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The relationship of the UN treaty bodies and regional systems

Lorna McGregor

1 Introduction

Other chapters in this Handbook examine the regional human rights systems individually as well as the roles of the UN treaty bodies in the promotion and protection of human rights.[1] The purpose of this chapter is not to duplicate those efforts, but to address the interaction between these institutions and whether it strengthens or weakens the unity of international human rights law.

For reasons of space, this chapter concentrates on the relationship between the regional human rights and UN treaty bodies when acting in a judicial or quasi-judicial capacity. As the Arab and ASEAN human rights systems have yet to establish judicial bodies of this nature, the chapter is limited to the courts and commissions within the African, American and European systems. While regional courts such as the East African Court of Justice, Court of Justice of the Economic Community of West African states (ECOWAS), European Court of Justice and Southern African Development Community (SADC) Tribunal consider human rights issues in specific cases, their mandate is also much wider. Accordingly – and again for reasons of space – this chapter focuses on the relationship of the dedicated regional human rights bodies (the African Commission and Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Commission on and Court of Human Rights) to the six UN treaty bodies currently able to hear individual and inter-state communications.[2] Collectively, this chapter refers to these judicial and quasi-judicial bodies as 'international human rights bodies'.

This chapter considers their relationship from two perspectives. First, the majority of international and regional treaties contain the general legal principles of *lis pendens* and *res judicata*. These principles prevent international human rights bodies from hearing the same

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1 See Chs 22–26 and Ch. 37.

2 The Committee on Enforced Disappearance, Committee on the Elimination of All Forms of Discrimination against Women, Committee on the Elimination of Racial Discrimination, Committee on the Rights of Persons with Disabilities, Committee against Torture and the Human Rights Committee.

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matter if it is already pending or has been examined by another procedure of international investigation or settlement. However, in certain cases it is still possible that more than one international human rights body may hear the same case. As will be discussed, sometimes this may be justified where one international human rights body is unable to hear the whole complaint due to restrictions on its subject-matter jurisdiction. In other instances, however, it may inappropriately result in the state being judged twice; cause compliance challenges where the decisions rendered are contradictory; and put pressure on the already constrained resources of international human rights bodies.

Second, a number of international treaties contain the same or similar rights. While, strictly speaking, they are only mandated to interpret the terms of their own treaty, the overlap in substantive protection means that their decisions also contribute to the broader interpretation of international human rights law. Echoing a wider debate in public international law, the number of tribunals capable of interpreting and applying international human rights law gives rise to concerns of fragmentation where they reach different results or employ different reasoning in similar cases. The second part of this chapter engages with these challenges and explores practical ways in which the risk of fragmentation can be reduced through greater engagement with each other's jurisprudence and peer-to-peer dialogue.

2 The possibility that more than one body will hear the same complaint

A number of states have authorised more than one international human rights body to hear complaints against them. In such a situation, applicants may attempt to adjudicate their case before more than one international forum, particularly if they consider the first decision rendered to be unfavourable. To warrant against this possibility, the majority of international treaties incorporate the general legal principles of *lis pendens* and *res judicata*.[3] The principle of *res judicata* signifies the end of litigation, whereas the principle of *lis pendens* refers to proceedings that have been initiated but not yet completed by another court.[4] A number of human rights treaties provide that a complaint will be deemed inadmissible if it has been or is being examined under another procedure of international investigation or settlement – for example, Article 22(4)(a) of the Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment (CAT), Article 4(2) of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP CEDAW), Article 3(2)(c) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (CESCR), Article 2(c) of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRPD) and Article 77(3)(a) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Article 5(2)(a) of the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) and Article 31(2)(c) of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) only provide that a

3 See UN Committee on the Elimination of Racial Discrimination, *Anna Koptova v Slovak Republic* (2000) UN Doc CERD/C/57/D/13/1998, para. 6.3.

4 For a full discussion of these terms, see A. Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Resolution Outcomes' (2004) 3 *The Law and Practice of International Courts and Tribunals* 37–77 at 43.

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complaint is admissible if the same matter is not being examined under another procedure of international investigation or settlement. Thus, they can receive complaints which have already been examined by another procedure of international investigation or settlement as long as that body has already disposed of the matter either through a finding of inadmissibility or a decision on the merits. However, a number of states have entered a reservation to Article 5(2)(a) of the Optional Protocol to the ICCPR to prevent two international decisions on the same complaint and according to Phuong, the Human Rights Committee (HRC) tries to interpret the rule restrictively in order to minimise the possibility of duplication.[5] States that have made a declaration authorising the Committee on Enforced Disappearance to hear individual complaints have not made similar reservations to the ICPPED. The only UN treaty body that is not restricted by either of these principles is the Committee on the Elimination of Racial Discrimination which can hear complaints even if they are already being or have been decided upon by another international human rights body.

At the regional level, Article 46(1)(c) of the American Convention on Human Rights (ACHR) deems a complaint admissible provided 'that the subject of the petition or communication is not pending in another international proceeding for settlement'. Article 47(d) also provides that 'the petition or communication [must not be] substantially the same as one previously studied by the Commission or by another international organization'. Article 35(2)(b) of the European Convention on Human Rights (ECHR) provides that a complaint will be rejected if it 'is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information'. Finally, Article 56(7) of the African Charter on Human and Peoples' Rights provides that complaints will be admissible where they '[d]o not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter'. Viljoen notes that '[w]hile the African Charter allows for the simultaneous submission of communications to both the African Commission and a UN treaty body . . . the complainant has to abide by the first decision or finding'.[6]

The incorporation of the principles of *lis pendens* and *res judicata* into the rules and practice of most international human rights bodies is important for a number of reasons. First, it provides legal certainty for both parties to the dispute. Second, it protects states from subjection to complaints in multiple forums and from being required to comply with two potentially inconsistent judgments.[7] Third, it is a matter of 'judicial economy'[8] in that it protects international human rights bodies from having to decide upon cases that have already been considered by another international body, which reflects a key practical concern in light of the resource constraints and backlogs each faces. Fourth, it minimises forum shopping.[9] Fifth,

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5 C. Phuong, 'The Relationship between the European Court of Human Rights and the Human Rights Committee: Has the 'Same Matter' Already been 'Examined'?' (2007) 7(2) *Human Rights Law Review* 385–95 at 387.

6 F. Viljoen, 'Communications under the African Charter: Procedure and Admissibility', in M. Evans and R. Murray (eds), *African Charter on Human and Peoples' Rights: The System in Practice: 1986–2006* (CUP, 2008) 126.

7 L.R. Helfner, 'Forum Shopping for Human Rights' (1999) 148(2) *University of Pennsylvania Law Review* 285–400 (1999) at 325.

8 Reinisch (n. 4) 44.

9 Helfner (n. 7) (for a full discussion of the potential for forum shopping and its impact on the integrity of international human rights law, arguing that 'forum shopping, if properly regulated, can materially benefit international human rights law' at 292).

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as discussed in the next section of this chapter, it also lessens the prospect of divergent decisions and interpretations of international human rights law in similar cases.

Equally, the submission of a complaint to more than one international body may be necessary in certain instances where the limited subject-matter jurisdiction of an international human rights body prevents it from examining the whole complaint. Helfner also argues in favour of re-litigating a complaint even where one forum is available to hear the whole complaint, where it would 'minimize the erroneous denial of fundamental rights claims'[10] and redress what he perceives as the inequality between the parties particularly in experience of litigating before international human rights bodies.[11]

Where the principles of *lis pendens* or *res judicata* apply, the scope for two international human rights bodies to hear the same complaint turns on the interpretation of the terms (or their equivalent) 'another procedure of international investigation or settlement'; 'same matter'; and 'examination'. The remainder of this section explores how these terms have been interpreted by different international human rights bodies and the possibility for duplication that arises as a consequence.

2.1 The interpretation of 'another body of international investigation or settlement'

The first issue that requires resolution is whether the international body that is or has already considered the case is the type of body foreseen by the principles of *lis pendens* and *res judicata*. As detailed throughout this Handbook, a range of political, legal, monitoring and advocacy bodies at the international level work to promote and protect human rights. These bodies can take up individual cases and due to the different functions and methodologies each employs, multiple treatment may enhance the prospects for the resolution of the case and the guarantee of its non-repetition in the future. As Leach points out, '[t]his multiplicity of devices is indicative of the fact that it is often the case that a multi-faceted approach (combining legal, political and diplomatic mechanisms) will be necessary in order to tackle the more intractable human rights problems.'[12]

Despite the number of international bodies that can address an individual case, as a general rule, only those that are capable of determining state responsibility will be considered to engage the principles of *lis pendens* and *res judicata*. Thus, if a case is referred to by a treaty body when acting in its monitoring capacity through state party reporting, as part of the Universal Periodic Review, or by the Human Rights Council's country or thematic special procedures which 'examine, monitor, advise and publicly report on human rights situations',[13] this will usually be insufficient to render a case inadmissible before an international human rights body acting in a judicial or quasi-judicial manner. For example, the Office of the United Nations Human Commissioner for Human Rights (OHCHR) explains the role of the UN Working Group on Enforced and Involuntary Disappearances (one of the Human Rights Council's thematic special procedures) in the examination of individual cases as:

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10 Helfner (n. 7) 347.

11 Ibid. at 348 (although this may not always be a persuasive argument given the experience of many NGO representatives in litigating cases at the international level).

12 See P. Leach, 'The European System and Approach' in this Handbook.

13 OHCHR website *Special Procedures of the Human Rights Council*, available at: http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx, accessed on 27 July 2012.

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> to assist families in determining the fate and whereabouts of their disappeared relatives . . . The Working Group's role ends when the fate or whereabouts of the disappeared person have been clearly established as a result of investigations . . . At that point the Working Group no longer concerns itself with the question of determining responsibility for specific cases of disappearance or for other human rights violations which may have occurred in the course of a disappearance; its work in this respect is of a strictly humanitarian nature.[14]

By characterising its work on individual cases as 'humanitarian', this does not preclude the submission of a case to an international human rights body for the purpose of determining state responsibility. Thus, in a case concerning allegations of enforced disappearance, the HRC explained that:

> extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Economic and Social Council, and whose mandates are to examine and publicly report on human rights situations in specific countries or territories or on major phenomenon of human rights violations worldwide, do not constitute procedures of international investigation or settlement within the meaning of article 5, paragraph 2(a), of the Optional Protocol. The Committee recalls that the study of human rights problems of a more global character, although it might refer to or draw on information concerning individuals, cannot be seen as being the same matter as the examination of individual cases within the meaning of article 5, paragraph 2(a) of the Protocol.[15]

Another UN Human Rights Council special procedure, the Working Group on Arbitrary Detention (WGAD), may be an exception to this general principle. Leach observes that the European Court on Human Rights (ECtHR) has found a complaint inadmissible on the basis that it had already been submitted to the WGAD, which in its view could be analogised to the HRC as it 'could accept individual applications, its proceedings were adversarial and its recommendations were determinative of state liability, were capable of bringing the violations in question to an end and were also subject to a monitoring procedure'.[16] The HRC has so far declined to take a position on whether the WGAD constitutes another form of international investigation or settlement for the purposes of admissibility. For example, in *Arredondo v Peru,* it noted that while the case had also been referred to the WGAD:

> [t]he Committee decides to reach no decision on whether this matter falls within the scope of article 2, paragraph 5(a) of the Optional Protocol, since it has received information from the Working Group that it realized the existence of the present communication and has referred the case to the Committee without any expression of its views.[17]

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14 OHCHR, Fact Sheet No. 6/Rev.3, 'Enforced or Involuntary Disappearances' 15.
15 UN Human Rights Committee, *Madoui v Algeria* (2008) UN Doc. CCPR/C/94/D/1495/2006 (2008) para. 6.2.
16 P. Leach, *Taking a Case to the European Court of Human Rights* (OUP, 2011) 148.
17 UN Human Rights Committee, *Arredondo v Peru* (2000) UN Doc. CCPR/C/69/D/688/1996 para. 10.2. See also, UN Human Rights Committee, *Musaeva v Uzbekistan* (2012) UN Doc. CCPR/C/104/D/1914 para. 82.

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Another procedure lacking in clarity for these purposes is that established under Economic and Social Council (ECOSOC) Resolution 1503. The International Commission of Jurists helpfully explains the questions surrounding this procedure in its description that:

> Although the '1503 procedure' was known as a procedure for individual complaints, it was in fact established to enable the Commission and Sub-Commission to consider in a confidential manner, information from nongovernmental sources about situations that showed 'a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms'. Although individuals can submit complaints, the procedure is not designed to protect the rights of individual victims, nor to be a mechanism to provide redress and reparation to victims. Rather, the procedure is a way to the establish mechanisms to monitor a situation and/or to provide technical assistance to a government. The complainant (the author of the communication) plays no role in the procedure after having submitted the original complaint. The '1503 procedure' is non-accusatorial, confidential and non-adversarial in style.[18]

The African Commission on Human and Peoples' Rights (ACommHPR) has previously found that a case considered under this procedure triggered the principle of *res judicata* without providing any reasoning for this assessment.[19] However, the ECtHR has not reached the same conclusion.[20] Accordingly, the principles of *lis pendens* and *res judicata* work to preserve the complimentary political, advocacy and monitoring functions of international human rights bodies when considering individual cases but seek to avoid duplication when such bodies act in a (quasi) judicial manner.

2.2 The interpretation of the 'same matter'

The 'same matter' generally refers to the same parties, facts and alleged violations.[21] However, as set out below, the interpretation and application of the 'same matter' (or 'substantially the same matter' as set out in the American and European Conventions) is far from straightforward and gives rise to the greatest possibility of duplication by international human rights bodies.

2.2.1 Interpretation of the same parties

To engage the principles of *lis pendens* and *res judicata* the parties to the case must be the same. This aspect of the rule not only protects states from multiple proceedings against it at the international level but also ensures that individuals are able to have their complaints heard even if a similar case has already been decided by an international human rights body. For example, in *Kayhan v Turkey*, the applicant challenged the state party's ban on the wearing of headscarves in schools before the Committee on the Elimination of All Forms of

18 International Commission of Jurists, 'Establishing a Complaint Procedure in the Human Rights Council – Moving beyond the "1503 procedure"' (2006), available from www.icj.org.

19 *Amnesty International v Tunisia*, ACommHPR, Comm. No. 69/92 (1994), para. 2. See also Viljoen (n. 6) 127–28.

20 *Celniku v Greece,* ECtHR, Application No. 21449/04, Judgment of 5 July 2007, para. 40.

21 *Baena-Ricardo et al. v Panama*, Petition No. 11,325, IACtHR (1999) (Preliminary Objections), para. 53.

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Discrimination against Women (CEDAW). The state party contested the admissibility of the case on the basis that the ECtHR had already decided the issue in *Leyla Sahin v Turkey*. The CEDAW rejected this challenge, finding that while the issue was similar, the parties were different, implying that Ms Kayan could not be prevented from accessing justice at the international level simply because someone else had already challenged the ban in another forum.[22]

Similarly, the HRC still admitted a case that was under consideration by the Inter-American Commission on Human Rights (IACommHR) on the basis that the parties were different.[23] The factors that appeared persuasive to the Committee in this case were that the applicant had 'no prior knowledge' of the complaint before the IACommHR; 'in spite of extensive inquiries on his part, he had been unable to find out who may have submitted that case to IACHR'; and the IACommHR had confirmed to the HRC that the complaint had been submitted by an 'unrelated third party'.[24] Again, this decision is significant as it provides important protection to the applicant who otherwise would have been unable to have his case heard.

Equally, the formality of the rule still leaves space for duplication even if the parties were part of the same case before national courts. The starkest illustrations of this point are the HRC case of *Leirvåg and others v Norway* and the ECtHR case of *Folgerø v Norway*. In these cases, eight sets of parents challenged a domestic law on compulsory religious education before the Norwegian courts. Following the Supreme Court's dismissal of the complaint, they separated into two groups with one complaining to the HRC and one to the ECtHR. Norway challenged the admissibility of the complaints in both forums on the basis that they had been joined at the national level and were 'to a large extent identical. Thus it appears that the authors stand together, but that they are seeking a review by both international bodies of what is essentially one case.'[25] Both the HRC and the ECtHR rejected this admissibility challenge as the applicants were factually 'distinct'.[26] Accordingly, where cases involve more than one complainant it is possible that more than one international body will be seized of the complaint even if the facts and alleged violations are the same.

2.2.2 Interpretation of the same alleged violations

Where the parties and the facts are the same, the international human rights body must still consider whether the alleged violations are the same to satisfy the principles of *lis pendens* and *res judicata*. Treaties can frame certain rights differently. However, the principles of *lis pendens* and *res judicata* generally do not require identical wording unless the scope of the right is significantly different.

This may arise with regard to complaints that involve allegations of violations of the right to equality and non-discrimination. This is because the right to equality and non-discrimination is treated differently by different treaties. For example, Article 14 of the

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22 UN Human Rights Committee, *Fanali v Italy* (1983) UN Doc CCPR/C/18/D/75/1980, para. 7.2; UN Committee on the Elimination of Discrimination Against Women, *Kayhan v Turkey* (2006) UN Doc CEDAW/C/34/D/8/2005, para. 7.3.
23 UN Human Rights Committee, *Miguel Angel Estrella v Uruguay* (1990) UN Doc. CCPR/C/OP/2.
24 Ibid. para. 4.2.
25 UN Human Rights Committee, *Leirvåg and others v Norway* (2004) UN Doc. CCPR/C/82/D/1155/2003, para. 8.2.
26 Ibid. para. 13.3. *Folgerø v Norway,* App. No. 15472/02, (ECtHR, Admissibility, 2004) at section B(2) (finding that the complainants must be identical).

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ECHR treats the right to non-discrimination as an accessory right, meaning that it can only be invoked in relation to one of the other substantive rights set out in the Convention itself.[27] By contrast, Article 26 of the ICCPR provides a free-standing right to equality and non-discrimination. As Phuong explains, where the ECtHR has considered a case under Article 14, the HRC 'often concludes that the [European] Court could not have examined the author's independent right to equality and non-discrimination'[28] and therefore still admits the case. However, she also points out that the Committee is alive to the possibility that parties may allege a violation of Article 26 in order to overcome the barrier of the principle of *res judicata*. Therefore, it carefully scrutinises claims on this basis in order to ensure that the 'allegation based on Article 26 truly constitutes a free-standing claim of discrimination. If it does not, it considers that the new allegation of a violation of Article 26 does not exceed the scope of the claim already made under another article of the ICCPR.'[29]

This issue may also arise before the CEDAW and the Committee on the Rights of Persons with Disabilities if it can be successfully argued that their governing conventions frame the right to equality and non-discrimination differently to other international treaties. This argument has already been presented to the CEDAW in *Cristina Muñoz-Vargas y Sainz de Vicuña v Spain* in which the complainant argued that:

> the two communications brought before the Human Rights Committee were based on article 26 of the International Covenant on Civil and Political Rights (right to equality), which was more restrictive than articles 1 and 2(f) of the Convention. The purpose of the Convention is to eradicate discrimination suffered by women in all spheres of life, without any limitations (article 1). Therefore, the same matter has not been examined under another procedure of international investigation or settlement. For the same reasons, the petition brought before the European Court of Human Rights should also not be considered as the same matter as a communication brought before the Committee on the Elimination of Discrimination against Women.[30]

However, the Committee found the case inadmissible on other grounds and found no 'reason to find the communication inadmissible on any other grounds.'[31] Therefore, it is unclear whether this argument could be successfully made.

The second issue that arises is whether applicants may split up their complaints in order to have them heard by different bodies. Certain UN treaty bodies only have a narrow subject-matter jurisdiction with the result that they may only be able to consider particular aspects of a wider complaint. For example, the Committee against Torture can only deal with complaints of torture and other ill-treatment even if the broader allegations raise questions relating to the freedom of expression or association or the right to liberty and security of person. Even the HRC and the regional bodies with wider mandates will not always be capable of examining the full complaint, for example, if it involves allegations of violations of certain economic,

27 See Phuong (n. 5) 388 (contrasting the HRC's practice on Art. 26 ICCPR with the ECtHR's on Art. 14). Notably, this issue may not arise with regards to Protocol 12 to the ECHR which provides a free-standing prohibition of discrimination but which has not been ratified by all states).
28 Ibid.
29 Ibid. 389.
30 UN Committee on the Elimination of Discrimination Against Women, *Cristina Muñoz-Vargas y Sainz de Vicuña v Spain* (2007) UN Doc. CEDAW/C/39/D/7/2005, para. 8.3.
31 Ibid. para. 11.6.

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social and cultural rights, gender rights or rights of persons with disabilities. Inevitably this may result in multiple complaints before international human rights bodies due to the applicant's lack of options in the absence of a body capable of adjudicating the whole complaint.

However, in other cases one body may be available to hear the full complaint but the applicant may seek to act strategically by splitting up the complaint with the view to achieving multiple international decisions against the state.[32] For example, in *Pauger v Austria*, the applicant had already successfully complained to the HRC, which found a violation of Article 26 ICCPR.[33] The European Commission still found the subsequent complaint admissible on the basis that 'he [had] complained about issues related to the proceedings before the Austrian authorities and courts' under Article 6(1) and not non-discrimination.[34] Similarly, if the second complaint is wider than the first, the international human rights body may still find it admissible. For example, in *Smirnova & Smirnova v Russia,* the ECtHR admitted a complaint that was pending before the HRC as the HRC complaint only concerned one of the applicants and was not 'substantially the same' as:

> the first applicant's complaints in that case were directed against her arrest on 26 August 1995 and, in particular, the question whether this arrest was justified, the impossibility to challenge it in the courts, and the alleged inadequate conditions of detention. The scope of the factual basis for the first applicant's application to the Court, although going back to the arrest of 26 August 1995, is significantly wider. It extends to the whole of the proceedings which terminated in 2002, and includes the first applicant's arrest on three more occasions since 26 August 1995.[35]

2.2.3 The interpretation of 'examination'

The final issue that arises with regard to the principles of *lis pendens* and *res judicata* is the interpretation of whether the complaint is being 'examined'. Clearly, a previous decision on the merits or the agreement of a friendly settlement will satisfy this aspect of the principles. For the ACommHPR this is the only possible reading of the Charter as it refers to 'settled' cases, as was confirmed by the ACommHPR in *Bob Ngozi Njoku v Egypt.*[36]

However, this reading does not necessarily apply to other international human rights bodies as the UN treaty bodies only refer to 'examined' cases; the ECHR refers to 'submitted' cases; and the ACHR refers to 'previously studied' complaints. This language could be interpreted to mean that decisions on admissibility alone could satisfy the principles of *lis pendens* and *res judicata* even if the grounds for the admissibility decision by the first body were not shared by the second body (such as the ECtHR's six-month rule which is not employed by other international human rights bodies) or the facts were no longer the same (for example,

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32 See Helfner (n. 7) proposing reforms to ward against splitting up claims while still allowing complainants to access more than one international human rights forum where one alone is incapable of dealing with the full claim.

33 *Pauger v Austria,* App. No. 16717/90 (ECtHR, Judgment of 28 May 1997), paras. 27–28.

34 Ibid. para. 65 (although the Court did not reconsider this issue as the state party did not raise it before the Court, para. 66).

35 *Smirnova & Smirnova v Russia,* ECtHR, Application No. 46133/99 and 48183/99, Admissibility Decision of 3 October 2002.

36 *Bob Ngozi Njoku v Egypt*, ACommHPR, Comm. No. 40/90 (1997), para. 55.

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where the first complaint was rejected for a failure to exhaust domestic remedies which are subsequently exhausted prior to the second complaint). Phuong explains that the HRC has not found that a complaint has been 'examined' where the admissibility decision by the first international human rights body was based on 'purely procedural' grounds. However, she observes that if the ground for inadmissibility can be read to have any substantive content, such as a finding that the complaint is manifestly ill-founded, the HRC will usually reject the complaint. She highlights the dangers of this approach by noting that:

> Due to the increasing workload of the ECtHR, Committees of three judges have started to issue one-paragraph decisions on the admissibility of complaints whereby the ECtHR finds that the facts of the case 'do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols'. What is slightly disturbing in the wording of these decisions is the term 'appearance'. It suggests that the Committee of three judges has examined the complaint very briefly and concluded that there did not *appear to be* any violation, rather than that there *was* no violation. Nonetheless, one could argue that the Court has still 'examined' the complaint, although it may not have done so in the most thorough manner.[37]

This section has therefore examined the relationship and interaction between the regional human rights and UN treaty bodies and their general attempt to avoid duplicated proceedings, though this may sometimes materialise.

3 The relationship between the jurisprudence

Each international human rights body is formally only mandated to interpret and apply the terms of its own treaty. In theory, therefore, they simply co-exist with each autonomously contributing to the general promotion and protection of human rights through the adjudication of disputes arising from their governing treaties and within their jurisdiction. However, as set out in the previous section of this chapter, in certain cases more than one international human rights body may consider the same case. In addition, certain rights are replicated or are very similar in more than one convention with the result that multiple adjudicative bodies flesh out their meaning and scope under international human rights law more broadly. Where the decisions are consistent with each other and the bodies cross-reference each other's jurisprudence, the bodies collectively deepen and strengthen international human rights law. Equally, as this section details, where international human rights bodies reach different outcomes or employ divergent reasoning in the consideration of similar cases, this can potentially threaten the unity of international human rights law and lead to its fragmentation. It also produces what Helfner frames as a 'true conflict (. . .) where a signature to the two agreements cannot comply with both treaty obligations at the same time'.[38]

3.1 Fragmentation as an issue germane to international law generally

In response to the general proliferation of international tribunals and the development of specialised sub-regimes of public international law, a number of scholars have raised concerns

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37 Phuong (n. 5) 391.
38 Helfner (n. 7), 325.

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about the threat to the unity and legal certainty in public international law.[39] In a study for the UN International Law Commission, Professor Koskenniemi explained that:

> fragmentation does create the danger of conflicting and incompatible rules, principles, rule-systems and institutional practices[40] . . . The problem [with the emergence of specialised regimes such as human rights], as lawyers have seen it, is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.[41]

Equally, the Report recognises the reality of fragmentation as deriving from 'the rapid expansion of international legal activity into various new fields and the diversification of its objects and techniques'.[42] Scholars have also pointed out that divergent interpretations of the same principles of public international law by different tribunals does not necessarily need to be viewed negatively where it gives rise to inter-judicial dialogue and engagement in the field's development. For example, one of the leading writers on fragmentation, the late Jonathan Charney, noted that:

> tribunals may differ on the rules of international law. I find much value in this situation. The variety of views on what the rules of international law are, the debates over those judicial decisions when they may differ, and the resolution of the issues will help the international community discover what may be the most acceptable interpretations of international law. This is a healthy process. International tribunals are aware of what other international tribunals may decide, and if those tribunals are not aware, counsel will inform them. As a consequence, this debate will continue across the broad spectrum of tribunals, and hopefully will result in optimal rules of international law that are fully thought through and analyzed.[43]

As noted above, international human rights law is often cited as contributing to fragmentation due to its nature as a specialised regime of international law.[44] Less attention has been paid, however, to the risk of fragmentation within international human rights law as a result of the proliferation of tribunals capable of interpreting and applying it but without necessarily coordinating.[45] This risk and its possible mediation are explored in the remainder of this chapter.

39 See for example M. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (CUP, 2011).
40 UN General Assembly, International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi', UN Doc. A/CN.4/L.682 (2006), para. 14.
41 Ibid. para. 8.
42 Ibid. para. 14.
43 J. Charney, 'The "Horizontal" Growth of International Courts and Tribunals: Challenges and Opportunities?' (2002) 96 *ASIL Annual Meeting Proceedings* 369 at 370.
44 M. Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) 11(3) *European Journal of International Law* 489–519 at 490.
45 L. Lixinski, 'Choice of Forum in International Human Rights Adjudication and the Unity/Fragmentation Debate: Is Plurality the Way Ahead?'(2009) 9 *University College Dublin Law Review* 23–45 at 29.

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3.2 Fragmentation in international human rights law

To some extent fragmentation and divergent interpretations of international human rights law are inevitable due to the number of international human rights bodies that have been established and the commonalities in the rights provided in their governing treaties. While it might be inevitable in certain situations, the International Court of Justice in *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)* emphasised the importance of aiming for unity in order to ensure clarity, consistency and legal security.[46] Such an approach would ensure that fragmentation only occurs where there are real points of disagreement on the interpretation of a right in common.

In order to minimise fragmentation in this way, knowledge and engagement with each other's jurisprudence is necessary, as referenced by Charney above. Helfner emphasises that this safeguards against fragmentation arising 'by chance or inadvertence'[47] and argues in favour of what he characterises as 'horizontal dialogue' of which the 'core feature . . . is open acknowledgment of *the existence* of relevant precedents from other treaty systems as a way to enhance the precision, certainty, and reasoned decision-making that are essential features of a coherent body of human rights law'.[48] This is where the challenges with international human rights bodies lie as historically, they rarely acknowledged or engaged with each other's jurisprudence. Many examples can be provided as evidence of this point, but in the space available the following cases illustrate the traditional lack of interaction between the different international human rights bodies when deciding similar cases.

In the cases of *Leirvåg* and *Folgerø* referenced above, the HRC issued its decision before the ECtHR. However, the Grand Chamber only noted the HRC's decision in its description of the factual background to the case and did not engage with its finding.[49] This was the case even though the decisions were reasonably similar in finding a violation of Article 18(4) ICCPR requiring states 'to undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conforming with their own convictions',[50] and Article 2 of Protocol 1 to the ECHR on the right to education, including the obligation on states to:

> respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.[51]

Similarly, in *Carlos Correia de Matos v Portugal,* the HRC heard a case that had previously been decided upon by the ECtHR.[52] The ECtHR had previously found that Article 6(3)(c) on the right to defend himself in court without legal counsel had not been violated.[53] The HRC

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46 Judgment of 30 November 2010, para. 66.
47 Helfner (n. 7) 335.
48 Ibid. 350.
49 *Folgerø* (n. 26) paras 43–46.
50 Ibid. para. 15
51 Ibid. para. 105.
52 UN Human Rights Committee, *Carlos Correia de Matos v Portugal* (2006) UN Doc. CCPR/C/86/D/1123/2002/Rev.1.
53 For a full discussion of these cases see Phuong (n. 5) 391.

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found that the equivalent provision in the ICCPR, Article 14(3)(d), had been violated. However, in doing so, it made no reference to the ECtHR's decision or why it disagreed with it.[54] In an individual opinion, three members (Palm, Ando and O'Flaherty) expressed concern that 'two international instances – instead of trying to reconcile their jurisprudence with one another – come to different conclusions when applying exactly the same provisions to the same facts'.[55] One of this Handbook's editors, Professor Sir Nigel Rodley, in his own separate opinion criticised the HRC for 'the cavalier way in which the Committee chooses to ignore the reasoned approach of the European Court of Human Rights, applying the same law to the same facts'.[56]

The two cases presented to the ECtHR and the HRC on whether a prohibition on wearing a headscarf violated the right to manifest one's religion again provide stark illustration of this point. In *Leyla Sahin v Turkey,* the applicant petitioned the ECtHR following her exclusion from university as she had violated a ban on wearing a headscarf. The ECtHR issued its Chamber decision on 29 June 2004. In finding that there had been no violation of Article 9 on the right to manifest one's religion or Article 14 on the right to equality and non-discrimination, the Court only took into account its own jurisprudence.[57] On 18 January 2005, the HRC then issued its decision in the similar case of *Raihon Hudoyberganova v Uzbekistan*.[58] In this case, the HRC found that the applicant's 'right to freedom of thought, conscience and religion was violated as she was excluded from University because she refused to remove the headscarf that she wore in accordance with her beliefs' and an 'individual's freedom to have or adopt a religion'.[59] In support of its decision, the Committee cited its own General Comment 22, but with the exception of Professor Wedgewood in her individual opinion, did not reference the ECtHR's decision in the year prior or the reason for reaching a different decision. The Grand Chamber of the ECtHR then issued its decision in *Leyla Sahin* on 10 November 2005, upholding its Chamber decision. In a 54-page judgment, however, it failed to acknowledge or engage with the HRC's views despite their issuance only months earlier.[60]

More recently, however, international human rights bodies have begun to demonstrate a greater willingness to engage with comparative jurisprudence, although this typically only arises if a party or third party intervener presents the jurisprudence rather than *proprio motu*. For example, in the 2011 decision of *Yevdokimov & Rezanov v Russian Federation* on the question of whether prisoners have the right to vote, the HRC not only acknowledged the previous decision on the same issue before the ECtHR in *Hirst (No. 2) v The United Kingdom*[61] but also engaged with the tests applied in the case.[62] It also stated that:

> [t]he Committee notes the state party's reference to earlier decisions of the European Court of Human Rights. However, the Committee is also aware of the Court's judgment

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54 Ibid. 393.
55 *Carlos Correia de Matos v Portugal* (n. 52).
56 Ibid.
57 *Leyla Sahin v Turkey,* App. No. 44774/98 (ECtHR, Judgment of 29 June 2004).
58 UN Human Rights Committee, *Raihon Hudoyberganova v Uzbekistan* (2005) UN Doc CCPR/C/82/D/931/2000.
59 Ibid. para. 6.2.
60 *Leyla Sahin v Turkey,* App. No. 44774/98 (ECtHR, Judgment of 10 November 2005).
61 *Hirst v The United Kingdom (No. 2)*, App. No. 74025/01 (ECtHR, Judgment of 6 October 2005).
62 UN Human Rights Committee, *Yevdokimov and Rezanov v Russian Federation* (2011) UN Doc. CCPR/C/101/D/1410/2005.

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> in the case *Hirst v. United Kingdom* in which the Court affirmed that the principle of proportionality requires sufficient link between the sanction and the conduct and circumstances of the individual concerned.[63]

Other members also engaged with the test applied by the ECtHR in their dissenting opinion, commenting that:

> General Comment 25 states that the right to vote and to be elected is not an absolute right and that restrictions may be imposed on it, provided they are not discriminatory or unreasonable. It also states that if conviction for an offence is a basis for suspending the right to vote, the period for such suspension should be proportionate to the offence and the sentence. The norm which follows from General Comment 25 should be used in interpreting whether a violation of the Covenant has occurred in the case before us, instead of some form of extended proportionality test, as might be inferred from the European Court of Human Rights in the case *Hirst* v. *United Kingdom* and which seemingly has inspired the majority.[64]

Some bodies have also begun to engage in dialogue with peers from other bodies such as the recent meeting between the ECtHR and the HRC at the former's seat in Strasbourg.[65] At this meeting, members of both bodies discussed their practice and approach to interim measures, freedom of expression, the prohibition of discrimination and enforced disappearance. The UN High Commissioner for Human Rights in her latest report on the reform of treaty bodies also highlighted such engagement as an important aspect of treaty body reform.[66] Similarly, the second meeting of the chairpersons of treaty bodies took place in Addis Ababa in part in order to 'strengthen linkages and enhance synergies between international and regional human rights mechanisms and institutions, as well as with their stakeholders' and to meet with the 'African human rights mechanisms . . . to discuss complementarities between the international and regional human rights systems'.[67] The summary report notes that one point discussed at a round table was:

> how to ensure that the jurisprudence of the African Court on Human and Peoples' Rights, the Committee of Experts on the Rights and Welfare of the Child, the African Commission on Human and Peoples' Rights, and sub-regional courts is consistent with that of the United Nations human rights treaty bodies, and how to identify examples of diverging jurisprudence, as well as sharing of experiences.[68]

63 Ibid. para. 7.5.
64 Individual opinion by Committee members, Mr Krister Thelin and Mr Michael O'Flaherty (dissenting).
65 Visit by a Delegation of the United Nations Human Rights Committee to the European Court of Human Rights (29 June 2012).
66 *Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights*, Navanethem Pillay (June 2012), 69, available at: http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf.
67 UN General Assembly, 'Implementation of Human Rights Instruments: Note by the Secretary-General', UN Doc A/67/28442 (2012) Advanced Unedited Version, summary and para. 16.
68 Ibid. para. 26.

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One recommendation that emerged from the round table was the establishment of a 'forum for regional and international courts to meet regularly to discuss topical issues'[69] and to seek 'coherence and avoid . . . the fragmentation of international human rights law'.[70] Other recommendations included 'attendance of representatives of the African mechanisms during the annual meetings of treaty body Chairpersons and treaty body sessions, and the attendance of treaty body members during the meetings of the African Commission';[71] 'regular contacts at the level of the secretariats';[72] 'efforts by the [international and regional bodies] . . . to take into consideration and reference their respective jurisprudence so as to seek coherence and avoid the fragmentation of international human rights law'.[73]

4 Conclusion

The number of international human rights bodies capable of hearing individual complaints continues to increase, particularly at the UN level once the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child start to hear individual complaints. This increases the opportunities for individuals to access justice at the international level and enhances the development of a core body of jurisprudence on international human rights law. In order to maximise the opportunities offered by such proliferation as well as provide certainty and clarity to all stakeholders, coordination and dialogue between the different bodies presents a crucial aspect of their working methodology both in relation to their interpretation of the principles of *lis pendens* and *res judicata* and the substantive rights in common in their governing treaties.

Equally, while this is a desirable approach, it is by no means straightforward. All supranational human rights bodies currently face significant resource constraints with the result that it is not always easy to remain aware of judicial developments elsewhere and to ensure that sufficient time is provided for the body as a collective to consider the significance of comparative jurisprudence to its decisions, particularly when not raised by the parties or third party interveners (the role of which not all international human rights bodies recognise). Moreover, the ACommHPR and the UN treaty bodies typically issue short decisions that do not always reference their own jurisprudence, let alone those of other bodies. A full engagement with the jurisprudence of other bodies would require lengthier decisions which may not always be possible, particularly as these bodies sit on a part-time basis and with small secretariats. By contrast, the Inter-American Court of Human Rights may face a similar problem due to its recent commitment to shortening its decisions in order to make them more accessible. The ECtHR may also experience difficulties in engaging with other bodies' jurisprudence in light of thousands of its own decisions. Accordingly, within the ongoing individual reform projects, greater consideration is required of how to support and enable regional human rights and UN treaty bodies to engage with each other's practice from a practical and realistic perspective without further overburdening them.

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69 Ibid. para. 27.
70 Ibid. para. 28. See also, Annex II.
71 Annex II, para. 1.
72 Ibid. para. 15.
73 Ibid. para. 16.

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Select bibliography

J. Charney, 'The "Horizontal" Growth of International Courts and Tribunals: Challenges and Opportunities?'(2002) 96 *ASIL Annual Meeting Proceedings* 369.

L.R. Helfner, 'Forum Shopping for Human Rights' (1999) 148(2) *University of Pennsylvania Law Review* 285–400 (1999) at 325.

C. Phuong, 'The Relationship between the European Court of Human Rights and the Human Rights Committee: Has the 'Same Matter' Already been 'Examined'?' (2007) 7(2) *Human Rights Law Review* 385–95.

A. Reinisch, 'The Use and Limits of Res Judicata and LisPendensas Procedural Tools to Avoid Conflicting Dispute Resolution Outcomes' (2004) 3 *The Law and Practice of International Courts and Tribunals* 37–77.

M. Young (ed.) *Regime Interaction in International Law: Facing Fragmentation* (CUP, 2011).

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