […]. In any event, as reflected in the various recommendations of the Council of Europe bodies [calling upon the States parties to the Convention to agree to recognizing the Court a power to adopt provisional measures of a binding character], *the practice of complying with Rule 36 indications cannot have been based on a belief that these indications gave rise to a binding obligation* […]. It was rather a matter of good faith co-operation with the Commission in cases where this was considered reasonable and practicable' (emphasis added)). For comments, see, e.g., Rudolf Bernhardt, 'Interim Measures of Protection under the European Convention on Human Rights', in R. Bernhardt (ed.), *Interim Measures indicated by International Courts*, Berlin, Springer Verlag, 1994,

Indeed, there was good reason for the Court to be cautious. Although, in *Mamatkulov and Askarov*, the Court cited in support of its position the practice both of the International Court of Justice and that of the Inter-American Court of Human Rights, the Rules of the European Court of Human Rights are adopted by the plenary Court.[43] They are thus not agreed upon by the States parties to the Convention. Their status therefore differs markedly from that of Article 41 of the Statute of the International Court of Justice,[44] which the International Court of Justice interpreted in the *LaGrand (Germany v. the United States)* judgment of 27 June 2001 as imposing on the States parties to a dispute before the Court an obligation to comply with the provisional measures indicated under that provision, despite the vague character of the wording of that provision.[45] Nor may Article 39 of the Rules adopted by the European Court of Human Rights be considered equivalent to Article 63(2) of the American Convention on Human Rights, which provides explicitly for a power of the Inter-American Court of Human Rights to adopt provisional measures 'in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons'. Both the Statute of the International Court of Justice and the American Convention on Human Rights are international treaties to whose terms the States parties have agreed. In contrast, no equivalent clause exists in the European Convention on Human Rights. In *Mamatkulov and Askarov v. Turkey*, the Court nevertheless considered that the precedents set by the Committee against Torture and the Human Rights Committee authorized it to consider, like these expert bodies, that the obligatory character of interim measures should be considered as a condition of the effectiveness of the protection provided to the individual by a system of individual communications. It stated:

> 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.

The episode provides a clear example of human rights bodies developing a doctrine, motivated perhaps by the need to ensure an effective protection of human rights, but which is difficult to reconcile with an orthodox (some might say conservative) view of international law.

That this development was made possible by a number of human rights bodies moving in the same direction and, in part, legitimizing their interpretative inventivity by referring to one another's case law, seems hardly contestable. Indeed, the pressure to transpose solutions developed in one system in another system is such, that human rights bodies occasionally feel compelled to justify departing from precedents established by other such bodies, as if they were part of the same legal system -- more precisely, as if such precedents had more than mere persuasive authority, and were actually binding. Thus in *Kindler v. Canada*, which is was presented with in 1991, the Human Rights Committee goes out of its way to explain what distinguishes the situation it was confronted with, from the situation that had given rise to the judgment the European Court of Human Rights adopted on 7 July 1989 in *Soering v. the United Kingdom*. In this latter case, the European Court of Human Rights had concluded that the extradition to the United States of Jens Soering would expose him concerned to inhuman treatment, contrary to Article 3 ECHR, the equivalent to Article 7 of the International Covenant on Civil and Political Rights. Like Soering, Kindler was a fugitive, threatened to be extradited to the United States,

p. 102; R. St. J. Mcdonald, 'Interim measures in international law, with special reference to the European system for the protection of human rights', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 52 (3-4) (1992), p. 703.

[43] See, in its current version, Article 25(d) of the European Convention on Human Rights.

[44] 3 Bevans 1179; 59 Stat. 1031; T.S. 993 (1945).

[45] Article 41 of the Statute of the International Court of Justice provides : '1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council'.

where he feared he would be facing the death penalty. Should the Human Rights Committee follow the assessment of the European Court of Human Rights, in a judgment delivered just a few years earlier? The Committee believed not :

> In determining whether, in a particular case, the imposition of capital punishment could constitute a violation of article 7, the Committee will have regard to the relevant personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent. In this context the Committee has had careful regard to the judgment given by the European Court of Human Rights in the *Soering v. United Kingdom* case [European Court of Human Rights, judgment of 7 July 1989.] It notes that important facts leading to the judgment of the European Court are distinguishable on material points from the facts in the present case. In particular, the facts differ as to the age and mental state of the offender, and the conditions on death row in the respective prison systems. The author's counsel made no specific submissions on prison conditions in Pennsylvania [the US state where Kindler was facing prosecution; Soering was to be prosecuted in West Virginia], or about the possibility or the effects of prolonged delay in the execution of sentence; nor was any submission made about the specific method of execution. The Committee has also noted in the Soering case that, in contrast to the present case, there was a simultaneous request for extradition by a State where the death penalty would not be imposed [Germany, of which Jens Soering was a national, has requested that he be extradited to that country rather than returned to the United States, where he had committed a crime].[46]

To thus distinguish the case of Kindler from that of Soering is not to deny the authoritative value of the decision of the European Court. It is rather the opposite: it is to acknowledge its weight as precedent. Yet, there is no institutional link between the Human Rights Committee and the European Court of Human Rights, hierarchical or other: the only link that binds the two bodies is that they apply treaties which are both inspired by the Universal Declaration of Human Rights and thus use similar wording.

It is this kind of mutual borrowing that we are growing accustomed to. Indeed, the practice has become so widespread that it is almost institutionalized and has occasionally been codified, for instance in the South African post-apartheid Constitution[47] or in the 1981 African Charter of Human and Peoples' Rights.[48] The reasons for this development are obvious enough. In addition to the replication of language from the Universal Declaration of Human Rights in a large number of constitutions and in various regional human rights treaties, they include the much improved accessibility of case law through the internet, particularly as regards the case law of supreme courts or constitutional courts, since the early 1990s ; the growing role of non-governmental organisations before regional or international courts, acting as *amici curiae*, which appear particularly keen to present the court with detailed comparative law analyses, in which the most progressive jurisprudence is presented in a digestable form ; the desire

[46] Human Rights Committee, *Kindler v. Canada*, Comm. No. 470/1991, dec. of 30 July 1993, para. 15.3.

[47] Article 39(1) of the 1996 Constitution of South Africa was already referred to above. The full provision reads: 'When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) *may consider foreign law*.' Article 35(1) of the Interim Constitution of 1993 used even more explicit wording: ' In interpreting the provisions of [Chapter 3 on fundamental rights] a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.'

[48] Article 60 of the African Charter provides that the African Commission on Human and Peoples' Rights shall 'draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the Parties to the present Charter are members'. Article 61 in turn prescribes that the Commission 'shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by Member States of the Organisation of African Unity, African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine'.

of human rights bodies (whether judicial or not) not to be seen as providing a weaker level of protection than that provided by other, similar bodies ; and finally, a simple principle of judicial economy, leading human rights bodies to seek inspiration from solutions developed elsewhere, since such solutions are presumed to have been based on carefully weighed considerations and, perhaps, to have induced at least some reliance either by individuals or by States, so that not following precedents established by other, 'foreign' courts, deserves at least a special justification. These various circumstances have been well articulated elsewhere, and there is no need therefore to revisit them here.[49] Rather, the next section will ask whether the judicial method that this leads to is workable, and what challenges still have to be addressed.

V. The problem of consistency in the formation of the human rights *jus commune*

The challenges associated with the formation of a common law of human rights fall in two categories. Some of these challenges concern the use of case-law as a source of law, how the doctrine of precedent may constrain judges, and whether there is a principled way to rely on distinctions to adapt general principles to specific cases. All legal system face these challenges, although they have been discussed more explicitly in common law jurisdictions where the binding character of judicial precedent is acknowledged openly rather than abided to in secret. But other challenges concern the practice by which we have defined the human rights *jus commune*, in which one 'borrowing' jurisdiction treats as persuasive, or to a certain extent binding, an interpretation provided by a 'source' jurisdiction, which is external to the system in which the receiving mechanism operates. As long as such practice remains *ad hoc* and unsystematic, it may undermine the legitimacy of decision-making in the very process of seeking to strengthen it. But can a proper methodology be designed for such borrowing to develop in a more principled manner?

The practice of the European Court of Human Rights illustrates the problem. Two examples are considered here. The first example concerns the use, in the case law of the Court, of the views expressed on questions of interpretation by the ILO expert bodies or by the European Committee of Social Rights, operating under the European Social Charter. The second example concerns the relationship between the Court and the Human Rights Committee, where the International Covenant on Civil and Political Rights includes provisions very similar, if not identical, to those of the European Convention on Human Rights.

1. Developing the human rights common law in the area of workers' rights

In the well-known case of *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, the European Court of Human Rights was asked whether the statutory ban on secondary industrial action was a disproportionate interference with the freedom of association recognized under Article 11 ECHR.[50] In denouncing such interference, the applicant union referred, in particular, to the recognition of the right to strike by the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations, two expert bodies established within the International Labour Organisation, which had based their conclusions in this regard on Articles 3 and 10 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87),[51] an instrument ratified by the United Kingdom.[52]

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[49] C. McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights', *Oxford Journal of Legal Studies*, vol. 20(4) (2000), pp. 499-532.

[50] Eur. Ct. HR (4th sect.), *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* (Appl. No. 31045/10, judgment of 8 April 2014).

[51] *U.N.T.S.*, vol. 68, p. 17.

[52] As regards secondary industrial action (or 'sympathy' strikes), the ILO Committee of Experts in particular had noted that 'a general prohibition of this form of strike action could lead to abuse, particularly in the context of globalization characterized by increasing interdependence and the internationalization of production, and that workers should be able to take such action, provided that the initial strike they are supporting is itself lawful.' (*Giving globalisation a human face*, International Labour Office, 2012, at paragraph 125, cited in *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, para.

The European Court of Human Rights also took note of the position of the European Committee of Social Rights, the body of experts in charge of supervising compliance with the European Social Charter, which -- like the ILO bodies -- had taken issue at the British rules concerning 'solidarity' strikes. Article 6 § 4 of the European Social Charter, provides that "with a view to ensuring the effective exercise of the right to bargain collectively", the States parties to the Charter that have accepted this clause recognize "the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into". On the basis of this provision, the European Committee of Social Rights had criticized the United Kingdom for not ensuring immunity from dismissal of workers engaging in secondary industrial action (so-called "sympathy strikes", in solidarity with workers of another enterprise), relying in that regard on the conclusions reached by the ILO Committee of Experts.[53]

But which weight, if any, is to be given to these findings? In the case of *Demir and Baykara v. Turkey* referred to above,[54] another case concerning the implication for unions of freedom of association, the Court had stated that 'The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.'[55] '[I]n defining the meaning of terms and notions in the text of the Convention', the Court explained, it 'can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases'.[56] The Court had taken the bold step, in *Demir and Baykara*, of imposing on Turkey an interpretation of Article 11 of the European Convention on Human Rights that extended the right to form trade unions to municipal civil servants, and that derived from freedom of association a right to collective bargaining. The Court developed this interpretation by taking into account other instruments of international law to guide its interpretation of this clause,[57] without limiting itseld to the instruments ratified by the State concerned:

> ... it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.[58]

30). Similarly, the Committee on Freedom of Association considered this form of industrial action to be protected by international labour law: see id., § 31.

[53] European Committee of Social Rights, Conclusions XIII-1 (1993), and Conclusions XIX-3 (2010), cited in the *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* judgment, §§ 36-37.

[54] See above, fn 10

[55] Eur. Ct. HR (GC), *Demir and Baykara v. Turkey* judgment of 12 November 2008, § 85. For an extensive discussion of the *Demir and Baykara* case under this angle, see Julian Arato, "Constitutional Transformation in the ECtHR: Strasbourg's Extensive Recourse to External Rules of International Law", *Brooklyn Journal of International Law*, vol. 37(2) (2012), pp. 349-387. See also Charles Barrow, '*Demir and Baykara v Turkey: breathing life into Article 11*', *European Human Rights Law Review*, vol. 4 (2010), pp. 419-423; and K.D. Ewing and John Hendy, 'The Dramatic Implications of Demir and Baykara', *Industrial Law Journal*, vol. 39(1) (2010), pp. 2-51 (also addressing the broader ramifications of the judgment before English courts and for the relationships with economic freedoms protected under EU law).

[56] Id.

[57] See *Demir and Baykara* judgment, § 76: 'Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty'.

[58] *Demir and Baykara* judgment, § 86.

The implications of this approach were remarkable. Although Article 11 § 2 ECHR states that the guarantee of freedom of association 'shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State', the Court considered that 'the restrictions imposed on the three groups mentioned in Article 11 are to be construed strictly': such restrictions could affect the 'exercise' of the right to organise, but not its 'very essence'; moreover, 'it is incumbent on the State concerned to show the legitimacy of any restrictions to such persons' right to organise'.[59] In support of this reading, it cited Article 5 of the European Social Charter and Article 22 of the International Covenant on Civil and Political Rights, both of which allow the States parties to restrict the exercise of the right to freedom of association of members of the armed forces and of the police, but without referring to members of the administration of the State; as well as ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise, Article 2 of which provides that all workers, without distinction whatsoever, have the right to establish and to join organisations of their own choosing.[60]

In addition, the Court considered that by annulling *ex nunc* a collective agreement concluded by a Turkish union of municipal civil servants, the Turkish courts had violated the right to freedom of association: it saw the right to bargain collectively with the employer as 'one of the essential elements' of the right to form and to join trade unions for the protection of one's interests as set forth in Article 11 of the Convention, an interpretation that the Court had refused to give in the past but that it felt compelled to reconsider 'having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters'.[61] As remarked above,[62] it is noteworthy that, to reach this conclusion, the Court took into account in particular Article 6 § 2 of the European Social Charter, although this is a provision of the Charter that Turkey had not accepted in the *à la carte* system of the Charter. Though this paragraph of the Charter does not as such oblige authorities to enter into collective agreements, the Court relies on the meaning attributed to it by the European Committee of Social Rights, to the effect that 'States which impose restrictions on collective bargaining in the public sector have an obligation, in order to comply with this provision, to arrange for the involvement of staff representatives in the drafting of the applicable employment regulations'.[63] In other terms: following this extensive interpretation of Article 11 ECHR in the light of other international instruments, Turkey was in effect bound to comply with a requirement of the European Social Charter that it had deliberately not consented to, as interpreted by a committee of experts which read into the relevant provision a guarantee that this provision was silent about.

When, a little more than five years later, the European Court of Human Rights was again faced with a new question of interpretation of Article 11 ECHR, it could have taken a similar approach, in order to protect the right of unions to resort to 'secondary strikes', by reading freedom of association as protected under the European Convention on Human Rights in the light of international case law related to union's rights. Instead, it took the view in *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* that

> the negative assessments made by the relevant monitoring bodies of the ILO and European Social Charter are not of such persuasive weight for determining whether the operation of the statutory ban on secondary strikes in circumstances such as those complained of in the present case remained within the range of permissible options open to the national authorities under Article 11 of the Convention.[64]

[59] *Demir and Baykara* judgment, § 97.
[60] *Demir and Baykara* judgment, §§ 37 and 100.
[61] *Demir and Baykara* judgment, § 154.
[62] See above, fn. 10.
[63] *Demir and Baykara* judgment, § 149.
[64] Eur. Ct. HR (4th sect.), *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, cited above, § 98.

The Court arrived at this conclusion after noting that the review it performs has a 'distinct character .... compared with that of the supervisory procedures of the ILO and the European Social Charter' insofar as '[t]he specialised international monitoring bodies operating under those procedures have a different standpoint, shown in the more general terms used to analyse the ban on secondary action. In contrast, it is not the Court's task to review the relevant domestic law in the abstract, but to determine whether the manner in which it actually affected the applicant infringed the latter's rights under Article 11 of the Convention'.[65]

In other terms: according to the judgment of the Court in *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, whereas the ILO bodies and the European Committee of Social Rights assessed the British legal system in the abstract, all that was required from the European Court of Human Rights was to examine whether a violation of the ECHR occurred in the particular case it was presented with, without it being necessary to adopt a position on the full range of hypothetical situations that might occur in the future. This would justify the Court in departing from the findings of these other bodies, even when faced with a similar question of interpretation as regards the scope of the protection of workers freedom of association. Although the wordings of the respective instruments are not identical -- from the very vague formulations of Articles 3 and 10 of the ILO (No. 87) Freedom of Association and Protection of the Right to Organise Convention to the comparatively far more precise wording of Article 6 of the European Social Charter, with Article 11 ECHR located somewhere in between --, it is not these textual divergences that the European Court of Human Rights invoked to justify departing from the readings of the ILO Committee of Experts and the European Committee of Social Rights: it relied, rather, on the respective functions of these bodies and its own.

It is therefore rather ironic that, in *National Union of Rail, Maritime and Transport Workers*, the Court explicitly pledged to be consistent as regards its importation, as a guide to the interpretation of the Convention, of assessments made by other international and regional human rights bodies (including but not limited to bodies established within the framework of the Council of Europe). The United Kingdom argued that the ILO Committee of Experts was 'not formally competent to give authoritative interpretations to ILO Conventions',[66] and that neither could the assessment of the European Committee of Social Rights under the collective complaints procedure be treated as authoritative 'since, despite the independence and expertise of its members, the ECSR did not possess judicial or quasi-judicial status'.[67] In response, the European Court of Human Rights emphasized the role of these expert bodies in providing an interpretation of the ILO instruments concerned or of the European Social Charter respectively, and it noted that 'It would be inconsistent with [the method adopted in *Demir and Baykara*] for the Court to adopt in relation to Article 11 an interpretation of the scope of freedom of association of trade unions that is much narrower than that which prevails in international law.'[68] Yet, by emphasizing that the nature of the review performed by the Court is distinct from that of these expert bodies, the Court made it clear that it refuses to be bound by any assessments such bodies may have made of a domestic legal system under consideration, since its examination only focuses on the specific facts before it, rather than on the compatibility of that legal system as a whole with the requirements of the Convention.

It may well be, of course, that the *National Union of Rail, Maritime and Transport Workers* case did not provide the European Court of Human Rights with an ideal opportunity to question the restrictions imposed on unions' resort to 'solidarity strikes' under the British legislation, since the 'substance' of the freedom of association of the unions did not appear to be affected in the circumstances of that case : the unions, indeed, were not deprived of any means to effectively influence social dialogue. Nevertheless, the hesitations of the Court, and the awkard combination of a pledge to interpret the Convention consistently with general international human rights law and a (not particularly plausible) attempt to

[65] Id.
[66] Id., § 96.
[67] Id., § 94.
[68] Id., § 76.

explain why the views of the ILO experts and the European Committee on Social Rights could be disregarded, provide a good illustration of the main problem facing the formation of human rights *jus commune*: the problem of consistency. But how real is this 'problem' ? And should it not be seen, rather, as a symptom of our inability to define an intermediate ground between recognizing that case law, borrowed from external sources, can have binding authority (which it obviously could not), and dismissing such case law as little more than providing information to the Court that it may freely disregard, if it does see the solution as fit for its own purposes?

2. Interacting with the Human Rights Committee

We may take as our departure point another example, by asking how the European Court of Human Rights has been referring to the case-law of the Human Rights Committee in recent years. In *Bayatyan v. Armenia*, the Grand Chamber of the Court was asked to decide whether a conscientious objector, refusing to perform a military service on religious grounds, could be prosecuted.[69] Since Article 4 § 3 (b) ECHR excludes from the scope of 'forced or compulsory labour' prohibited by Article 4 § 2 'any service of a military character or, *in case of conscientious objectors in countries where they are recognised*, service exacted instead of compulsory military service', it had traditionally been assumed that the member States of the Council of Europe could refuse to provide for a right to conscientious objection without violating the Convention: that was the position expressed by the European Commission of Human Rights since the 1966 case of *Grandrath v. the Federal Republic of Germany*.[70] In effect, freedom of religion, recognized under Article 9 ECHR, was nullified as far as conscientious objection to performing a military service was concerned: the issue was considered exclusively under the provision of the Convention referring to conscientious objectors, that dealt with forced labour.

In *Bayatyan* however, the Court changed its view, and for the first time explicitly recognized a right to conscientious objection. A major reason for this change was the evolution of the position of the Human Rights Committee. The Committee had traditionally assumed that Article 8 ICCPR implicitly acknowledged that the States parties to the Covenant could refuse to recognize conscientious objection to military service.[71] In a General Comment it adopted in 1993 on freedom of religion however, it noted that whereas the Covenant "does not explicitly refer to a right to conscientious objection", such a right "can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief".[72] When, in 2004, it was confronted with the claims of two Jehovah's Witnesses who were prosecuted for having refused to perform their military service, the Human Rights Committee confirmed its willingness to depart from its previous approach. It reasoned that since Article 8 ICCPR seemed to implicitly acknowledge that the States parties to the Covenant could refuse to recognize conscientious objection to military service,[73] this provision 'itself neither recognizes nor excludes a right of conscientious objection', and the claims it was presented with were therefore to be assessed 'solely in the light of article 18 of the Covenant', which guarantees freedom of religion[74]: on the basis of that rule, it concluded that the refusal to establish a procedure for the recognition of religious conscientious objectors was a disproportionate interference with freedom of religion.

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[69] Eur. Ct. HR (GC), *Bayatyan v. Armenia* (Appl. No. 23459/03), judgment of 9 July 2011. For a comment, see Petr Muzny, 'Bayatyan v. Armenia: the Grand Chamber renders a Grand Judgment', *Human Rights Law Review*, vol. 12(1) (2012), pp. 135-147.

[70] *Grandrath v. the Federal Republic of Germany* (Appl. No. 2299/64), Commission report of 12 December 1966, ECHR Yearbook, vol. 10, p. 626.

[71] Article 8 ICCPR prohibits forced and compulsory labour. Para. 3 of this provision however, excludes from this notion 'any service of a military character' 'and, *in countries where conscientious objection is recognized*, any national service required by law of conscientious objectors'. The Committee implied from this formulation that the States parties to the ICCPR had a choice whether or not to allow for conscientious objection on grounds of religion to justify a refual to perform a military service: see Human Rights Committee, *L.T.K. v. Finland*, communication No. 185/1984, CCPR/C/25/D/185/1984, dec. of 9 July 1985.

[72] The Human Rights Committee noted in its General Comment No. 22 that:.

[73] See above, fn 71.

[74] Human Rights Committee, *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, Joined communications Nos 1321-1322/2004 (CCPR/C/88/D/1321-1322/2004), decision of 23 January 2007.

In *Bayatyan v. Armenia*, the European Court of Human Rights followed the same approach, using a wording borrowing directly from that of the Human Rights Committee.[75] Citing the *Demir and Baykara* judgment of 2008, the Court notes in this regard that

> 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.[76]

The Court provided a detailed description of the evolution that the Human Rights Committee went through in the 1990s, in the part of the judgment where it offers its own assessement.[77] Although that factor in itself may not have been decisive, it nevertheless seems to have had an important weight.

That does not mean, however, that the Court shall align itself with the position of the Committee, wherever the Committee has provided an interpretation of provisions of the ICCPR with a wording similar to that of the ECHR. The famous cases concerning the wearing of headscarves provide illustrate this. In six decisions it adopted on 30 June 2009, the European Court of Human Rights declared inadmissible as manifestly ill-founded applications filed against France, which alleged that the application of the French law of 2004 prohibiting the wearing of religious insigna in public schools[78] resulted in a violation of freedom of religion and freedom of expression, protected under Articles 9 and 10 ECHR.[79] Though the position of the Court was predictable once we consider its former case law on this issue,[80] it is nevertheless remarkable that this position is in complete disregard of the Concluding Observations concerning France adopted by the Human Rights Committee a year earlier[81] -- and which, anecdotally, it would confirm again in an individual decision in 2012.[82]

Other such disagreements have occasionally emerged between the European Court of Human Rights and the Human Rights Committee.[83] This would not constitute a problem if the two bodies not only

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[75] The Court referred to para. 23 of the *Travaux préparatoires*, noting that 'the clause relating to conscientious objectors [sub-paragraph (b) of Article 4 § 3] was intended to indicate that any national service required of them by law would not fall within the scope of forced or compulsory labour. As the concept of conscientious objection was not recognised in many countries, the phrase 'in countries where conscientious objection is recognised' was inserted'. In the Court's opinion, the *Travaux préparatoires* confirm that the sole purpose of sub-paragraph (b) of Article 4 § 3 is to provide a further elucidation of the notion "forced or compulsory labour". In itself it neither recognises nor excludes a right to conscientious objection and should therefore not have a delimiting effect on the rights guaranteed by Article 9' (§ 100).

[76] *Bayatyan v. Armenia* (Appl. No. 23459/03), judgment of 9 July 2011, § 102.

[77] See § 105.

[78] Loi n°2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics,

[79] The cases of Ranjit Singh and Jasvir Singh (Appl. Nos 27561/08 and 25463/08) concerned pupils wearing a keski (substituting a turban); the cases of Aktas (Appl. No. 43563/08), Gamaledynn (Appl. No. 18527/08), Bayrak (Appl. No. 14308/08) and Ghazal (Appl. No. 29134/08) concerned Muslim pupils wearing a bonnet (substituting a headscarf).

[80] In the *Dogru* and *Kervanci* judgments of 4 December 2008 (appl. Nos 31645/04 and 27058/05 respectively), the Court had already taken the view that France had remained within its margin of appreciation by adopting this legislation.

[81] **Concluding Observations of the Human Rights Committee, France (CCPR/C/FRA/CO/4) (2008), para. 23 (concluding that France** 'should re-examine Act No. 2004/228 of 15 March 2004 in light of the guarantees of article 18 of the Covenant concerning freedom of conscience and religion, including the right to manifest one's religion in public as well as private, as well as the guarantee of equality under article 26')**.**

[82] In the case of *Bikramjit Singh v. France*, the Human Rights Committee was presented with the case of a Sikh adolescent who was denied access to school in France because he insisted on wearing a keski (a sort of mini-turban covering the long uncut hair considered sacred in the Sikh religion): the Committee considered that France had not provided 'compelling evidence that by wearing his keski the author would have posed a threat to the rights and freedoms of other pupils or to order at school', and had not sought to find a solution to accommodate all interests at stake (Human Rights Committee, *Bikramjit Singh v. France*, communication No. 1852/2008, dec. of 1 Nov. 2012).

[83] See, e.g., concerning the refusal to allow a Sikh to provide a photograph for an identity document on which he wears a turban, the contrasted views of the Human Rights Committee in *Ranjit Singh v. France* (concerning a residence permit) (communication No. 1876/2009, dec. of 22 July 2011) or in *Mann Singh v. France* (concerning a passport) (communication

applied different instruments, but applied instruments containing different provisions, imposing on the States parties different sets of obligations. Here, however, we are faced with instruments that, in areas such as freedom of religion, use almost exactly the same wording, derived from the Universal Declaration of Human Rights. In addition to inviting forum-shopping by individuals alleging to be victims of violations,[84] such divergences are problematic for a number of reasons. They undermine the legitimacy of both the bodies concerned, as the authority of the views they express are challenged. They are a source of legal uncertainty for the domestic courts and, generally, for the States parties: although in principle it is the protection most favorable to the individual that should prevail, this principle may be difficult to apply in practice, in situations where rights conflict with one another (and the State frequently puts forward the protection of the rights of others to justify certain interferences). Moreover, as far as political authorities are concerned, such a conclusion is not obvious: in reality, the Executive or the Legislature may feel that, since human rights bodies established at international level cannot agree among themselves, the State is free to choose the attitude that suits it best.

The broader point, however, is that the European Court of Human Rights gives the impression that it has been inconsistent as regards the weight it affords, or not, to the interpretation given by the Human Rights Committee of provisions of the ICCPR that rely on a wording similar to that of the ECHR. For instance, whereas the Court justifies the evolution of its case-law in *Baytayan* by the similar evolution that took place in the jurisprudence of the Human Rights Committee, it almost entirely ignored the views expressed by the Committee in the above-mentioned cases concerning freedom of religion, and it failed to relate to the position of the same Committee in the second *Hirst* case concerning the right to vote of convicted detainees in the United Kingdom.[85] In *A. and Others v. the United Kingdom*, it refers to the interpretation given by the Committee to Article 4 of the International Covenant on Civil and Political Rights, the derogation clause under the Covenant, as expressed by General Comment No. 29 on Article 4 of the ICCPR (24 July 2001). It then explains that the requirement imposed by the Human Rights Committee under Article 4 ICCPR -- that the measures derogating from the Covenant be "temporary" -- does not apply as such under Article 15 ECHR, although nothing in the wording of these respective clauses suggests why their interpretation should be different.[86] Such apparent inconsistencies should concern us. They risk undermining the legitimacy of reliance on comparative analysis in human rights

No. 1928/2010, dec. of 19 July 2013) on the one hand, and of the European Court of Human Rights in *Mann Singh v. France* (Appl. No. 24479/07, inadmissibility decision of 13 November 2008) (concerning a driver's license) on the other hand. In these cases, the Human Rights Committee concluded that France had not provided an acceptable justification for the interference with freedom of religion, whereas in *Mann Singh v. France*, the European Court of Human Rights considered that the restriction imposed by France was not disproportionate.

[84] See on this risk the detailed and prescient study by Laurence R. Helfer, 'Forum Shopping for Human Rights', *U. Pa. L. Rev.*, vol. 148(2) (1999), pp. 285-400. The cases referred to above provide an illustration: after having failed to convince the European Court of Human Rights to find a breach of Article 9 ECHR after France had denied him the right to appear on a driver's license wearing his sikh turban, Mann Singh successfully filed a communication with the Human Rights Committee, this time alleging that the refusal of the French authorities to allow him to appear on the photograph of his passport wearing a turban violated Article 18 ICCPR.

[85] Eur. Ct. HR (GC), *Hirst v. the United Kingdom (No. 2)* (Appl. No. 74025/01), judgment of 6 October 2005. In its General Comment No. 25 of 12 July 1996, the Human Rights Committee had stated : 'If conviction for an offence is a basis for suspending the right to vote, the period of suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote' (para. 14). Although the Court refers to the position of the Human Rights Committee where it lists 'relevant international materials' (§§ 26-27), it does not consider that view in the remainder of its judgment.

[86] Eur. Ct. HR (GC), *A. and Others v. the United Kingdom* (Appl. No. 3455/05), judgment of 19 February 2009, § 178. In fact, the Court is rather ambiguous as to whether or not it shares the view of the Human Rights Committee, according to which the requirement that the measures adopted be 'strictly necessary' to respond to the exigencies of the situation imply that such measures be temporary in nature: 'While the United Nations Human Rights Committee has observed that measures derogating from the provisions of the International Covenant on Civil and Political Rights must be of “an exceptional and temporary nature” ..., the Court’s case-law has never, to date, explicitly incorporated the requirement that the emergency be temporary, although the question of the proportionality of the response may be linked to the duration of the emergency. Indeed, the cases ... relating to the security situation in Northern Ireland, demonstrate that it is possible for a “public emergency” within the meaning of Article 15 to continue for many years. The Court does not consider that derogating measures put in place in the immediate aftermath of the al-Qaeda attacks in the United States of America, and reviewed on an annual basis by Parliament, can be said to be invalid on the ground that they were not “temporary”.'

law, the operation at the heart of the formation of human rights *jus commune*. A more principled approach seems desirable. But is it possible?

VI. From a formalistic to a dialogic approach

The view that is taken here is that the proper role of foreign human rights jurisprudence should be to force human rights bodies to be more reflexive about their interpretation of human rights law. Foreign jurisprudence should not be treated as binding, as it does not have such authority; nor however should it be treated as a mere source of inspiration, with only persuasive authority that could be ignored if the 'receiving' court finds it inconvenient to follow. Rather, because such foreign jurisprudence does create certain expectations, it should be seen as establishing a presumption, but one that is rebuttable: the interpretation provided in one instance should in principle be followed in later instances, unless there are strong (and principled) reasons to depart from the precedent. The integrity of the human rights system as a whole shall benefit from thus being disciplined.

Prior precedents should not be ignored. Nor however should they discourage the quest for more alternative interpretations of the requirements of human rights, where the balance of interests weighs in favor of a different reading of human rights rather than in favor of respecting legitimate expectations and preserving legal certainty. Indeed, if human rights bodies were to act as if they were bound to follow the precedents set by their peers, the order in which cases are presented for settlement, as well as the fora where they are settled, would take on a decisive importance: human rights litigation would become a strategic game for some repeat players, particularly non-governmental advocacy organisations, although in the majority of cases, it would be mere chance -- which facts are ripe for adjudication first, and before which court -- that would ultimately decide the outcome. The proposal, therefore, is not to treat such precedents are binding, as in the classic doctrine of *stare decisis* -- which in effect would mean forcing the "receiving" court to rely on the technique of distinctions classic in common law adjudication, in order to justify not following a precedent --, but to see such precedents as mere presumptions, that could be set aside if the context in which the "receiving" court operates is different.

This does not rule out that inconsistencies shall persist between different human rights bodies, operating under different instruments and in different legal regimes, even where the provisions applied are similarly worded. Much as such inconsistencies are dissatisfying for the logical mind, they are to a large extent inevitable. Yet, that is not to imply that human rights bodies can simply ignore each other's jurisprudence. This would not only deprive themselves of an important tool to improve the quality of decision-making, and of an important source of judicial economy -- it would also soon lead to form a cacophony that would de-legitimize the reference of human rights as a universal and timeless language. The default position is therefore for each human rights monitoring body to take into account the case-law developed in other fora, where such case-law is based on similarly worded instruments, and to treat such case law as persuasive (though not binding) authority, that can be given a certain weight in the deliberation. Thus conceived, the dialogue between human rights jurisdictions can contribute to a more reflexive jurisprudence -- one that is better informed by how similar situations have been dealt with elsewhere, and where such solutions do indeed exist and have been leading to satisfactory outcomes, that accepts the burden of justifying any deviation from such solutions.

This is true where a particular doctrine is developed in one forum, and where the question arises whether a similar doctrine should be adopted in another forum facing a similar issue. But it is equally true where one monitoring body has assessed a specific situation (such as a measure adopted by a State), and another body subsequently is asked to perform a similar assessment. What is most disturbing in the examples above, where the European Court of Human Rights and the Human Rights Committee have adopted opposing views as to the acceptability of the restrictions imposed by France on religious freedom, is not that the two institutions have not converged on one solution: although, as noted above, this does threaten the legitimacy of human rights law because of the specific pedigree of this branch of law which presents itself as grounded in a certain concept of human dignity, such conflicts are to certain extent unavoidable.

Rather, such disagreements are a source of concern to the extent that the respective bodies do not feel obliged to respond to one another's views, and thus do not seize upon such divergences as an opportunity to improve the overall quality of their decision-making. There are certainly disadvantages to a human rights court adopting a deferential position, in which it feels bound to follow the precedent set by a foreign court (or, more broadly, a monitoring mechanism located outside the system in which the borrowing court operates). But the opposite position, in which a court simply disregards such precedents, is equally problematic from the point of view of the progress of law: it leads to each system of protection becoming self-referential, and increasingly rigid and dogmatic in the solutions it prescribes.

VII. Conclusion

It is perhaps the Supreme Court of Canada that best embodies the dialogical attitude that moves us beyond the dilemma. In the case of *R. v. Keegstra*, the Court was asked to decide whether a teacher, who was prosecuted in the province of Alberta under hate propaganda legislation (section 319(2) of the Criminal Code) for communicating anti-semitic statements to his students, could invoke freedom of expression (as guaranteed under s 2 of the Canadian Charter of Rights and Freedoms) in order to escape liability: Mr Keegstra had vilified the Jews in class, and had told his classes that 'Jewish people seek to destroy Christianity and are responsible for depressions, anarchy, chaos, wars and revolution', and that they had 'created the Holocaust to gain sympathy'.[87] Those questioning the constitutionality of the criminalization of hate speech in Canada were seeking to rely, in particular, on the case-law of the United States Supreme Court, based on First Amendment to the United States Constitution.[88] What value, if any, should be attached to such a reference? Speaking for the majority of the Court, Chief Justice Dickson saw fit to explain 'the reasons why or why not American experience may be useful' in addressing a question arising under the Canadian Charter of Rights and Freedoms:

> In the United States, a collection of fundamental rights has been constitutionally protected for over two hundred years. The resulting practical and theoretical experience is immense, and should not be overlooked by Canadian courts. On the other hand, we must examine American constitutional law with a critical eye, and in this respect La Forest J. has noted in *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 639: "While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of *Charter* guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances ...."
>
> Canada and the United States are not alike in every way, nor have the documents entrenching human rights in our two countries arisen in the same context. It is only common sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada's constitutional vision depart from that endorsed in the United States. ... I am unwilling to embrace various categorizations and guiding rules generated by American law without careful consideration of their appropriateness to Canadian constitutional theory. Though I have found the American experience tremendously helpful in coming to my own conclusions regarding this appeal, and by no means reject the whole of the First Amendment doctrine, in a number of respects I am thus dubious as to the applicability of this doctrine in the context of a challenge to hate propaganda legislation. ... Far from requiring a less solicitous protection of *Charter* rights and freedoms, such independence of vision protects these rights and freedoms in a different way. [I]n my view the international commitment to eradicate hate propaganda and, most importantly, the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible

[87] ***R v Keegstra*, [1990] 3 SCR 697 (judgment of 13 December 1990).**

[88] The leading case is *Beauharnais v. Illinois*, 343 U.S. 250 (1952), although the case has been distinguished many times at different levels of jurisdiction, and its authority is now seriously weakened as a result (see, e.g., *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Ashton v. Kentucky*, 384 U.S. 195 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); and *Cohen v. California*, 403 U.S. 15 (1971)).

> with the guarantee of free expression. [Moreover, the role of s 1 in the Canadian Charter of Rights and Freedoms, which prescribes that the rights and freedoms of the Charter are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society', a provision that has no exact equivalent in the U.S. Constitution,] may well demand a perspective particular to Canadian constitutional jurisprudence when weighing competing interests. If values fundamental to the Canadian conception of a free and democratic society suggest an approach that denies hate propaganda the highest degree of constitutional protection, it is this approach which must be employed.

This position is consistent with the role United States constitutional law has played, in other contexts, in Canadian Charter jurisprudence.[89] It is neither deferential to the case-law developed outside Canada, nor dismissive of such case law. The jurisprudence of the United States Supreme Court, we are told, should be considered carefully, because of the wisdom it embodies: 'over two hundred years' of accumulated 'practical and theoretical experience' cannot be simply overlooked by Canadian courts. Nor should not be controlling, however, where the overall structure and spirit of the Canadian Charter of Rights and Freedoms points to an opposite solution.[90]

It is thus that we should conceive of the dialogic relationship between human rights bodies, both domestic and international. These monitoring mechanisms are not connected institutionally to one another. Yet, they influence each other by expressing views that each must take into account. The duty to consider such views follows from the fact that the various instruments -- whether they are domestic legislation or catalogues of rights in national constitutions, or international or regional human rights treaties -- share a same origin in the Universal Declaration of Human Rights. Given the similarity of language and the commonality of origin, it seems inevitable that such influence will make itself felt. Indeed, it would be odd if counsels arguing their case before domestic or international tribunals, as well as NGOs intervening as amici curiae, did not rely on comparative law analysis to build their argument. This is to be welcomed, to the extent that it leads to a more richly argued case law in each forum -- a case law better informed by the range of solutions that have been explored elsewhere and by the advantages or disadvantages of each, and by the various sensitivities or philosophical approaches that may provide them with a justification. Through the formation of a human rights *jus commune* thus conceived, we may hope for an adequate equilibrium point between the dangers of homogeneity and the pitfalls of dispersion and cacophony.

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[89] For instance, *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, *per* Lamer J., at p. 498 (the use of the substantive / procedural dichotomy in approaching the content of the 'principles of fundamental justice' under s. 7 of the Canadian Charter of Rights and Freedoms, which stipulates that 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof *except in accordance with the principles of fundamental justice*', 'is largely bound up in the American experience with substantive and procedural due process. It imports into the Canadian context American concepts, terminology and jurisprudence, all of which are inextricably linked to problems concerning the nature and legitimacy of adjudication under the U.S. Constitution. That Constitution, it must be remembered, has no section 52 [of the Canadian Constitution, which provides that 'any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect'] nor has it the internal checks and balances of ss. 1 and 33. We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two constitutions').

[90] In the dissenting opinion appended to *Keegstra*, McLachlin, J. (joined by Sopinka, J.), does not disagree with the general approach of the majority towards the constitutional case law of the United States Supreme Court. He considers, however, that the Canadian understanding of freedom of expression is closer to that of the U.S. than to the approach embodies in international or European human rights instruments ('Perhaps the experience most relevant to Canada is that of the United States, since its Constitution, like ours, places a high value on free expression, raising starkly the conflict between freedom of speech and the countervailing values of individual dignity and social harmony. Like s. 2(*b*) [of the Charter of Rights and Freedoms, which guarantees freedom of thought, belief, opinion and expression], the First Amendment guarantee is conveyed in broad, unrestricted language, stating that "Congress shall make no law . . . abridging the freedom of speech, or of the press". [In contrast,] protection for free expression under [Article 10 of the European Convention on Human Rights] has at times been decidedly lukewarm, as befits an international instrument which is designed to limit as little as possible the sovereignty of the nations that signed it').