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Final Report on the UN Human Rights
Committee and other
Human Rights Treaty Bodies

by Photini Pazartzis & Panos Merkouris



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**FINAL REPORT ON
THE UN HUMAN RIGHTS COMMITTEE AND
OTHER HUMAN RIGHTS TREATY BODIES**

29 November – 13 December 2020, Kyoto

*Photini Pazartzis & Panos Merkouris**

Introduction

This report addresses the questions put by the Co-Rapporteurs, mainly in relation to the UN Human Rights Committee (HRCttee) established pursuant to the International Covenant on Civil and Political Rights (ICCPR). When useful the jurisprudence of other UN human rights treaty bodies (UN treaty bodies) is also examined, in order to reinforce the findings emerging from the jurisprudence of the HRCttee or to underline any potential divergences in the practice of these bodies. The HRCttee (like the other UN treaty bodies) is a treaty-monitoring body, which performs three main functions: a) it conducts a periodic state reporting procedure and formulates concluding observations on state reports; b) it develops/adopts General Comments by which specific rights or cross-cutting issues are examined in a comprehensive way and presented as a formal (re)statement of the Committee’s considered understanding of the rights or issues in question; c) it hears ‘communications’ by individuals about alleged violations of their rights by a State Party and adopts ‘views’ determining whether or not an individual’s rights were violated in a specific case. Through these functions, which are to a large extent similar in all the UN human rights treaty bodies, these bodies play a role both in interpreting the normative content of the respective instruments and in giving concrete meaning to individual rights and state obligations.

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In all of its functions, the HRCttee interprets the Covenant.¹ Rules of interpretation are relevant firstly, when the Committee renders views on an individual communication. Rules of interpretation are also relevant in the General Comments, where the HRCttee “distils its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises and presents those views in the context of a formal statement of its understanding to which it attaches major importance”.²

Notwithstanding the importance of General Comments in the interpretation of the Covenant, this paper focuses on “judicial interpretation” by the HRCttee and other UN treaty bodies.³ The ICCPR’s provisions are mainly interpreted in views rendered on individual communications, where the Committee acts as a *quasi*-judicial organ.⁴ The HRCttee has developed an important body of jurisprudence defining specific rights and obligations of states in concrete situations, reaching findings of breach or non-breach of Covenant provisions by the State concerned and recommending an appropriate remedy.

I. Content-related Issues/Questions

1. Do the courts and tribunals refer to the VCLT rules of interpretation? Do they discuss the content of these rules?

The typical structure of the judicial reasoning of the Committee’s views contains a statement of the facts, the author’s submissions and the State Party’s responses to the submissions of the author in the case in question, and an assessment of whether the facts give rise to a violation of the Covenant; thus, the prospects of a more elaborate consideration of rules of interpretation are somewhat narrowed (due also to the word-limit). Attempts to expand further on an interpretive reasoning were much more frequent in the Committee’s earlier jurisprudence than in its recent case law. Individual opinions of Committee members (both concurring and dissenting) sometimes

¹ The HRCttee considers individual communications in relation to States Parties who have adhered to the First Optional Protocol to the ICCPR.

² See Ph Alston, ‘The Historical Origins of “General Comments” in Human Rights Law’, in L Boisson de Chazournes & V Gowlland-Debbas (eds), *L’ordre juridique international, un système en quête d’équité et d’universalité. Liber Amicorum Georges Abi-Saab* (Brill/Martinus Nijhoff 2001), p. 764.

³ On interpretation by UN treaty bodies, indicatively, B Schlütter, ‘Aspects of Human Rights Interpretation by the UN Treaty Bodies’, in H Keller & G Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012), pp. 261-318; K Mechlem, ‘Treaty Bodies and the Interpretation of Human Rights’, (2009) 42 *Vanderbilt J’l of Trans’l Law* 905, pp. 905-947.

⁴ See HRCttee General Comment 33, **para. 11**: “While the function of the HRCttee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of the Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions”, also **paras. 13 and 15**.

contain a more elaborative interpretative reasoning, including references to the VCLT rules of interpretation.

When examining an individual communication, the HRCtee has interpreted the provisions of the Covenant by applying rules and methods of interpretation, predominantly in a more implicit manner and, in some occasions, in more direct terms.

It must be first pointed out that the HRCtee's jurisprudence (views) contains only sporadic and limited *direct* references to the VCLT rules by way of explicit citation of the corresponding VCLT Articles.⁵ This paucity is even more pronounced in the jurisprudence of the other UN treaty bodies, where reference to VCLT rules appears either in individual opinions of members or more likely in the arguments of the parties.⁶

⁵ *S. W. M. Brocks v. The Netherlands*, **Communication No. 172/1984**, Views adopted on 9 April 1987, CCPR/C/29/D/172/1984, **paras. 12.2.-12.3.**: “**12.2.** The Committee has also examined the contention of the State party that article 26 of the International Covenant on Civil and Political Rights cannot be invoked in respect of a right which is specifically provided for under article 9 of the International Covenant on Economic, Social and Cultural Rights (social security, including social insurance). In so doing, the Committee has perused the relevant travaux préparatoires of the International Covenant on Civil and Political Rights, namely, the summary records of the discussions that took place in the Commission on Human Rights in 1948, 1949, 1950 and 1952 and in the Third Committee of the General Assembly in 1961, **which provide a ‘supplementary means of interpretation’ (art. 32 of the Vienna Convention on the Law of Treaties)**. The discussions, at the time of drafting, concerning the question whether the scope of article 26 extended to rights not otherwise guaranteed by the Covenant, were inconclusive and cannot alter the conclusion arrived at by the ordinary means of interpretation referred to in paragraph 12.3 below. **12.3.** For the purpose of determining the scope of article 26, **the Committee has taken into account the ‘ordinary meaning’ of each element of the article in its context and in the light of its object and purpose (art. 31 of the Vienna Convention on the Law of Treaties)**”. Also, *L.G. Danning v. The Netherlands*, **Communication No. 180/1984**, Views adopted on 9 April 1987, CCPR/C/29/D/180/1984, and *F.H. Zwaan-de Vries v. The Netherlands*, **Communication No. 182/1984**, Views adopted on 9 April 1987, CCPR/C/29/D/182/1984, **paras. 12.2.-12.3.**, *Errol Johnson v. Jamaica*, **Communication No. 588/1994**, Views adopted on 22 March 1996, CCPR/C/56/D/588/1994, **para. 8.2**: “8.2 The question that must be addressed is whether the mere length of the period a condemned person spends confined to death row may constitute a violation by a State party of its obligations under articles 7 and 10 not to subject persons to cruel, inhuman and degrading treatment or punishment and to treat them with humanity. In addressing this question, the following factors must be considered: (...) (c) **The provisions of the Covenant must be interpreted in the light of the Covenant's objects and purposes (article 31 of the Vienna Convention on the Law of Treaties)**. As one of these objects and purposes is to promote reduction in the use of the death penalty, an interpretation of a provision in the Covenant that may encourage a State party that retains the death penalty to make use of that penalty should, where possible, be avoided.” Also, *Robinson LaVende v. Trinidad and Tobago*, **Communication No. 554/1993**, Views adopted on 29 October 1997, CCPR/C/61/D/554/1993, **para. 5.3.**, *Ramcharan Bickaroo v. Trinidad and Tobago*, **Communication No. 555/1993**, Views adopted on 29 October 1997, CCPR/C/55/D/555/1993, **para. 5.3.**

⁶ *Adam Harun v. Switzerland*, **Communication No. 758/2016**, Views adopted on 6 December 2018, CAT/C/65/D/758/2016, Individual dissenting opinion of Abdelwahab Hani, **para. 5**: “**It bases its interpretation, *inter alia*, on the rules enshrined in the 1969 Vienna Convention on the Law of Treaties**”; *T.M. v. Sweden*, **Communication No. 228/2003**, Views adopted on 18 November 2003, CAT/C/31/D/228/2003, Individual opinion by Committee member, Mr. Fernando Mariño Menéndez: “**A further consideration is that under article 31, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties, when interpreting a treaty account must be taken, together with the context, of ‘any relevant rules of international law applicable in the relations between the parties’**”; *Gemma Beasley v. Australia*, **Communication No. 11/2013**, Views adopted on 1 April 2016,

However, the frequent references to the wording and denominations of interpretative norms and methods as stipulated under the VCLT (such as the ‘object and purpose’ of the Covenant or a particular article or the ‘travaux préparatoires’) are a strong indicator that the HRCtee and the other UN treaty bodies rely in principle on the VCLT rules of interpretation.⁷

For instance, in its interpretive analysis, the Committee takes note of the interpretive pattern and process as formulated in the VCLT rules, even though not every method and stage of the interpretive process is always invoked:

“The Committee has noted the contention of the State party that the case of Mr. Vuolanne does not fall within the ambit of article 9, paragraph 4, of the Covenant. The Committee considers that this question must be answered by reference to the express terms of the

CRPD/C/15/D/11/2013, **para. 5.7**: “As to the merits of her claims, the author refers to the **general rules of interpretation as provided by the Vienna Convention**”; *Michael Lockrey v. Australia*, **Communication No. 13/2013**, Views adopted on 1 April 2016, CRPD/C/15/D/11/2013, **para. 5.6**.

⁷ See *inter alia*: *Robinson LaVende v. Trinidad and Tobago*, **Communication No. 554/1993**, Views adopted on 29 October 1997, CCPR/C/61/D/554/1993, **paras. 5.3-5.4**: “5.3 In assessing whether the mere length of detention on death row may constitute a violation of articles 7 and 10, the following factors must be considered: (...)5.4 In light of these factors, the Committee must examine the implications of holding the length of detention on death row, *per se*, to be in violation of articles 7 and 10. The first, and most serious, implication is that if a State party executes a condemned prisoner after he has spent a certain period of time on death row, it will not be in violation of its obligations under the Covenant, whereas if it refrains from doing so, it will violate the Covenant. **An interpretation of the Covenant leading to this result cannot be consistent with the Covenant’s object and purpose.**”, *Lauri Peltonen v. Finland*, **Communication No. 492/1992**, Views adopted on 21 July 1994, CCPR/C/51/D/492/1992, **para. 8.3**: “8.3 The *travaux préparatoires* to article 12, paragraph 3, of the Covenant reveal that it was agreed upon that the right to leave the country could not be claimed, *inter alia*, in order to avoid such obligations as national service.”, *Hugo van Alphen v. The Netherlands*, **Communication No. 305/1988**, Views adopted on 23 July 1990, CCPR/C/39/D/305/1988, **para. 5.8**: “**The drafting history of article 9, paragraph 1**, confirms that ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability”; *Stephen Hagan v. Australia*, **Communication No. 26/2002**, Opinion adopted on 20 March 2003, CERD/C/62/D/26/2002, **para. 7.3**: “7.3Nevertheless, the Committee considers that that use and maintenance of the offending term can at the present time be considered offensive and insulting, even if for an extended period it may not have necessarily been so regarded. **The Committee considers, in fact, that the Convention, as a living instrument, must be interpreted and applied taking into the circumstances of contemporary society.** In this context, the Committee considers it to be its duty to recall the increased sensitivities in respect of words such as the offending term appertaining today”; *A.W.R.A.P. v. Denmark*, **Communication No. 37/2006**, Opinion adopted on 8 August 2007, CERD/C/71/D/37/2006, **para. 6.3**: “... The Committee recalls that the Convention does not cover discrimination based on religion alone, and that Islam is not a religion practised solely by a particular group, which could otherwise be identified by its ‘race, colour, descent, or national or ethnic origin.’ **The Travaux Préparatoires of the Convention reveal that the Third Committee of the General Assembly rejected the proposal to include racial discrimination and religious intolerance in a single instrument**, and decided in the ICERD to focus exclusively on racial discrimination. It is unquestionable therefore that discrimination based exclusively on religious grounds was not intended to fall within the purview of the Convention”; *M.E.N. v. Denmark*, **Communication No. 35/2011**, Decision adopted on 26 July 2013, CEDAW/C/55/D/35/2011, **para. 8.7**: “An explicit non-refoulement provision is contained in article 3 of the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**, which prohibits the removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Obligations under the **International Covenant on Civil and Political Rights**, as interpreted by the Human Rights Committee in its jurisprudence, also encompass the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm”; similarly *M.N.N. v. Denmark*, **Communication No. 33/2011**, Decision adopted on 15 July 2013, CEDAW/C/55/D/33/2011, **para. 8.8**.

*Covenant as well as its purpose (...) Furthermore, the travaux préparatoires as well as the Committee's General Comments indicate that the purpose of the Covenant was to proclaim and define certain human rights for all and to guarantee their enjoyment. It is, therefore, clear that the Covenant is not, and should not be conceived of in terms of the individuals whose rights shall be protected but in terms of what rights shall be guaranteed and to what extent”.*⁸

The Committee’s reasoning in its landmark decision in *Roger Judge v. Canada*⁹ provides one of the most illustrative and elaborate examples of interpretive reasoning and of a combination of a literal with a contextual method of interpretation:

“10.4. In reviewing its application of article 6, the Committee notes that, as required by the Vienna Convention on the Law of Treaties, a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Paragraph 1 of article 6, which states that, “Every human being has the inherent right to life...”, is a general rule: its purpose is to protect life. States parties that have abolished the death penalty have an obligation under this paragraph to so protect in all circumstances. Paragraphs 2 to 6 of article 6 are evidently included to avoid a reading of the first paragraph of article 6, according to which that paragraph could be understood as abolishing the death penalty as such. This construction of the article is reinforced by the opening words of paragraph 2 (“In countries which have not abolished the death penalty...”) and by paragraph 6 (“Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.”). In effect, paragraphs 2 to 6 have the dual function of creating an exception to the right to life in respect of the death penalty and laying down limits on the scope of that exception. Only the death penalty pronounced when certain elements are present can benefit from the exception. Among these limitations are that found in the opening words of paragraph 2, namely, that only States parties that “have not abolished the death penalty” can avail themselves of the exceptions created in paragraphs 2 to 6. For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.

10.5 The Committee acknowledges that by interpreting paragraphs 1 and 2 of article 6 in this way, abolitionist and retentionist States parties are treated differently. But it considers that this is an inevitable consequence of the wording of the provision itself, which, as becomes clear from the Travaux Préparatoires, sought to appease very divergent views on the issue of the death penalty, in an effort at compromise among the drafters of the provision. The Committee notes that it was expressed in the Travaux that, on the one hand,

⁸ *Antti Vuolanne v. Finland*, Communication No. 265/1987, Views adopted on 7 April 1989, CCPR/C/35/D/265/1987, para. 9.3.

⁹ *Roger Judge v. Canada*, Communication No. 829/1998, Views adopted on 5 August 2002, Doc. CCPR/C/78/D/829/1998, paras. 10.4-10.5.

one of the main principles of the Covenant should be abolition, but on the other, it was pointed out that capital punishment existed in certain countries and that abolition would create difficulties for such countries. The death penalty was seen by many delegates and bodies participating in the drafting process as an "anomaly" or a "necessary evil". It would appear logical, therefore, to interpret the rule in article 6, paragraph 1, in a wide sense, whereas paragraph 2, which addresses the death penalty, should be interpreted narrowly”.

Similarly, in the jurisprudence of UN treaty bodies although an explicit reference to the VCLT rules is rarely seen, and the UN treaty bodies often announce the interpretative result without much in the direction of an exegesis,¹⁰ nonetheless the whole structure of the interpretive reasoning of the Committees seem to be heavily influenced by the main approaches to interpretation as enshrined in the VCLT. Indicatively, in *Adam Harun v. Switzerland* CAT member Abdelwahab Hani in his individual dissenting opinion refers not only to the rules of the VCLT, but also to the ordinary meaning, purpose, evolutive interpretation, preamble and preparatory work of the Convention, as well as indirectly to Article 33 of the VCLT, and other supplementary means.

*5. The Committee should interpret the **Convention “in response to evolving threats, issues and practices”**. It bases its interpretation, inter alia, **on the rules enshrined in the 1969 Vienna Convention on the Law of Treaties**. Before seeking other relevant national and international norms, it would have been wiser to begin by interpreting article 16 (1).*

*6. The “**ordinary meaning**” in the six authentic languages of the text of the term “in particular” in article 16 (1), which expands its scope to the “obligations contained in articles 10, 11, 12 and 13”, is not confined to that list, which is neither exhaustive nor restrictive. The Committee considers that the obligations contained in articles 2 to 15 are equally applicable to torture and ill-treatment.*

*7. Furthermore, the **preamble** to the Convention contains four references, all of which can be consulted for interpretative purposes. The Committee can therefore take into account the relevant **jurisprudence of the Human Rights Committee**. The Committee should also take into account the **1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**.*

¹⁰ See for instance: *A.A. v. Azerbaijan*, **Communication No. 247/2004**, Decision adopted on 25 November 2005, CAT/C/35/D/247/2004, **para. 6.8**; *E.E. v. Russian Federation*, **Communication No. 479/2011**, Views adopted on 24 May 2013, CAT/C/50/D/479/2011, **para. 8.4**; *N.Z. v. Kazakhstan*, **Communication No. 495/2012**, Views adopted on 28 November 2014, CAT/C/53/D/495/2012, **para. 12.3**; *Gerasimov v. Kazakhstan*, **Communication No. 433/2010**, Views adopted on 24 May 2012, CAT/C/48/D/433/2010, **para. 11.2**.

8. *It is possible through preparatory work to establish the link between torture and ill-treatment when it comes to non-refoulement...*¹¹

Another interesting example can be seen in *Muñoz-Vargas y Sainz de Vicuña v. Spain* CEDAW member Mary Shanthi Dairiam in her dissenting opinion suggests that a strictly textual interpretation is not the apposite approach to interpreting CEDAW, but rather that it must be complemented by a teleological interpretation as well.¹²

Agiza v. Sweden, on the other hand, is demonstrative of not only the holistic nature of the interpretative process but also of the fact that the HRCtee and the other UN treaty bodies focus more on the end result of the interpretative process rather than provide a road-map or elucidate the process *eo ipso*.

*The Committee observes that the right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise the protections afforded by the Convention would be rendered largely illusory. In some cases, the Convention itself sets out a remedy for particular breaches of the Convention, while in other cases the Committee has interpreted a substantive provision to contain within it a remedy for its breach. In the Committee's view, in order to reinforce the protection of the norm in question and understanding the Convention consistently, the prohibition on refoulement contained in article 3 should be interpreted the same way to encompass a remedy for its breach, even though it may not contain on its face such a right to remedy for a breach thereof.*¹³

In this small paragraph one can see how complicated it is to extract meaningful conclusions as to trends in the interpretative approach of UN treaty bodies. In the short space of a few lines of text, the CAT seems to apply contextual interpretation, the principle of effectiveness, it refers to its own case-law, considers the necessity of harmonious interpretation, and signs off with a melange of teleological/effective/contextual interpretation with a possible dash of *ejusdem generis* reasoning.

Overall, although direct references to the VCLT rules of interpretation are not usual in the jurisprudence of the HRCtee and the other UN treaty bodies, it can be reasonably deduced that their reasoning largely reflects the considerations of the VCLT rules of interpretation.

¹¹ *Adam Harun v. Switzerland*, **Communication No. 758/2016**, Views adopted on 6 December 2018, CAT/C/65/D/758/2016, Individual dissenting opinion of Abdelwahab Hani, **paras. 5-8**.

¹² *Muñoz-Vargas y Sainz de Vicuña v. Spain*, **Communication No. 7/2005**, Decision adopted on 9 August 2007, CEDAW/C/39/D/7/2005, Individual opinion by Committee member Mary Shanthi Dairiam (dissenting), **para. 13.9**: “**A textual reading** of article 1 of the Convention as seen in the concurring opinion, stating that claims of titles to nobility are not compatible with the provisions of the Convention as denial of such claims do not nullify or impair the exercise by women of human rights and fundamental freedoms, **does not take into account the intent and spirit of the Convention**.”

¹³ *Agiza v. Sweden*, **Communication No. 233/2003**, Views adopted on 20 May 2005, CAT/C/34/D/233/2003, **para. 13.6**.

The UN treaty bodies follow this approach not only with respect to the interpretation of their respective treaties but also of the reservations to them, as is shown in more detail below in Section I.6

2. Preference/Prevalence of a particular approach to interpretation over others (textual, contextual, teleological, intentions of the parties, historical). Has the approach changed over time?

Consistent with its special role and mandate as a body supervising the application of an international human rights treaty, the Committee has developed over time interpretive approaches and combinations thereof that address the particular issues raised within the legal context of its Covenant.

The Committee has progressively favored a broader and more liberal interpretation of the Covenant's provisions. This interpretive approach can be perceived as the outcome of the employment of a combination of various interpretive methods and their adaption to the context-specific character of human rights norms. Albeit the distinction between interpretative methods not always easily recognizable in the Committee's work, it can be deduced from its jurisprudence that the Committee favors a teleological approach, alongside a contextual and a *sui generis* dynamic method of interpretation of the Covenant and its particular rights, taking into consideration the concerns for an effective application of the Covenant's provisions. However, as has been noted, it is difficult to identify a *consistent* trend of liberalism or conservatism, and this has been attributed mainly to the changes in composition of the HRCttee over time.¹⁴

It is a common interpretive pattern of the HRCttee jurisprudence that for the purposes of assessing the scope and core of the invoked rights in order to reach a finding of violation or non-violation, the Committee engages in the identification of the object and purpose of the Covenant rights in question and/or of the object and purpose of the Covenant as a whole.¹⁵

Similar interpretative patterns can be seen in the jurisprudence of the other UN treaty bodies as well. The 'living instrument' approach to human rights treaties is often alluded to in the text of the

¹⁴ See S Joseph & M Castan, *The ICCPR: Cases, Materials and Commentary* (OUP 2013), pp. 26, 28-29.

¹⁵ *Francis Hopu and Tepoaitu Bessert v. France*, **Communication No. 549/1993**, Views adopted on 29 July 1997, CCPR/C/60/D/549/1993/Rev.1, **para. 10.3**: "10.3 The Committee observes that **the objectives of the Covenant require** that the term "family" be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term "family" in a specific situation.", *Robinson LaVende v. Trinidad and Tobago*, **Communication No. 554/1993**, Views adopted on 29 October 1997, CCPR/C/61/D/554/1993, **para. 5.3**: "5.3 In assessing whether the mere length of detention on death row may constitute a violation of articles 7 and 10, the following factors must be considered: (...) (b) While the Covenant does not prohibit the death penalty, the Committee has taken the view, which has been reflected in the Second Optional Protocol to the Covenant, that article 6 "refers generally to abolition in terms which strongly suggest that abolition is desirable". Reducing recourse to the death penalty **may therefore be seen as one of the objects and purposes of the Covenant.**", *Ramcharan Bickaroo v. Trinidad and Tobago*, **Communication No. 555/1993**, Views adopted 29 October 1997, CCPR/C/61/D/555/1993, **para. 5.3**, *Errol Johnson v. Jamaica*, **Communication No. 588/1994**, Views adopted on 22 March 1996, CCPR/C/56/D/588/1994, **para. 8.2**.

various decisions,¹⁶ as is the appropriateness of the teleological interpretation, with the UN treaty bodies referring back to the ‘object and purpose’ of the relevant Convention or more usually the ‘intent and spirit of the Convention’.¹⁷ In a similar fashion to the approach taken by the HRCtee, the UN treaty bodies often go back and forth as to which ‘object and purpose’ is critical for the interpretative process. Sometimes they refer to the object and purpose of the Convention as a whole,¹⁸ whereas other times they opt for the object and purpose of a specific provision.¹⁹

Recourse to the teleological interpretive method is frequent in the Committee’s jurisprudence, which appears consistent with a general trend in the interpretation of human rights instruments, as found, for example, in the jurisprudence of the ECtHR. The use, however, of this method by the Committee and the other UN treaty bodies is articulated in a much more implicit, narrower and less distinctive context.

¹⁶ *Stephen Hagan v. Australia*, **Communication No. 26/2002**, Opinion adopted on 20 March 2003, CERD/C/62/D/26/2002, **para. 7.3**: “7.3 Nevertheless, the Committee considers that that use and maintenance of the offending term can at the present time be considered offensive and insulting, even if for an extended period it may not have necessarily been so regarded. **The Committee considers, in fact, that the Convention, as a living instrument, must be interpreted and applied taking into the circumstances of contemporary society.** In this context, the Committee considers it to be its duty to recall the increased sensitivities in respect of words such as the offending term appertaining today”; *Elizabeth de Blok et al. v. the Netherlands*, **Communication No. 36/2012**, Views adopted on 17 February 2014, CEDAW/C/57/D/36/2012, **para. 5.5** (arguments of the authors): “5.5 ... The courts, according to the authors, should take into account **the considerable time elapsed since the adoption of the Convention and the fact that the Convention is a living instrument.** Provisions that may previously have been strictly regarded as having no direct effect may be seen differently today”.

¹⁷ *Muñoz-Vargas y Sainz de Vicuña v. Spain*, Communication No. 7/2005, Decision adopted on 9 August 2007, CEDAW/C/39/D/7/2005, Individual opinion by Committee member Mary Shanthi Dairiam (dissenting), **para. 13.9**: “13.9 **The Human Rights Committee in its General Comment No. 28 on equality of rights between men and women has stated,** ‘Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes.’ This statement reminds us that the ideology of the subordination of women based on history, culture and religion has manifested itself in material ways creating inequality. **The entire intent and spirit of the Convention is the elimination of all forms of discrimination against women and the achievement of equality for women.** In pursuing this goal, the Convention recognizes, in article 5 (a), the negative effects of conduct based on culture, custom, tradition and the ascription of stereotypical roles that entrench the inferiority of women ... **Because of its mandate, the Committee on the Elimination of Discrimination against Women, more than any other treaty body, must be broad in its interpretation and recognition of the violations of women’s right to equality,** going beyond the obvious consequences of discriminatory acts and recognizing the dangers of ideology and norms that underpin such acts. **A textual reading of article 1 of the Convention as seen in the concurring opinion, stating that claims of titles to nobility are not compatible with the provisions of the Convention as denial of such claims do not nullify or impair the exercise by women of human rights and fundamental freedoms, does not take into account the intent and spirit of the Convention**”; *H.A. Saut Villamar and F Osorio Cancino v. Canada*, **Communication No. 163/2000**, Decision adopted on 24 November 2004, CAT/C/33/D/163/2000, **para. 6.3**; *A.K Calonzo v. Canada*, **Communication No. 343/2008**, Views adopted on 18 May 2012, CAT/C/48/D/343/2008, **para. 9.5**.

¹⁸ *Muñoz-Vargas y Sainz de Vicuña v. Spain*, **Communication No. 7/2005**, Decision adopted on 9 August 2007, CEDAW/C/39/D/7/2005, Individual opinion by Committee member Mary Shanthi Dairiam (dissenting), **para. 13.9**: “**The entire intent and spirit of the Convention is the elimination of all forms of discrimination against women and the achievement of equality for women**”.

¹⁹ *A.K Calonzo v. Canada*, **Communication No. 343/2008**, Decision adopted on 18 May 2012, CAT/C/48/D/343/2008, **para. 9.5**; *R.S. et al. v. Switzerland*, **Communication No. 482/2011**, Views adopted on 21 November 2014, CAT/C/53/D/482/2011, **para. 7**.

For the purposes of determining the “object and purpose”, the Committee has favored predominantly a self-referential approach of invoking its Concluding Observations, its General Comments and jurisprudence, which it refers to as the main tool for interpreting the Covenant. This approach is also evident in the jurisprudence of the other UN treaty bodies.²⁰ The Committee’s interpretive reasoning also often relies on “supplementary means of interpretation” and in particular on the *travaux préparatoires* of the Covenant/Conventions.²¹

In some occasions, in view of drawing conclusions for interpretive purposes, references are made to other elements of a broader context that could be considered as fitting within the rules of the VCLT Article 31 (3)(b) (c) or 32, namely to other international instruments, jurisprudence and

²⁰ Reference to General Comments/Recommendations: *T.P.F. v. Peru*, **Communication No. 22/2009**, Views adopted on 17 October 2011, CEDAW/C/50/D/22/2009, **para. 8.11**; *D.R. v. Australia*, **Communication No. 42/2008**, Opinion adopted on 14 August 2009, CERD/C/75/D/42/2008, **para. 6.3**; *The Jewish Community of Oslo et al. v. Norway*, **Communication No. 30/2003**, Opinion adopted on 15 August 2005, CERD/C/67/D/30/2003, **para. 10.3**; *J.H.A v. Mauritania and Spain*, **Communication No. 323/2007**, Decision adopted on 10 November 2008, CAT/C/41/D/323/2007, **para. 8.2**; *Sonko v. Spain*, **Communication No. 368/2008**, Views adopted on 25 November 2011, CAT/C/47/D/368/2008, **para. 10.3**; *Sahli v. Algeria*, **Communication No. 341/2008**, Views adopted on 3 June 2011, CAT/C/46/D/341/2008, **para. 9.9**; *R.K.B. v. Turkey*, **Communication No. 28/2010**, Views adopted on 24 February 2012, CEDAW/C/51/D/28/2010, **para. 8.6**.

Reference to prior jurisprudence: *A.W.R.A.P. v. Denmark*, **Communication No. 37/2006**, Opinion adopted on 8 August 2007, CERD/C/71/D/37/2006, **para. 6.4**; *D.R. v. Australia*, **Communication No. 42/2008**, Opinion adopted on 14 August 2009, CERD/C/75/D/42/2008, **para. 6.4**; *Nirman Singh v. Canada*, **Communication No. 319/2007**, Views adopted on 30 May 2011, CAT/C/46/D/319/2007, **para. 7.3**; *A.A. v. Azerbaijan*, **Communication No. 247/2004**, Decision adopted on 25 November 2005, CAT/C/35/D/247/2004, **para. 6.4**; *N.B.-M. v. Switzerland*, **Communication No. 347/2008**, Views adopted on 14 November 2011, CAT/C/47/D/347/2008, **para. 9.9**.

Reference to concluding observations: *Sahli v. Algeria*, **Communication No. 341/2008**, Views adopted on 3 June 2011, CAT/C/46/D/341/2008, **para. 9.9**; *Dzemajl et al. v. Yugoslavia*, **Communication No. 161/2000**, Views adopted on 21 November 2002, CAT/C/29/D/161/2000, **para. 9.2**; *Abramova v. Belarus*, **Communication No. 23/2009**, Views adopted on 25 July 2011, CEDAW/C/49/D/23/2009, **paras. 7.3**.

²¹ See, for instance: *A.W.R.A.P. v. Denmark*, **Communication No. 37/2006**, Opinion adopted on 8 August 2007, CERD/C/71/D/37/2006, **para. 6.3**: “... The Committee recalls that the Convention does not cover discrimination based on religion alone, and that Islam is not a religion practised solely by a particular group, which could otherwise be identified by its “race, colour, descent, or national or ethnic origin.” **The Travaux Préparatoires of the Convention reveal that the Third Committee of the General Assembly rejected the proposal to include racial discrimination and religious intolerance in a single instrument, and decided in the ICERD to focus exclusively on racial discrimination.** It is unquestionable therefore that discrimination based exclusively on religious grounds was not intended to fall within the purview of the Convention”.

rules of international law,²² as well as to subsequent state practice,²³ and even to preparatory work of other instruments and to non-binding instruments.²⁴

Following this line of interpretation, the Committee combines its traditionally upheld teleological approach with a more context-driven approach, with a more dynamic and systemic interpretative approach that takes note of the existence of other relevant rules of international law, the evolution of international law, as well as incurring changes in subsequent state practice.

Another aspect of the HRCttee's recourse to a contextual interpretation of the Covenant's terms is the frequently recurring in the Committee's jurisprudence recognition of an interdependence between the Covenant's provisions and rights and their examination in light of each other or in relation to the broader context of the Covenant.²⁵

²² See *inter alia* frequent references to the "Standard Minimum Rules for the Treatment of Prisoners", adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council in its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, references to the ILC's Articles on Responsibility of States for internationally wrongful acts and to the Rome Statute of the International Criminal Court in *S. Jegatheeswara Sarma v. Sri Lanka*, **Communication No. 950/2000**, Views adopted on 16 July 2003, CCPR/C/78/D/950/2000, **paras. 9.2 and 9.3**, *Franz Wallmann et al. v. Austria*, **Communication No. 1002/2001**, Views adopted on 1 April 2004, CCPR/C/80/D/1002/2001, **para. 8.4**: "8.4 As to the question of whether the subject matter of the present communication is the same matter as the one examined by the European Court, the Committee recalls that the same matter concerns the same authors, the same facts and the same substantive rights. The first two requirements being met, **the Committee observes that article 11, paragraph 1, of the European Convention, as interpreted by the Strasbourg organs, is sufficiently proximate to article 22, paragraph 1, of the Covenant now invoked**, to conclude that the relevant substantive rights relate to the same matter", *Joseph Kindler v. Canada*, **Communication No. 470/1991**, Views adopted on 30 July 1993, CCPR/C/48/D/470/1991, **para. 15.1**: "15.1 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**", *Klaus Dieter Baumgarten v. Germany*, **Communication No. 960/2000**, Views adopted on 31 July 2003, CCPR/C/78/D/960/2000, **para. 9.4**: "9.4 (...) The Committee further recalls that States parties are required to prevent arbitrary killing by their own security forces. It finally notes that **the disproportionate use of lethal force was criminal according to the general principles of law recognized by the community of nations already at the time when the author committed his acts**", *Alzbeta Pezoldova v. Czech Republic*, **Communication No. 757/1997**, Views adopted on 25 October 2002, CCPR/C/76/D/757/1997, **para. 8.3**: "State in transition from totalitarian to democratic regime. **The non-existence of the recognition of the right to restitution in international law should be also taken into account in this respect.**"

²³ See for example, *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, **Communications Nos. 1321/2004 and 1322/2004**, Views adopted on 23 January 2007, CCPR/C/88/D/1321-1322/2004, **paras. 8-9**, where the HRCttee took into account subsequent state practice regarding conscientious objection.

²⁴ *Nura Hamulić and Halima Hodžić v. Bosnia and Herzegovina*, **Communication No. 2022/2011**, Views adopted on 30 March 2015, CCPR/C/113/D/2022/2011, Separate opinion of Committee members Olivier de Frouville, Mauro Politi, Victor Manuel Rodríguez-Rescia and Fabián Omar Salvioli (partly dissenting), **para. 3**, where reference is made not only to the *travaux préparatoires* of the ICCPR but also of the UNHRC *travaux*, as well as to a number of other non-binding documents.

²⁵ *Joseph Kindler v. Canada*, **Communication No. 470/1991**, Views adopted on 30 July 1993, CCPR/C/48/D/470/1991, **para. 15.1**: "15.1 As regards the author's claims that Canada violated article 7 of the Covenant, **this provision must be read in the light of other provisions of the Covenant, including article 6, paragraph 2**, which does not prohibit the imposition of the death penalty in certain limited circumstances. Accordingly, capital punishment as such, within the parameters of article 6, paragraph 2, does not *per se* violate article

Finally, it should be noted that the text of the Covenant and the specific wording of its provisions still serve as the usual starting point of the HRCttee's interpretive reasoning. In many of its Views, the Committee seeks to determine the notion of various terms and elements, namely the "ordinary meaning" under the VCLT terminology, by reference to the text and wording of the specific provision in question.²⁶ In some other cases, the "ordinary meaning" of a term is determined by referral to other international instruments, as it is evidenced by the Committee's established practice in cases of enforced disappearances.²⁷

7", *Keith Cox v. Canada*, **Communication No. 539/1993**, Views adopted on 31 October 1994, CCPR/C/52/D/539/1993, **para. 16.2**: "16.2 The Committee notes that **article 6, paragraph 1, must be read together with article 6, paragraph 2**, which does not prohibit the imposition of the death penalty for the most serious crimes.", *Robert W. Gauthier v. Canada*, **Communication No. 633/1995**, Views adopted on 7 April 1999, CCPR/C/65/D/633/1995, **para. 13.4**: "13.4 In this connection, the Committee also refers to the right to take part in the conduct of public affairs, as laid down in article 25 of the Covenant, and in particular to General Comment No. 25 (57) which reads in part: (...) Read together with article 19, this implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members(...)", *J.G.A Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, **Communication No. 760/1997**, Views adopted on 20 July 2000, CCPR/C/69/D/760/1997, **para. 10.3**: "10.3 (...)Furthermore, the provisions of article 1 **may be relevant in the interpretation of other rights protected by the Covenant**, in particular articles 25, 26 and 27", *Marie-Hélène Gillot et al. v. France*, **Communication No. 932/2000**, Views adopted on 15 July 2002, CCPR/C/75/D/932/2000, **para. 13.4**: "13.4 Although the Committee does not have the competence under the Optional Protocol to consider a communication alleging violation of the right to self-determination protected in article 1 of the Covenant, **it may interpret article 1, when this is relevant, in determining whether rights protected in parts II and III of the Covenant have been violated**. The Committee is of the view, therefore, that, in this case, it may take article 1 into account in the interpretation of article 25 of the Covenant".

Similarly, for CERD see: *D.R. v. Australia*, **Communication No. 42/2008**, Opinion adopted on 14 August 2009, CERD/C/75/D/42/2008, **para. 6.3**: "Taking into account General Recommendation No.30 of 2004 and **in particular the necessity to interpret article 1, paragraph 2, of the Convention in the light of article 5**".

²⁶*Charles Stewart v. Canada*, **Communication No. 538/1993**, Views adopted on 1 November 1996, CCPR/C/58/D/538/1993, **para. 12.4**: "12.4 (...) The **language of article 12, paragraph 4, permits a broader interpretation**, moreover, that might embrace other categories of long-term residents, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. 12.5 (...) In this regard it is to be noted that while in the drafting of article 12, paragraph 4, of the Covenant the term "country of nationality" was rejected, so was the suggestion to refer to the country of one's permanent home", *Darmon Sultanova v. Uzbekistan*, **Communication No. 915/2000**, Views adopted on 30 March 2006, CCPR/C/86/D/915/2000, **para. 7.3**: "7.3 On the claim of a violation of the author's sons' rights under article 14, paragraph 3 (g), in that they were forced to sign a confession, the Committee must consider the principles that underlie this guarantee. **It refers to its previous jurisprudence that the wording, in article 14, paragraph 3 (g), that no one shall "be compelled to testify against himself or confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological coercion by the investigating authorities on the accused with a view to obtaining a confession of guilt.**"

²⁷ See e.g. *Grioua v. Algeria*, **Communication No. 1327/2004**, Views adopted on 10 July 2007, CCPR/C/90/D/1327/2004, **para. 7.2**: "7.2 **The Committee recalls the definition of enforced disappearance in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court**: "Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." Any act leading to such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of the person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art.

3. When has the case-law of an international court and tribunal indicated a clear shift in the content of a rule of interpretation? How was this established?

Neither the Committee's nor the other UN treaty bodies' jurisprudence provide substantial evidence of a clear shift in the *content* of a rule of interpretation. There have been, however, shifts in the Committee's jurisprudence, in cases where the Committee, pursuant to the employment of a different line of interpretation, has departed from its previous jurisprudence.²⁸

4. When, how and what maxims/canons of interpretation (not explicitly referred to in the VCLT) have been used in international case-law? What is their status?

While the HRCttee and the other UN treaty bodies follow in principle the VCLT rules of interpretation, they have also developed a variety of interpretive methods and approaches, that albeit not explicitly referred to in the VCLT, they may be viewed, if considered in broader terms, as conforming with the VCLT framework:

1. As already indicated, the Committee has predominantly favored a self-referential approach of invoking extensively its own General Comments and jurisprudence for substantiating its interpretive reasoning and, in particular, as a means of authoritative interpretation of the Covenant's provisions. When viewed in light of the VCLT rules of interpretation, the Committee's jurisprudence and General Comments could be perceived as reflecting "subsequent practice" as stipulated in the VCLT Article 31(3)(b), however there is still a discussion as to whether they also meet the second requirement of the said Article, namely whether they establish an "agreement of the parties".²⁹

The other UN treaty bodies also show a tendency to self-reference. Not only do they often refer to their own jurisprudence in an effort to bolster the validity of an interpretative outcome already arrived in the context of a previous Communication,³⁰ but they also refer to General Comments and Recommendations. Their jurisprudence, unfortunately, does not shed any substantial light as to

10). It also violates or constitutes a grave threat to the right to life (art. 6). In the present case, the author invokes articles 7, 9 and 16."

²⁸ See *Roger Judge v. Canada*, **Communication No. 829/1998**, Views adopted on 5 August 2002, CCPR/C/78/D/829/1998. Here, the HRCttee used a literal and contextual interpretation to deviate from previous findings on the right to life under article 6 of the Covenant and to stress a new understanding of this right. For examples of 'inconsistencies' in the HRCttee's opinions, see Joseph & Castan, *supra* note 14, pp. 29-30.

²⁹ See below, Section II.3 and the ILC Draft Conclusions referred therein.

³⁰ *A.W.R.A.P. v. Denmark*, **Communication No. 37/2006**, Opinion adopted on 8 August 2007, CERD/C/71/D/37/2006, **para. 6.4**; *D.R. v. Australia*, **Communication No. 42/2008**, Opinion adopted on 14 August 2009, CERD/C/75/D/42/2008, **para. 6.4**; *Nirman Singh v. Canada*, **Communication No. 319/2007**, Views adopted on 30 May 2011, CAT/C/46/D/319/2007, **para. 7.3**; *A.A. v. Azerbaijan*, **Communication No. 247/2004**, Decision adopted on 25 November 2005, CAT/C/35/D/247/2004, **para. 6.4**; *N.B.-M. v. Switzerland*, **Communication No. 347/2008**, Views adopted on 14 November 2011, CAT/C/47/D/347/2008, **para. 9.9**.

where exactly in the Article 31-32 VCLT framework such reference may fall. The most that has been said has been that such Comments/Recommendations are “*an authoritative interpretation tool*”,³¹ or in a similar vein that they are an “*authoritative interpretation of the Covenant*”.³²

Furthermore, apart from the previously mentioned debate as to whether these documents should be categorized as “subsequent practice” under Art. 31(3)(b) or “supplementary means” under Article 32 VCLT, of note is that the Committees have been quite liberal as to the General Comments and/or Recommendations they refer to. Not only do they use the Comments/Recommendations of their respective constituent instruments³³ but sometimes they refer to General Comments of *other* human rights treaties.³⁴

³¹ *T.P.F. v. Peru*, **Communication No. 22/2009**, Views adopted on 17 October 2011, CEDAW/C/50/D/22/2009, **para. 8.11**: “[The Committee] also recalls its general recommendation No. 24, which [is] an authoritative interpretation tool in relation to article 12”.

³² *López Albán et al v. Spain*, **Communication No. 37/2018**, Views adopted on 11 October 2019, E/C.12/66/D/37/2018, **para. 6.2**; *SSR v. Spain*, Communication No. 51/2018, Views adopted on 11 October 2019, E/C.12/66/D/51/2018, **para. 6.2**.

³³ *T.P.F. v. Peru*, **Communication No. 22/2009**, Views adopted on 17 October 2011, CEDAW/C/50/D/22/2009, **para. 8.11**: “[The Committee] also recalls its general recommendation No. 24, which, as an authoritative interpretation tool in relation to article 12, states that ‘it is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women’ (para. 11)”; *D.R. v. Australia*, **Communication No. 42/2008**, Opinion adopted on 14 August 2009, CERD/C/75/D/42/2008, **para. 6.3**: “Taking into account **General Recommendation No.30 of 2004** and in particular the necessity to interpret article 1, paragraph 2, of the Convention in the light of article 5”; *The Jewish Community of Oslo et al. v. Norway*, **Communication No. 30/2003**, Opinion adopted on 15 August 2005, CERD/C/67/D/30/2003, **para. 10.3**: “However, the Committee considers that it has the responsibility to ensure the coherence of the interpretation of the provisions of article 4 of the Convention as reflected in its general recommendation No.15”; *J.H.A v. Mauritania and Spain*, **Communication No. 323/2007**, Decision adopted on 10 November 2008, CAT/C/41/D/323/2007, **para. 8.2**: “Nevertheless, the Committee recalls its General Comment No. 2, in which it states that the jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law”; similarly in *Sonko v. Spain*, **Communication No. 368/2008**, Views adopted on 25 November 2011, CAT/C/47/D/368/2008, **para. 10.3**; *Sahli v. Algeria*, **Communication No. 341/2008**, Views adopted on 3 June 2011, CAT/C/46/D/341/2008, **para. 9.9**: “The Committee has drawn the attention of the State party to **paragraph 5 of its General Comment No. 2 (2007)** in which it considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability”; *R.K.B. v. Turkey*, **Communication No. 28/2010**, Views adopted on 24 February 2012, CEDAW/C/51/D/28/2010, **para. 8.6**: “The Committee recalls its observations in **general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women** to the effect that ‘according to subparagraph (c), States parties must ensure that courts are bound to apply the principle of equality as embodied in the Convention and to interpret the law, to the maximum extent possible, in line with the obligations of State parties under the Convention’”.

³⁴ *Abramova v. Belarus*, **Communication No. 23/2009**, Views adopted on 25 July 2011, CEDAW/C/49/D/23/2009, **para. 7.6**: “This important safeguard based on non-discrimination against women in line with article 1 of the Convention has been reaffirmed by ... **the Human Rights Committee in paragraph 15 of its General Comment No. 28 (2000) on the equality of rights between men and women**”; *Muñoz-Vargas y Sainz de Vicuña v. Spain*, **Communication No. 7/2005**, Decision adopted on 9 August 2007, CEDAW/C/39/D/7/2005, Individual opinion by Committee member Mary Shanthi Dairiam (dissenting), **para. 13. 9**: “13.9 **The Human Rights Committee in its General Comment No. 28 on equality of rights between men and women has stated**, ‘Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes.’”

2. In some instances, the Committee and the other UN treaty bodies have substantiated their interpretive reasoning in light of factual and legal developments in international opinion and practice, namely in light of the constant evolution of international law, as well as in light of the changing factual circumstances in subsequent state practice.³⁵ By doing so, they have manifested an interpretive approach that allows for a contemporary interpretation of the Covenant's provisions in alignment with present-day conditions. In this context, the HRCtee and the other UN treaty bodies have explicitly referred to their constituent treaties as "living instrument" and upheld that "the rights protected under it should be applied in context and in the light of present-day conditions".³⁶

³⁵ *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, **Communications Nos. 1321/2004 and 1322/2004**, Views adopted on 3 November 2006, CCPR/C/88/D/1321-1322/2004, **para. 8.4**: "The Committee also notes, in relation to relevant State practice, that an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service, and considers that the State party has failed to show what special disadvantage would be involved for it if the rights of the authors' under article 18 would be fully respected. As to the issue of social cohesion and equitability, the Committee considers that respect on the part of the State for conscientious beliefs and manifestations thereof is itself an important factor in ensuring cohesive and stable pluralism in society. It likewise observes that it is in principle possible, **and in practice common, to conceive alternatives to compulsory military service** that do not erode the basis of the principle of universal conscription but render equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service. The Committee, therefore, considers that the State party has not demonstrated that in the present case the restriction in question is necessary, within the meaning of article 18, paragraph 3, of the Covenant."

³⁶ *Roger Judge v. Canada*, **Communication No. 829/1998**, Views adopted on 5 August 2002, CCPR/C/78/D/829/1998, **paras. 10.3-10.7**: "**10.3** While recognizing that the Committee should ensure both consistency and coherence of its jurisprudence, it notes that there may be exceptional situations in which a review of the scope of application of the rights protected in the Covenant is required, such as where an alleged violation involves that most fundamental of rights – the right to life - and in particular if there have been **notable factual and legal developments and changes in international opinion in respect of the issue raised**. The Committee is mindful of the fact that the abovementioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favour of abolition of the death penalty, and in states which have retained the death penalty, a broadening consensus not to carry it out. Significantly, the Committee notes that since *Kindler* the State party itself has recognized the need to amend its own domestic law to secure the protection of those extradited from Canada under sentence of death in the receiving state, in the case of *United States v. Burns*. There, the Supreme Court of Canada held that the government must seek assurances, in all but exceptional cases, that the death penalty will not be applied prior to extraditing an individual to a state where he/she faces capital punishment. It is pertinent to note that under the terms of this judgment, "Other abolitionist countries do not, in general, extradite without assurances." The Committee considers that **the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions**. **10.7** As to the State party's claim that its conduct must be assessed in the light of the law applicable at the time when the alleged treaty violation took place, the Committee considers that **the protection of human rights evolves and that the meaning of Covenant rights should in principle be interpreted by reference to the time of examination and not, as the State party has submitted, by reference to the time the alleged violation took place**. The Committee also notes that prior to the author's deportation to the United States **the Committee's position was evolving** in respect of a State party that had abolished capital punishment (and was a State party to the Second Optional Protocol to the International Covenant on Human Rights, aiming at the abolition of the death penalty), from whether capital punishment would subsequent to removal to another State be applied in violation of the Covenant to whether there was a real risk of capital punishment as such (Communication No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997 and Communication No. 706/1996, *G.T. v. Australia*, Views adopted on 4 November 1997). Furthermore, the State party's concern regarding possible retroactivity involved in the present approach has no bearing on the separate issues to be addressed under question 2 below." Cf. *Joseph Kindler v. Canada*, **Communication No.**

This interpretive approach, important in international human rights law and prominent in the jurisprudence of the ECHR, is employed by the HRCttee in a more restricted manner, mostly in combination with the teleological method. In any case, however, the particular consideration of the ongoing evolution of international law and the changing circumstances of international and national state practice, although elaborated predominantly in the context of human rights law, correlates to a great extent with the relating interpretation rules of VCLT Article 31 (3)(b) and (c).

3. In some other instances, the Committee's interpretive reasoning is primarily guided by a careful consideration and balancing of the wider implications that the precedence of one interpretive conclusion over the other could generate. In this context, the Committee has in some occasions followed a more subjective line of interpretation motivated by its concern to convey the 'proper' message to States parties:

*“The second implication of making the time factor per se the determining one, i.e. the factor that turns detention on death row into a violation of the Covenant, is that it conveys a message to States parties retaining the death penalty that they should carry out a capital sentence as expeditiously as possible after it was imposed. **This is not a message the Committee would wish to convey to States parties.** Life on death row, harsh as it may be, is preferable to death. Furthermore, experience shows that delays in carrying out the death penalty can be the necessary consequence of several factors, many of which may be attributable to the State party. Sometimes a moratorium is placed on executions while the whole question of the death penalty is under review. At other times the executive branch of government delays executions even though it is not feasible politically to abolish the death penalty. **The Committee would wish to avoid adopting a line of jurisprudence, which weakens the influence of factors that may very well lessen the number of prisoners actually executed.** It should be stressed that by adopting the approach that prolonged detention on death row cannot, per se, be regarded as cruel and inhuman treatment or punishment under the Covenant, **the Committee does not wish to convey the impression that keeping condemned prisoners on death row for many years is an acceptable way of treating them. It is not.** However, the cruelty of the death row phenomenon is first and foremost a function of the permissibility of capital punishment under the Covenant. This situation has unfortunate consequences”.*³⁷

470/1991, Views adopted on 30 July 1993, CCPR/C/78/D/829/1998, **para. 14.2**: “**14.2** Moreover, the Committee notes the evolution of international law and the trend towards abolition, as illustrated by the adoption by the United Nations General Assembly of the Second Optional Protocol to the International Covenant on Civil and Political Rights. Furthermore, even where capital punishment is retained by States in their legislation, **many of them do not exercise it in practice.**”

For the other Committees see: *Stephen Hagan v. Australia*, **Communication No. 26/2002**, Views adopted on 20 March 2003, CERD/C/62/D/26/2002, **para. 7.3**; *Elizabeth de Blok et al. v. the Netherlands*, **Communication No. 36/2012**, Views adopted on 17 February 2014, CEDAW/C/57/D/36/2012, **para. 5.5**

³⁷ *Errol Johnson v. Jamaica*, **Communication No. 588/1994**, Views adopted on 22 March 1996, CCPR/C/56/D/588/1994, **para. 8.4.**

This interpretive analysis reveals in essence the underlying adherence to a predominantly teleological approach. However, it has been met with criticism primarily due to its subjectivity and recourse to hypothetic reasoning.³⁸

In a similar interpretive context and following what can be perceived as an *a contrario* reasoning, the Committee has relied on the potential greater impact of its findings on a broader category of affected individuals to conclude that:

*“Were the Committee to rely on this argument to prevent Canada from now deporting him, it would establish a principle that might adversely affect immigrants all over the world whose first brush with the law would trigger their deportation lest their continued residence in the country convert them into individuals entitled to the protection of article 12, paragraph 4”.*³⁹

4. In some occasions, the Committee has upheld the view of an autonomous and independent from the national level interpretation and application of the Covenant by holding that its interpretation of the Covenant’s provisions and terms is not dependent on notions and definitions deriving from national legislation:

*“The Committee further notes that its interpretation and application of the International Covenant on Civil and Political Rights has to be based on the principle that the terms and concepts of the Covenant are independent of any particular national system of law and of all dictionary definitions. Although the terms of the Covenant are derived from long traditions within many nations, the Committee must now regard them as having an autonomous meaning”.*⁴⁰

5. In the course of its interpretive work and under various circumstances, such as on the occasion of the examination of cases of violation of the Covenant Articles 19 or 27, the Committee refers certain issues to the interpretive discretion of states. The Committee’s acknowledgment of a certain discretion to States in relation to the determination of the content and scope of the Covenant rights shares to some extent a similar reasoning with the “margin of appreciation” concept. However, the Committee has not been observing with consistency its admissions relating to States’ interpretive discretion, expressing explicitly at some point its reservations to make an assessment on the basis of such concept.⁴¹ However, even when the Committee refers to such a discretion of

³⁸ Ibid., individual Opinions of Christine Chanet and Francisco José Aguilar Urbina.

³⁹ *Charles Stewart v. Canada*, **Communication No. 538/1993**, Views adopted on 1 November 1996, CCPR/C/58/D/538/1993, **para. 12.7**.

⁴⁰ *Gordon C. Van Duzen v. Canada*, **Communication No. 50/1979**, Views adopted on 7 April 1982, CCPR/C/15/D/50/1979, **para. 10.2**.

⁴¹ *Ilmari Länsman et al. v. Finland*, **Communication No. 511/1992**, Views adopted on 26 October 1994, CCPR/C/52/D/511/1992, **para. 9.4**: “A State may understandably wish to encourage development or allow economic activity by enterprises. **The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation**, but by reference to the obligations it has undertaken in article 27.”

the State,⁴² it refrains from further elaborating on the extent of discretion permitted to States in the interpretation of the Covenant's provisions.

6. On several occasions, the Committee's interpretive reasoning has endorsed the *effet utile* principle, namely, the effective protection and exercise of an individual's rights under the Covenant.⁴³ This approach has also been systematically employed in the Committee's reasoning in support of the obligatory nature of States' compliance to interim measures.⁴⁴

This reasoning appears to have influenced the HRCttee's decision, in *Kennedy v. Trinidad and Tobago*, where it declared incompatible with the Covenant a reservation by Trinidad and Tobago

⁴² *Leo R. Hertzberg et al. v. Finland*, **Communication No. 61/1979**, Views adopted on 2 April 1982, CCPR/C/15/D/61/1979, **para. 10.3**: "(...) It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, **a certain margin of discretion must be accorded to the responsible national authorities**", *Mohammed Alzery v. Sweden*, **Communication No. 1416/2005**, Views adopted on 25 October 2006, CCPR/C/88/D/1416/2005, **para. 11.10**: "Concerning the claim under article 13, the Committee accepts that the decision to expel the author was reached in accordance with the State party's law as it then stood and was thus "in pursuance of a decision reached in accordance with law", within the meaning of article 13 of the Covenant. The Committee notes that in the assessment of whether a case presents national security considerations bringing the exception contained in article 13 into **play allows the State party very wide discretion**. In the present case, the Committee is satisfied that the State party had at least plausible grounds for considering, at the time, the case in question to present national security concerns. In consequence, the Committee does not find a violation of article 13 of the Covenant for the author's failure to be allowed to submit reasons against his expulsion and have the case reviewed by a competent authority."

⁴³ *Peter Chiiko Bwalya v. Zambia*, **Communication No. 314/1988**, Views adopted on 14 July 1993, CCPR/C/48/D/314/1988, **para. 6.4**: "(...) The Committee has already had the opportunity to explain that this right may be invoked not only in the context of arrest and detention, and that **an interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render ineffective the guarantees of the Covenant**"; *Barbarín Mojica v. Dominican Republic*, **Communication No. 449/1991**, Views adopted on 15 July 1994, CCPR/C/51/D/449/1991, **para. 5.4**: "(...) In its prior jurisprudence, the Committee has held that this right may be invoked not only in the context of arrest and detention, and that **an interpretation which would allow States parties to tolerate, condone or ignore threats made by persons in authority to the personal liberty and security of non-detained individuals within the State party's jurisdiction would render ineffective the guarantees of the Covenant**."

⁴⁴ See e.g. *Oleg Grishkovtsov v. Belarus*, **Communication No. 2013/2010**, Views adopted on 1 April 2015, CCPR/C/113/D/2013/2010, **paras. 6.4-6.5**: "6.4 The Committee reiterates that, apart from any violation of the Covenant found against a State party in a communication, **a State party commits serious breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views concerning the implementation of the obligations of the State party under the Covenant nugatory and futile**. In the present case, counsel alleges that his rights under various provisions of the Covenant have been violated in a manner that directly reflects on the legality of his death sentence. Having been notified of the communication and the request by the Committee for interim measures of protection, the State party committed a serious breach of its obligations under the Optional Protocol by executing the alleged victim before the Committee had concluded its consideration of the communication. 6.5 The Committee further recalls that interim measures under rule 92 of its rules of procedure, adopted in accordance with article 39 of the Covenant, are essential to its role under the Optional Protocol, in order to avoid irreparable damage to the victim of the alleged violation. **Flouting of that rule**, especially by irreversible measures, such as in the present case of the execution of Oleg Grishkovtsov, **undermines the protection of Covenant rights through the Optional Protocol**."

to the Optional Protocol to the ICCPR that would have precluded the Committee from considering individual communications involving death-row prisoners.⁴⁵

The *ut res magis valeat quam pereat* principle features in the jurisprudence of the other UN treaty bodies as well.⁴⁶ Although in one case, in particular, *Muñoz-Vargas y Sainz de Vicuña v. Spain*, in an individual opinion the content and limits of the principle seem to have been stated in the most expansive way.⁴⁷ As Sir Gerald Fitzmaurice warned almost 4 ½ decades ago the principle *ut res magis valeat quam pereat*, “is all too frequently misunderstood as denoting that agreements should always be given their maximum *possible* effect, whereas its real object is merely . . . to prevent them failing altogether”.⁴⁸

6. A *pro homine* approach to interpretation, along the lines of the Inter-American Court of Human Rights,⁴⁹ has also been advocated for in a number of individual opinions by HRCtee member Fabián Omar Salvioli.

General comment No. 32 is an important legal document with respect to the human right to due process, but its treatment of the issue under discussion here is highly regrettable. Almost four years have passed since it was adopted, and the Committee should take steps to correct the notion that military courts may try civilians; its current position is completely out of step with modern standards of international human rights protection and with the most enlightened doctrine on the subject.

⁴⁵ *Kennedy v. Trinidad and Tobago*, **Communication No. 845/1999**, Views adopted 2 November 1999, CCPR/C/74/D/845/1998, **paras. 6.6-6.7**. It should be noted that the Committee’s decision in this case met with strong criticism by four dissenting members, who based their arguments on the context, object and purpose of the ICCPR, see Dissenting opinion of Committee members Nisuke Ando, Prafulachandra N Bhagwati, Eckhart Klein and David Kretzmer, appended to the Communication.

⁴⁶ *The Jewish Community of Oslo et al. v. Norway*, **Communication No. 30/2003**, Opinion adopted on 15 August 2005, CERD/C/67/D/30/2003, **para. 7.4**: “As has been noted, article 14 of the Convention refers specifically to the Committee’s competence to receive complaints from ‘groups of individuals’. The Committee considered that to interpret this provision in the way suggested by the State party, namely to require that each individual within the group be an individual victim of an alleged violation, **would be to render meaningless the reference to ‘groups of individuals’**”; *R.S. et al. v. Switzerland*, **Communication No. 482/2011**, Views adopted on 21 November 2014, CAT/C/53/D/482/2011, **para. 7**.

⁴⁷ *Muñoz-Vargas y Sainz de Vicuña v. Spain*, **Communication No. 7/2005**, Decision adopted on 9 August 2007, CEDAW/C/39/D/7/2005, Individual opinion by Committee member Mary Shanthi Dairiam (dissenting), **para. 13.9**: “**Because of its mandate, the Committee on the Elimination of Discrimination against Women, more than any other treaty body, must be broad in its interpretation and recognition of the violations of women’s right to equality**”.

⁴⁸ GG Fitzmaurice, ‘Vae victis or woe to the negotiators: Your treaty or our ‘interpretation’ of it?’ (1971) 65 AJIL 373.; however, for an analysis of of the *effet utile* and *ut res magis valeat quam pereat* and the various approaches to its limits and content in international jurisprudence see: C Braumann and A Reinisch, “*Effet Utile*” in J Klingler, Y Parkhomenko and C Salonidis (eds), *Between the Lines of the Vienna Convention?: Canons of Construction and Other Interpretive Principles in Public International Law* (Wolters Kluwer 2018), pp. 47–72.

⁴⁹ For an analysis of the *pro homine* principle in the Inter-American system see report submitted by Laurence Burgorgue-Larsen attached in Annex 2 of the Final Report of the ILA Study Group on the Content and Evolution of the Rules of Interpretation and available online at: <https://www.ila-hq.org/index.php/study-groups>.

The Committee does not need to draft a new General Comment in order to move forward pro homine on this particular point, but merely to take account of developments in the system of human rights protection. Individual communications under the Optional Protocol involving cases before the Committee in which, as in the Akwanga case, a civilian is tried by a military court and concluding observations on State party reports under article 40 of the Covenant also provide appropriate opportunities to perform this indispensable legal task and thereby contribute to the better fulfilment of the object and purpose of the Covenant.

As soon as this position is adopted, States parties, as members of the international community, will in good faith adjust their domestic legislation, and military courts with the power to try civilians will become part of a sad past that has happily been left behind.⁵⁰

Although the exact place of this principle within the VCLT interpretative scheme is not explicitly stated, it is indicated that it is strongly connected both to evolutive interpretation by taking into account the ‘developments in the system of human rights protection’ and to the ‘better fulfilment of the object and purpose of the Covenant’.⁵¹

5. How do courts and tribunals define key concepts in the interpretative process (e.g. ordinary meaning, context, object and purpose [multiplicity, selection between a variety of objects and purposes]), supplementary means etc.?

See above Sections I.2, I.3 and I.4.

In some instances, the HRCttee has provided clarification on how the concept of *good faith* is perceived:

“10.8 Counsel finally submits that Mr. Ashby was arbitrarily deprived of his life when the State party executed him in full knowledge of the fact that Mr. Ashby was still seeking remedies before the Courts of Appeal of the State party, the Judicial Committee of the Privy Council and the Human Rights Committee. The Committee finds that, in these circumstances (detailed above at 6.3 to 6.6), the State party committed a breach of its obligations under the Covenant. Moreover, having regard to the fact that the representative of the Attorney-General informed the Privy Council that Mr. Ashby would not be executed until all possibilities of obtaining a stay of execution had been exhausted, the carrying out of Mr. Ashby’s sentence notwithstanding that assurance constituted a breach of the principle of good faith which governs all States in their discharge of obligations under international treaties, including the Covenant. The carrying out of the

⁵⁰ *Ebenezer Derek Mbongo Akwanga v Cameroon, Communication No. 1813/2008*, Views adopted on 22 March 2011, CCPR/C/101/D/1813/2008, Individual opinion of Committee member Mr Fabián Omar Salvioli, **para. 10**; *El Abani (El Ouerfeli) v Libya, Communication No. 1640/2007*, Views adopted on 26 July 2010, CCPR/C/99/D/1640/2007, Individual opinion of Committee member Mr Fabián Omar Salvioli, **para. 10**.

⁵¹ *Ibid.*

execution of Mr. Ashby when the execution of the sentence was still under challenge constituted a violation of article 6, paragraphs 1 and 2, of the Covenant.

*10.9 With regard to Mr. Ashby's execution, the Committee recalls its jurisprudence that apart from any violation of the rights under the Covenant, **the State party commits a serious breach of its obligations under the Optional Protocol if it engages in any acts which have the effect of preventing or frustrating consideration by the Committee of a communication alleging any violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. The behaviour of the State party represents a shocking failure to demonstrate even the most elementary good faith required of a State party to the Covenant and of the Optional Protocol***".⁵²

The Committee has also specified what constitutes "supplementary means of interpretation" for the purposes of interpreting its Constituent Covenant:

*"The Committee has also examined the contention of the State party that article 26 of the International Covenant on Civil and Political Rights cannot be invoked in respect of a right which is specifically provided for under article 9 of the International Covenant on Economic, Social and Cultural Rights (social security, including social insurance). In so doing, the Committee has perused the relevant **travaux préparatoires of the International Covenant on Civil and Political Rights, namely, the summary records of the discussions that took place in the Commission on Human Rights in 1948, 1949, 1950 and 1952 and in the Third Committee of the General Assembly in 1961, which provide a 'supplementary means of interpretation' (art. 32 of the Vienna Convention on the Law of Treaties)**. The discussions, at the time of drafting, concerning the question whether the scope of article 26 extended to rights not otherwise guaranteed by the Covenant, were inconclusive and cannot alter the conclusion arrived at by the ordinary means of interpretation referred to in paragraph 12.3 below".⁵³*

6. Is there a difference between the interpretative approach to treaties and that to unilateral acts of States and/or acts of international organizations?

As shown above, in the analysis provided in Section I.1, although in the jurisprudence of UN treaty bodies an explicit reference to the VCLT rules is rarely seen, and the UN treaty bodies often announce the interpretative result without much in the direction of an exegesis, nonetheless the whole structure of the interpretive reasoning of the Committees seem to be heavily influenced by the main approaches to interpretation as enshrined in the VCLT. The UN treaty bodies follow this approach not only in relation to the interpretation of their respective treaties but also of the

⁵² *Glen Ashby v. Trinidad and Tobago*, **Communication No. 580/1994**, Views adopted on 21 March 2002, CCPR/C/74/D/580/1994, **paras. 10.8-10.9**.

⁵³ *S. W. M. Brocks v. The Netherlands*, **Communication No. 172/1984**, Views adopted on 9 April 1987, CCPR/C/29/D/172/1984, **para. 12.2**.

reservations to them, where an implicit *mutatis mutandis* application of the VCLT rules seems to be the guiding principle, as can be seen in *Duilio Fanali v. Italy* where the HRCttee takes a textual approach to interpretation of reservations.

*Having examined the information before it, the Committee concluded that it could not at that stage reject the communication as inadmissible on the basis of the Italian reservation to article 14 (5) of the Covenant, **since the text of the reservation only referred to the President of the Republic and the Ministers** and that, therefore, the communication was not, within the meaning of article 3 of the Optional Protocol, incompatible with the provisions of the Covenant read in conjunction with this reservation.⁵⁴*

However, the textual method is by no means hierarchically superior to other approaches to interpretation. This is clearly evinced in *Franz Wallmann et al. v. Austria*, where the HRCttee opted for a more teleological oriented interpretation rather than adhering to strict textualism.

*The Committee considers that **a reformulation of the State party's reservation, upon re-ratification of the Optional Protocol, as suggested by the authors, only to spell out what is in fact a logical consequence of the reform of the European Convention mechanisms, would be a purely formalistic exercise. For reasons of continuity and in the light of its object and purpose, the Committee therefore interprets the State party's reservation as applying also to complaints which have been examined by the European Court.***⁵⁵

7. How do courts and tribunals respond to multiple authentic and conflicting texts of a treaty (or any other instrument)? How has Art. 33 VCLT been employed in practice? Does the procedure followed by courts and tribunals differ from that of Art. 33 VCLT?

The HRCttee and the other UN treaty bodies have on occasion referred both explicitly and in substance to the content of Article 33 VCLT.⁵⁶ This is best exemplified in *Rafael Rodríguez Castañeda v. Mexico* where the HRCttee examined the difference (if any) between the English and Spanish version of Article 5(2)(a) of the Optional Protocol.

The Committee considers that the Spanish version of article 5, paragraph 2 (a), of the Optional Protocol, which states that the Committee shall not consider any communication from an individual unless it has ascertained that the same matter “has not been examined already” (“no ha sido sometido ya” in the Spanish) under another procedure of

⁵⁴ *Duilio Fanali v. Italy*, **Communication No. 75/1980**, Views adopted on 31 March 1983, CCPR/C/18/D/75/1980, **para. 7.1**.

⁵⁵ *Franz Wallmann et al. v. Austria*, **Communication No. 1002/2001**, Views adopted on 29 April 2004, CCPR/C/80/D/1002/2001, **para. 8.3**.

⁵⁶ *Yelitze Lisbeth Moreno de Castillo v. Venezuela*, **Communication No. 2610/2015**, Views adopted on 10 November 2017, CCPR/C/121/D/2610/2015, **para. 8.3**; *Rafael Rodríguez Castañeda v. Mexico*, **Communication No. 2202/2012**, Views adopted on 18 July 2013, CCPR/C/108/D/2202/2012, **para. 6.3**; *Adam Harun v. Switzerland*, **Communication No. 758/2016**, Views adopted on 6 December 2018, CAT/C/65/D/758/2016, Individual dissenting opinion of Abdelwahab Hani, **para. 5**.

international investigation or settlement, can result in the Spanish version of this paragraph being interpreted differently from the other language versions.

*The Committee considers that this difference must be resolved in accordance with article 33, paragraph 4, of the 1969 Vienna Convention on the Law of Treaties by adopting the meaning which best reconciles the authentic texts, having regard to the object and purpose of the treaty. The Committee recalls its jurisprudence, which states that the phrase *ha sido sometido* in the Spanish version must be interpreted in the light of the other versions, i.e. understood as meaning “is being examined” under another procedure of international investigation or settlement.*

The Committee considers that this interpretation reconciles the meaning of article 5, paragraph 2 (a), of the authentic texts referred to in article 14, paragraph 1, of the Optional Protocol. The Committee therefore finds that there is no obstacle to the admissibility of the communication under article 5, paragraph 2 (a), of the Optional Protocol.⁵⁷

II. Process-related Issues/Questions

1. The variety of materials used during the interpretative process and their probative value (e.g. dictionaries, commentaries, books, statements etc.)

As it has already been pointed out, the HRCtee and the other UN treaty bodies refer extensively to their own material, namely to their jurisprudence, General Comments and Recommendations and to their Concluding Observations, in order to interpret the relevant Covenant/Convention provisions or to confirm/review their prior interpretations.

There are also sporadic references to other materials used in the Committees’ interpretive reasoning, which include: international texts and instruments, including human rights treaties, the jurisprudence of other international or regional bodies, in particular that of the ECtHR and the IACtHR, and academic or scholarly works⁵⁸.

⁵⁷ *Rafael Rodríguez Castañeda v. Mexico*, **Communication No. 2202/2012**, Views adopted on 18 July 2013, CCPR/C/108/D/2202/2012, **para. 6.3**. Similarly, in: *Yelitze Lisbeth Moreno de Castillo v. Venezuela*, **Communication No. 2610/2015**, Views adopted on 10 November 2017, CCPR/C/121/D/2610/2015, **para. 8.3**. For an *in passim* reference for an interpretation based on the ordinary meaning which is the same across all six authentic languages of the text see: *Adam Harun v. Switzerland*, **Communication No. 758/2016**, Views adopted on 6 December 2018, CAT/C/65/D/758/2016, Individual dissenting opinion of Abdelwahab Hani, **para. 5**.

⁵⁸ See Section I of this Report. Reference to ‘outside’ sources is not a very common practice. While Committee members are familiar with the practice and jurisprudence of other international and regional human rights bodies, it is usually the applicants who refer to ‘external’ case law. The same is true concerning academic sources: references are very rare in views, but sometimes appear in General Comments.

With respect to the other UN treaty bodies see: *Sahli v. Algeria*, **Communication No. 341/2008**, Views adopted on 3 June 2011, CAT/C/46/D/341/2008, **para. 9.9**: “The Committee wishes to recall its concluding observations to

2. Do international courts and tribunals have a tendency to explain the process and stages of their interpretative reasoning? If yes, what is the form that this usually takes?

As it has already been pointed out, the interpretive reasoning in the HRCttee's and the other UN treaty bodies' jurisprudence is usually limited in extent, with few explicit references to interpretative norms.

Overall, the consideration of a case brought before them is mostly limited to a case-by-case assessment of the facts and determination of whether they amount to a violation, without engaging further in the substantiation of its interpretive reasoning, or elaborating its process and stages.

In cases, as those cited above under point I.1, where the Committees explain their interpretive reasoning, they do so mostly by a brief and concise reference to the interpretive process they follow, which is in general structured on the basis of the VCLT pattern.

It has also been noted that the Committee uses a more elaborate interpretive reasoning in cases that mark a significant deviation from its established jurisprudence (See e.g. *Judge v. Canada*). However, even in those cases, the Committee chooses to focus its interpretive analysis on the substantiation of the grounds that justified under certain conditions the overruling of its settled

Algeria at its fortieth session, in which it considered that the State party should amend article 45, chapter 2, of Order No. 06-01 to specify that waivers of prosecution do not apply under any circumstances to crimes such as torture"; *Dzemajl et al. v. Yugoslavia*, **Communication No. 161/2000**, Views adopted on 21 November 2002, CAT/C/29/D/161/2000, **para. 9.2**: "In this respect, the Committee has reiterated on many instances its concerns about "inaction by police and law-enforcement officials who fail to provide adequate protection against racially motivated attacks when such groups have been threatened" (**concluding observations on the initial report of Slovakia, CAT A/56/44 (2001), paragraph 104; see also concluding observations on the second periodic report of the Czech Republic, CAT A/56/44 (2001), paragraph 113 and concluding observations on the second periodic report of Georgia, CAT A/56/44 (2001), paragraph 81**)"; *Abramova v. Belarus*, **Communication No. 23/2009**, Views adopted on 25 July 2011, CEDAW/C/49/D/23/2009, **paras. 7.3 & 7.5-7.6**: "In this regard, **the Committee recalls its recent concluding observations on the State party's report (CEDAW/C/BLR/CO/7)**, in which it expresses grave concern about inhuman and degrading treatment of women activists during detention, and urges the State party to ensure that the complaints submitted by those women are promptly and effectively investigated (paras. 25 and 26) ... Thus, in line with article 4 of the Convention, principle 5 (2) of the **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173 of 9 December 1988)** states that special measures designed to address the specific needs of women prisoners shall not be deemed to be discriminatory. The need for a gender-sensitive approach to problems faced by women prisoners has also been endorsed by **the General Assembly by its adoption, in its resolution 65/229, of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)** ... This important safeguard based on non-discrimination against women in line with article 1 of the Convention has been reaffirmed by **the report of the Special Rapporteur on violence against women, its causes and consequences (see E/CN.4/2000/68/Add.3, para. 44)**"; *Osmani v. Serbia*, **Communication No. 261/2005**, Views adopted on 8 May 2009, CAT/C/42/D/261/2005, **para. 10.5**; *M.E.N. v. Denmark*, **Communication No. 35/2011**, Decision adopted on 26 July 2013, CEDAW/C/55/D/35/2011, **para. 8.7**; *M.N.N. v. Denmark*, **Communication No. 33/2011**, Decision adopted on 15 July 2013, CEDAW/C/55/D/33/2011, **para. 8.8**; *T.M. v. Sweden*, **Communication No. 228/2003**, Views adopted on 18 November 2003, CAT/C/31/D/228/2003, Individual opinion by Committee member, Mr. Fernando Mariño Menéndez.

case law, but has refrained from providing a detailed and precise insight to the process and stages of its interpretative reasoning.

More extensive interpretive analyses, which also often include a more detailed explanation of the process and stages of the applied interpretive reasoning, are found in the individual opinions of Committee members, particularly in ‘important’ or contested cases.

3. What internal or external factors (e.g. contract incompleteness, statute of the court, the background of judges, the subject area, political constellations or situations, concerns about the court’s legitimacy, or about implementation of the judgment) affect the interpretative choices of international courts and tribunals, or changes in such choices, and in what manner? (In this context the framework suggested by Pauwelyn and Elsig could be useful).⁵⁹

The Committee’s work is susceptible to the influences of various internal and external factors.

At first, it must be pointed out that the composition of the Committee and the different legal, social and cultural background of its members is *per se* a factor, which influences its interpretative reasoning.

As it has already been shown, the Committee has also been on occasions mindful on reaching conclusions in line with the contemporary context and emerging factual and legal developments, while in other instances it has opted for a less overreaching, when circumstances demanded, or more balanced approach, with the aim of strengthening compliance to its jurisprudence.

Although as already noted UN human rights treaty bodies have a preference, for obvious reasons of consistency and promotion of their role, to refer to their own jurisprudence, nonetheless they have on occasion referred to the jurisprudence of other courts and tribunals, most notably the IACtHR, the ECtHR and the ICJ. This judicial dialogue and cross-fertilization have been underlined by former HRCtee member, Olivier de Frouville, who in his opinions has suggested that the HRCtee as a matter of

jurisdictional policy... should be mindful of ensuring consistency between its interpretations and those of other courts, including regional courts, and should diverge from them only after thorough reflection and for nullifying reasons, which should, ideally, be set forth in the reasoning. The Committee did not make enough of an effort to demonstrate that there were, in this case, such reasons justifying the adoption of a position contrary to that of the European Court in Leyla Şahin. ... The Committee ought to pay close attention to the overall context, in which human rights are, in essence, caught in the crossfire. It should not only defend victims of violations but also ensure that “nothing in the present Covenant may be interpreted as implying [...] any right to engage in any

⁵⁹ J Pauwelyn and M Elsig, ‘The Politics of Treaty Interpretation’ in JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013), pp. 445-473.

activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein” (art. 5 (1)).⁶⁰

Taking into consideration the nature of the Committee as a semi-judicial body of independent experts, the legitimacy of some of its interpretative findings has been met on occasions with great controversy by States parties to the ICCPR. Such concerns mainly center on the HRCttee’s interpretative ‘powers’. States have often expressed scepticism towards the interpretative development of substantive human rights by treaty bodies and have voiced concerns that through interpretation, treaty bodies (namely the HRCttee), encroach on their sovereignty and exceed the confines of States’ original consent to the treaty.⁶¹ The recent dialogue between the Committee and Canada, on the occasion of the presentation of the State’s report is an example.⁶² Canada challenged the validity of the Committee’s interpretation that the ICCPR applies extra-territorially and questioned the Chairperson’s final comment upon the conclusion of the dialogue that “[t]he final arbiter for interpreting the Covenant is the HRCttee, not individual States”.⁶³

Another interesting issue (for the purposes of the work of this Study Group) is whether pronouncements of treaty bodies give rise to subsequent agreement or subsequent practice by parties. The discussion has been generated in view of the International Law Commission’s recent Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (within the meaning of Article 31, 3 (a) and (b)).⁶⁴ For some HRCttee members, the current approach of the ILC’s Draft Conclusions is somewhat restricted as regards the potential -wider- contribution of the pronouncements of the HRCttee.

As a final remark and as mentioned in the *Introduction* of this Report, the HRCttee and the other UN human rights treaty bodies are treaty-monitoring bodies, which perform three main functions: i) they conduct periodic state reporting procedures; ii) they develop/adopt General Comments and iii) they hear ‘communications’, i.e. complaints by individuals under the human rights treaties. It

⁶⁰ *Seyma Türkan v. Turkey*, **Communication No. 2274/2013**, Views adopted on 17 July 2018, CCPR/C/123/D/2274/2013, Individual opinion (concurring) of Olivier de Frouville, **para. 11** (emphasis added); see also *Gabriel Osío Zamora v. Venezuela*, **Communication No. 2203/2012**, Views adopted on 7 November 2017, CCPR/C/121/D/2203/2012, Individual opinion of Olivier de Frouville (partially dissenting), **paras. 10**.

⁶¹ See Schlütter, *supra* note 3, p. 266.

⁶² 114th Session of the HRCttee, July 2015.

⁶³ For a critique of the HRCttee on this occasion, see J Harrington, ‘The HRCttee, Treaty Interpretation and the Last Word’, and the response by G Citroni, ‘The HRCttee and its Role in Interpreting the ICCPR vis-à-vis States Parties’, available at: www.ejiltalk.org.

⁶⁴ ILC, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries’ (2018) reproduced in [2018] YILC Vo. II Part Two, and available online at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_11_2018.pdf. Of particular import is Draft Conclusion 13 (‘Pronouncements of expert treaty bodies’), and the related commentary. Draft Conclusion 13 paras. 3 and 4 state: “3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body. 4. This draft conclusion is without prejudice to the contribution that pronouncements of expert treaty bodies make to the interpretation of the treaties under their mandates”.

is this multifariousness of the roles that the UN human rights treaty bodies are called to play, the synthesis of the various Committees, the ‘pragmatic’ structure and word-limit of the Views, and the ‘authors’ of the submission of the Communications or their ‘audience’ that are some of the factors that influence the interpretative approaches and solutions adopted by these bodies.

Indicative of the fine balance required of the UN human rights treaty bodies with respect to the ‘authors/audience’ influence is the following quote from the 2019 *SC and GP v. Italy*:

*The Committee understands that communications may be filed by authors who are not in all cases represented by lawyers or jurists trained in international human rights law. Therefore, the admissibility requirements have to be interpreted in a flexible manner, without resulting in the imposition of unnecessary technical requirements, to avoid creating obstacles to the presenting of communications to the Committee.*⁶⁵

III. Systemic Issues/Questions

1. What are the defining characteristics that differentiate interpretation from gap-filling and normative conflict? How do courts and tribunals address these processes?

Due to the special nature of human rights norms and the precedence given in principle by the Committees to a broader interpretation of the Covenant’s/Convention’s terms against a narrower reading, the Committees’ jurisprudence does not provide sufficient indications so as to identify a comprehensive set of characteristics that differentiate interpretation from gap-filling and normative conflict.

A pertinent illustration of the blurred lines between interpretation and gap-filling processes could, perhaps, be deduced from the following HRCttee’s dictum:

*“The first question before the Committee is whether the author is the victim of a violation of article 14 (1) of the Covenant for the reason that, as he alleges, his case did not receive a fair hearing within the meaning of that paragraph. The Committee notes in this connection that the paragraph in question applies not only to criminal matters but also to litigation concerning rights and obligations of a civil nature. Although article 14 does not explain what is meant by a “fair hearing” in a suit at law (unlike paragraph 3 of the same article dealing with the determination of criminal charges), the concept of a fair hearing in the context of article 14 (1) of the Covenant should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings, preclusion of ex officio reformatio in pejus, and expeditious procedure. The facts of the case should accordingly be tested against those criteria”.*⁶⁶

⁶⁵ *SC and GP v. Italy*, **Communication No. 22/2017**, Views adopted on 7 March 2019, E/C.12/65/D/22/2017, **para. 6.15** (emphasis added).

⁶⁶ *Yves Morael v. France*, **Communication 207/1986**, Views adopted on 28 July 1989, CCPR/C/36/D/207/1986, **para. 9.3**.

2. When have international courts and tribunals interpreted (not identified) the rules of interpretation? How do they distinguish between interpretation and identification?

From the jurisprudence examined for the preparation of this report, it appears that the HRCttee and the other UN human rights treaty bodies confine themselves - albeit implicitly in most cases - to the application of the interpretative rules, borrowing in most cases (although not always) the language adopted in the VCLT. Nonetheless, as has been shown throughout the analysis in the previous Sections when engaging in the interpretative exercise, by necessity albeit implicitly, the UN human rights treaty bodies conduct to a degree an interpretation of the rules of interpretation, in the form of either explication of their content or discussion on the hierarchy, if any between the various interpretative elements.⁶⁷ In addition to this, the limits of interpretation have also been an issue of concern. Characteristic of this is an individual concurring opinion of Messrs. Kurt Herndl and Waleed Sadi appended to the Committee's Views on Communication No. 539/1993:

“Here reference should be made to the jurisprudence of the International Court of Justice according to which interpretation is not a matter of revising treaties or of reading into them what they do not expressly or by necessary implication contain”.

⁶⁷ Although as has been the case throughout this report, a lot of the times this happens in the opinions of the members of the various Committees.