The Use Made by the Organs of the European Convention on Human Rights of Reference to the Views of Other Human Rights Bodies in Addressing the Scope of the Extraterritorial Applicability of the Convention

Françoise J. Hampson

1 Introduction

This chapter seeks to analyse the extent to which the European Commission of Human Rights (‘the European Commission’) and the European Court of Human Rights (ECtHR) have drawn on the decisions and views of other human rights bodies in determining the scope of the extraterritorial applicability of the European Convention on Human Rights (ECHR). A range of preliminary points need to be made at the outset. The title refers to the organs of the ECHR because much of the relevant early case law came from the European Commission and not the Court. The reference to the ‘views’ of other human rights bodies is not confined to binding legal judgments (see E below). This text does not address what can be referred to as the Soering line of cases, in other words situations in which the state acts within its territory but may thereby expose an individual to the risk of a violation outside national territory and at the hands of third parties; nor does it address situations occurring within parts of national territory over which the state has lost control.

By way of background, the following observations are made.

A. The question at the heart of this book is not part of the fragmentation debate. In that context, the debate concerns coherence between different fields of international law.

B. The issue here is coherence and consistency within one field. This issue assumes that there should be such coherence and might suggest that states should not be free to articulate distinctive obligations in different

1 Soering v United Kingdom Application No 14038/88, Merits and Just Satisfaction, 7 July 1989.

2 For example, Cyprus over northern Cyprus, Moldova over Transdniestria and Georgia over South Ossetia and Abkhazia.
human rights treaties. Such particularities may arise in at least two ways. The first is an issue which is addressed in a distinctive way in a particular region. The second is the provision of more specific obligations in specialist treaties than in more general ones. There is, of course, no reason why states should not seek and be free to put different provisions in different treaties. Clearly, effect should be given to such differences. It would be wrong to read all the very specific obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment into the International Covenant on Civil and Political Rights (ICCPR), for example. That does not, however, undermine the argument in favour of consistency and coherence when dealing with the same type of provision and/or the same type of treaty. In other words, one would expect similar provisions in general treaties (for example, the African Charter on Human and Peoples’ Rights, the ECHR, the American Convention on Human Rights (ACHR) and the ICCPR) to be treated in the same way, unless there was a specific reason not to do so. Equally, a similar provision in different types of treaties should be treated in the same way, but with a possibly wider margin for the existence of specific reasons not to do so. The issue of coherence is particularly important given the likelihood that a state will be bound by a range of international and regional human rights treaties, of both a specific and general character.

C. What does coherence mean in this context? The obligations of a state need to be coherent. That does not mean that they need to be identical. It does mean that they ought not to be conflicting. The mere fact that one body determines that there has been no violation, whereas another, faced with the same facts, decides that there has been a violation is not necessarily a conflicting result. It is only truly conflicting if the first body requires the state to do something which the second body prohibits the state from doing. Whilst the avoidance of conflict is a start, there may be a desire for a more amorphous goal—the achievement of coherence. For

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3 For example, the express provision with regard to the start of life in Article 4(1) ACHR.
4 For example, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as compared to the International Covenant on Civil and Political Rights.
5 For example, the problem that arose for Denmark following the conclusions of the Committee on the Elimination of Racial Discrimination (CERD) and the finding of a violation of Article 10 ECHR by the ECtHR in Jersild v Denmark Application No 15890/89, Merits and Just Satisfaction, 23 September 1994, for a penalty imposed on a journalist for reporting the views of others, which views could be argued to incite racial hatred (as to the CERD decision, see para 21 of Jersild).