The Admissibility of Multiple Human Rights Complaints: Strasbourg and Geneva Compared

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ABSTRACT

This article seeks to provide a comparative and up-to-date overview of the applicable rules and relevant practice of the European Court of Human Rights and of the United Nations Human Rights Committee on forum duplication in international human rights litigation. While specific inadmissibility clauses have been included in both the European Convention on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights with a view to preventing multiple human rights petitions in relation to the same matter, their respective scopes differ. Moreover, the applicable normative framework has led to important—and diverging—judicial developments in Strasbourg and in Geneva, which may be of great significance in human rights practice and therefore deserve to be thoroughly addressed.

KEYWORDS: international human rights law, admissibility, forum duplication, Human Rights Committee, European Court of Human Rights

1. Introduction

Forum shopping—that is, the selection of the most favourable jurisdiction by petitioners—in international human rights litigation has received well-deserved academic attention.1 Forum duplication, on the other hand, is another issue that tends to be overlooked. Especially (but not exclusively) in the context of high-profile cases with political implications, there seems to be an increasing tendency in contemporary human rights practice to submit successive or parallel complaints before several bodies or mechanisms—whether universal, regional, judicial, quasi-judicial or political in nature.2

The Yaker and Hebbadj cases may be counted among recent examples having attracted important media attention. In these two parallel cases, the authors complained

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1 See, for example, the seminal piece by Helfer, ‘Forum Shopping for Human Rights’ (1999) 148 University of Pennsylvania Law Review 285.

2 Early signs of this tendency were already observed two decades ago by Helfer, supra n 1 at 399–400. For a more relativist view, see Hennebel and Tigroudja, Traité de Droit International des Droits de l’Homme, 2nd edn (2018) at 524.
that France had fined them for wearing a full-body Islamic veil. Mrs Yaker and Mrs Hebbadj first referred the matter to the European Court of Human Rights (ECtHR or ‘Court’), which considered their application inadmissible.³ Unhappy with this decision, Mrs Yaker and Mrs Hebbadj submitted further communications to the United Nations Human Rights Committee (HRC or ‘Committee’), which, on 17 July 2018,⁴ declared those admissible and found a breach of the two women’s right to manifest their religion under Article 18 of the International Covenant on Civil and Political Rights (ICCPR or ‘Covenant’).⁵

This article seeks to provide a comparative and up-to-date overview of the applicable rules and relevant practice of the ECtHR and of the HRC on this issue. While specific inadmissibility clauses have been included in the two relevant instruments with a view to preventing multiple human rights petitions, their respective scopes differ. Under Article 35(2)(b) of the European Convention on Human Rights (ECHR or ‘Convention’),⁶ the ECtHR shall not deal with an individual application that 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’. In a seemingly less restrictive manner, Article 5(2)(a) of the first Optional Protocol (OP) to the ICCPR⁷ precludes the HRC from considering an individual communication unless it has ascertained that ‘[t]he same matter is not being examined under another procedure of international investigation or settlement’.⁸

Aside from a prima facie, literal reading of these succinct conventional foundations,⁹ it is clear that both in Strasbourg and in Geneva the applicable normative framework has led to important judicial developments that deserve to be thoroughly addressed.¹⁰ ‘Will a petition be declared inadmissible subsequent to an opinion delivered by the United Nations (UN) Working Group on Arbitrary Detention?’ ‘May a human rights violation be brought to the attention of a competent UN special rapporteur without jeopardizing the possibility to subsequently seize the HRC?’ ‘How does the respective practice of the ECtHR and of the HRC differ on whether these two bodies may, in one way or another,

⁴ Yaker v France, supra n 3; Hebbadj v France, supra n 3.
⁵ 1966, 999 UNTS 171.
⁷ 1966, 999 UNTS 171. On 1 August 2019, 116 States were parties to this instrument. This included most European States, with the notable of exceptions of the United Kingdom and Switzerland.
⁸ See, in identical terms, Rule 96(e) of the Rules of Procedure of the Committee adopted at the Committee’s 2852nd meeting during its 103rd session (‘Rules of Procedure’), CCPR/C/3/Rev.10, 11 January 2012.
⁹ Admissibility rules as provided for in the OP, in particular, have been rightly described as laconic and unclear: see Bossuyt, ‘Le Règlement Intérieur du Comité des Droits de l’Homme’ (1978–79) (1) Revue Belge de Droit International 105 at 135.
¹⁰ This has certainly been done by others in the past: see especially Zwart, The Admissibility of Human Rights Petitions: The Case Law of the European Commission of Human Rights and the Human Rights Committee (1994) at 173–86; Phuong, ‘The Relationship Between the European Court of Human Rights and the Human Rights Committee: Has the “Same Matter” Already Been “Examined”?‘ (2007) 7 Human Rights Law Review 385. This article will therefore seek to also uncover the most recent developments on this issue.
concurrently address the same human rights situation?’ This article aims to provide a concise, practical and up-to-date analysis of these questions and issues.

The article will be structured in three main parts. In Section 2, the scope *ratione materiae* of the two inadmissibility clauses will be compared (‘under what circumstances is it considered that the same issue is the object of multiple petitions?’). In Section 3, we will address the *ratione temporis* scope of the clauses (‘at what exact stage is it considered that a parallel or prior petition commands inadmissibility?’). In Section 4, we will turn to the respective scopes *ratione fori* (‘the concurrent action of what exact human rights bodies will lead to an inadmissibility decision in Strasbourg or Geneva?’). In Section 5, we will then conclude with a few broader reflections on forum duplication in human rights litigation.

2. Inadmissibility Of Multiple Complaints: Scope *Ratione Materiae*

In light of the practice of both the ECtHR and the HRC, the similarity of human rights petitions should be ascertained with reference to two separate aspects: the subject matter of the respective complaints (A) and the parties involved (B).

A. Identical Complaints as to the Subject Matter

While the OP provides for inadmissibility of multiple applications in relation to ‘[t]he same matter’, the ECHR seems to be more restrictive by also excluding multiple applications that are (merely) ‘substantially the same’. 11

In practice, however, no significant differences can be observed between the respective practice of the Court and of the Committee on whether two concurrent complaints cover the same subject matter. 12 Both the Court 13 and the Committee 14 will assess subject-matter identity between two parallel human rights complaints in light of the facts, on the one hand, and of the substantive rights concerned, on the other. In practice, this means that a subsequent petition will not be considered as covering ‘the same matter’ as an earlier one when the factual context is identical, but the breach of different substantive rights is complained of. 15

Some specific areas of flexibility are still worth observing in the practice of the Committee. In the *Millan Sequeira v Uruguay* case, for instance, a global complaint concerning hundreds of arbitrary detentions in Uruguay had been previously presented to the Inter-American Commission on Human Rights, including ‘a two-line reference to *Millan Sequeira*’. 16 The Committee considered that this global complaint ‘did not constitute the same matter as that described in detail by the author in his communi-

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12 See Hennebel and Tigroudja, supra n 2 at 527.
13 See, for example, *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland (No 2)* Application No 32772/02, Merits and Just Satisfaction, 30 June 2009 [Grand Chamber], at para 63.
cation to the Human Rights Committee’. The communication was therefore declared admissible.

In a more general fashion, the Committee has repeatedly clarified that as far as continuing violations are concerned (for example, prolonged arbitrary detention or inhuman conditions of detention), where the matter was already referred to another mechanism of human rights protection before the entry into force of the ICCPR and of the OP in relation to the State party concerned, the individual may still file a communication to the Committee upon such entry into force. In the view of the Committee, such subsequent communication will not address ‘the same matter’ because the initial, parallel procedure necessarily predates—and therefore cannot relate to events having taken place on or after the date of—entry into force.\(^18\)

Overall, however, the respective practice of the Court and of the Committee on subject-matter identity clearly goes along similar lines.

**B. Identical Complaints as to the Parties**

Both the ECtHR and the HRC have clarified that the (dis)similarity of multiple applications must not only be ascertained in light of their subject matter but also on the basis of the parties involved. As the Committee has repeatedly found, the words ‘the same matter’ under Article 5(2)(a) of the OP refer to ‘one and the same claim concerning the same individual, as submitted by that individual, or by some other person empowered to act on his behalf, to the other international body’.\(^19\) The general position of the ECtHR is not different,\(^20\) although individual judges have been critical of this.\(^21\)

Concretely, this means that two (groups of) individuals having together suffered the exact same violation under the exact same circumstances are not precluded from filing separate petitions, one of them before the HRC, the other one before the ECtHR. This has proved to sometimes happen in practice.\(^22\) In the *Leirvåg & Others v Norway* case,\(^23\) for instance, the Committee was seized by a group of parents who disputed the introduction in the Norwegian education programme of a new mandatory religious course. Other applicants had already initiated a parallel action in Strasbourg. Before Norwegian

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\(^17\) Ibid.


\(^20\) *Folgerø & Others v Norway* Application No 15472/02, Admissibility, 14 February 2006.

\(^21\) *Folgerø & Others v Norway* Application No 15472/02, Merits and Just Satisfaction, 26 June 2007, Separate Opinion of Judges Zupančič and Borrego Borrego: ‘In this case, according to the interpretation given by the majority, international litispendence ceases to exist when different individuals of the original group of applicants decide to separate in two groups to submit the same matter before different international organs. Nevertheless, the risk of contradictory decisions, in which international litispendence has its origin, does exist. This is an example of what the Convention and the Optional Protocol tried to avoid. Unfortunately, their subsequent interpretation by the competent international organs has deprived them of their original sense.’

\(^22\) See, for example, *Fanali v Italy*, supra n 19 at para 7.2.

courts, the matter had been litigated as a single case and all parents had been represented by the same lawyer. These circumstances did not lead the Committee—nor, for that matter, the ECtHR in the parallel case—\(^2^4\)—to divert from its well-established case law:

That the authors’ claims were joined with the claims of another set of individuals before the domestic courts does not obviate or change the interpretation of the Optional Protocol. The authors have demonstrated that they are individuals distinct from those of the three sets of parents that filed a complaint with the EC[t]HR. The authors in the present communication chose not to submit their cases to the EC[t]HR. The Committee, therefore, considers that it is not precluded under article 5, paragraph 2 a), of the Optional Protocol from considering the communication.\(^2^5\)

In the same vein, the strict parties-identity requirement also means that two (groups of) individuals connected to the same claim are unquestionably not precluded from filing separate, individual petitions before one same organ (this would even be generally recommended: although grouped petitions may in theory be submitted to both the Court\(^2^6\) and the Committee,\(^2^7\) they appear to be rather uncommon in practice and should only be envisaged with caution).\(^2^8\) It may be expected that any separate petitions related to a same factual context will be joined by the Court\(^2^9\) or by the Committee.\(^3^0\) Admissibility, however, would surely not be refused merely on the ground that such parallel applications have initially been submitted individually.

These strict principles should also apply when a prior petition has been submitted by a legal person, a non-governmental organization or a State: the latter should not normally make an ulterior individual claim by a private person inadmissible, as the parties would, in such a scenario, be different.

In the Sayadi & Vinck v Belgium case, for example, the authors complained that their assets had been frozen by Belgium pursuant to the UN-led anti-terrorism sanction regime. They submitted a communication to the HRC, at a time when a petition for delisting had already been presented by the Belgian State to the UN Sanctions Committee. As this parallel action had not been initiated by the authors themselves, the Committee considered their communication admissible.\(^3^1\)

\(^2^4\) Folgerø & Others v Norway, supra n 20.
\(^2^6\) See the Practice direction issued by the President of the ECtHR in accordance with Rule 32 of the Rules of Court on 1 November 2003, as amended on 22 September 2008, 24 June 2009, 6 November 2013 and 5 October 2015, supplementing Rules 45 and 47, at paras 14–16.
\(^2^7\) See, in particular, as far as the ECtHR is concerned, Rule 47, para 5.1 of the Rules of Court, as newly entered into force on 1 August 2018 (making it clear that '[f]ailure to comply with the requirements set out in paragraphs 1 to 3 of this Rule [which are only designed for individual petitions and do not shed much light on how grouped applications should be presented] will result in the application not being examined by the Court').
\(^2^9\) See Article 43 Rules of Court.
\(^3^0\) See Rule 94(2) Rules of Procedure.
The Admissibility of Multiple Human Rights Complaints

Strasbourg practice has generally led to similar conclusions. In the Illiu & Others v Belgium case, for instance, the Court considered that, as a prior petition to the UN Working Group on Arbitrary Detention had not been submitted by the applicants themselves, but by a non-governmental organization, it did not render the applicants’ subsequent action in Strasbourg inadmissible. Yet, it should be noted that the ECtHR has occasionally favoured a stricter approach. In the POA and Others v United Kingdom case, specifically, the Court declared an individual application inadmissible based on the fact that it was ‘virtually identical’ to collective proceedings that had been previously triggered by a trade union before the Committee on Freedom of Association of the International Labour Organization. The Court considered that individual applicants had to be seen as ‘closely associated’ with these prior, collective proceedings and that, therefore, a subsequent individual application in Strasbourg was inadmissible under Article 35(2)(b) of the Convention.

3. Inadmissibility of Multiple Complaints: Scope Ratione Temporis

A. Inadmissibility of Successive versus Parallel Complaints

The scope ratione temporis of the ban on multiple human rights complaints is where Strasbourg and Geneva’s ways go apart in the most distinctive manner. While under Article 35(2)(b) of the ECHR the Court’s assessment on (in)admissibility is to be made on grounds of any ‘matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement’, Article 5(2)(a) of the OP only calls on the Committee to verify that an identical application ‘is not being examined’. This is a major difference in the admissibility regime of the HRC, in comparison not only with that of the ECHR but also with those of most other international human rights instruments.

In Strasbourg, therefore, human rights petitions that are being or that have been litigated internationally are excluded. The Court clarifies that this exclusion applies in a strict manner, regardless of the respective introduction dates of parallel complaints, the key objective being to ‘avoid a plurality of international proceedings relating to the same cases’, a situation which would be ‘incompatible with the spirit and the letter of the Convention’.

By contrast, before the HRC, only strictly concurrent international applications will justify inadmissibility. Successive petitions, on the other hand, are not precluded: a complaint will not normally be declared inadmissible by the Committee if it has already been litigated internationally in the past but where that first international action has come to an end.

32 Application No 14301/08, Admissibility, 19 May 2009.
34 Ibid. at para 30.
36 See Peraldi v France Application No 2096/05, Admissibility, 7 April 2009; Savda v Turkey Application No 42730/05, Merits and Just Satisfaction, 12 June 2012, at para 66; Uça v Turkey Application No 73489/12, Admissibility, 30 September 2014, at para 40.
As to when exactly prior international proceedings—for instance, before the ECtHR—should be considered as having come to an end, the Committee seems to have developed a rather strict position, to the effect that a final judgment (for example, in the meaning of Article 44 of the ECHR) is not sufficient, but that any ongoing enforcement proceedings of such final judgment shall also be taken into consideration. The Paksas v Lithuania case illustrates this approach. The ECtHR had previously found a breach of the author’s right to stand in parliamentary elections. Yet, in practice, Lithuania resisted complying with the Court’s judgment. Mr Paksas therefore filed a further communication with the HRC. Because non-compliance with the original Strasbourg judgment was being addressed by the Committee of Ministers of the Council of Europe pursuant to the ECHR enforcement procedure under Article 46 of the Convention, the Committee considered the communication inadmissible:

The Committee notes that, according to article 46, paragraph 2, of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the execution of final judgements of the European Court of Human Rights is supervised by the Committee of Ministers of the Council of Ministers [sic], and considers that this matter is currently being actively examined under another procedure of international investigation or settlement. Accordingly, the Committee considers that ‘...’ the communication ‘...’ is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, in the present circumstances. 38

It should be clarified that the admissibility of multiple international complaints under Article 5(2)(a) of the OP normally extends to the specific possibility of successive communications to the Committee itself. Therefore, as a matter of principle, nothing should prevent the Committee from rehearing a human rights claim that it has already addressed in the past. Practitioners should however be cautious that, although in very rare cases,39 the Committee has sometimes found such repetitive communications to be an ‘abuse of the right of submission’ under Article 3 of the OP. 40

Furthermore, although such a scenario may be somewhat theoretical, as a matter of principle it is indifferent for the purpose of Article 5(2)(a) of the OP that the earlier international petition has been successful or unsuccessful: nothing seems to prevent the HRC from also addressing matters for which another international body has already found a violation. 41 Thus, to put it clearly, a State may well be declared in breach of international human rights law twice. In that specific scenario of an individual whose rights have already been acknowledged as violated by another international organ, the question may still be raised whether the HRC could be tempted to see in any new petition ‘an abuse of the right of submission’ under Article 3 of the OP. To date and to the extent of our knowledge, the Committee has never adopted such a position.

38 Paksas v Lithuania, supra n 14 at para 7.2.
39 Hennebel and Tigroudja, supra n 2 at 532.
41 See, for example, Wright v Jamaica (349/1989), Views, CCPR/C/45/D/349/1989, 18 August 1992, at paras 2.8 and 5.2.
This is to be welcomed. Where persons have successfully asserted their rights before an international body but the violation has not ceased or been remedied in practice, nothing should prevent them from taking their claim internationally again by seizing the Committee. If, on the other hand, the initial breach of their rights has been fully remedied subsequent to a first action before another human rights mechanism, the Committee could legitimately declare the subsequent communication inadmissible for lack of victim status (Article 1 of the OP).

Finally, practice shows that the Committee does not immediately or automatically declare a communication inadmissible when parallel proceedings are pending before another human rights mechanism. Rather, the Committee normally invites the author to withdraw his or her application to the concurrent body, which, if it is done, leads to a decision of admissibility by the Committee. Furthermore, even where the Committee decides that an application is inadmissible on this specific ground, authors are still entitled to reactivate their communication at a later stage, when the procedure before the concurrent international body has come to an end. Article 5(2)(a) of the OP has therefore been rightly described as ‘a mere suspensive barrier to admissibility’.

In short, the restrictive scope ratione temporis of Article 5(2)(a) of the OP certainly has great potential for practitioners: from the perspective of admissibility, it makes it possible—to take one obvious example—to first file a petition in Strasbourg and then, should the ECtHR turn down the request, to subsequently refer the exact same case to the Committee, thus taking advantage of what has been referred to as ‘a de facto appeal under the International Covenant’. One concrete and recent example of this has been provided earlier, in relation to the French ban on wearing a niqab in public.

The practical significance of this litigation option is further accentuated by the absence of any strictly defined time limit under the OP in order to refer a case to the Committee, which is also in sharp contrast with the six-month requirement in Strasbourg (running from the final decision in the process of exhaustion of domestic remedies). This is not to say that submitting a late communication to the Committee should not be approached with caution: depending on the specific circumstances of each case, the Committee may well consider there to be ‘an abuse of the right of submission’ justifying inadmissibility under Article 3 of the OP. Rule 96(c) of the Rules of Procedure of the Committee offers certain general guidelines in this respect, with specific reference to the case of successive petitions:

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44 See Rule 94(2) Rules of Procedure.
45 Nowak, supra n 42 at 695.
47 Yaker v France and Hebbedj v France, supra n 3.
49 Article 35(1) of the ECHR. It should be noted that this time limit will be replaced by an even stricter four-month limit when Protocol No 15 enters into force: see Article 4 of Protocol No 15 amending the ECHR 2013, ETS 213.
An abuse of the right of submission is not, in principle, a basis of a decision of inadmissibility \textit{ratisone temporis} on grounds of delay in submission. However, a communication may constitute an abuse of the right of submission when it is submitted . . . after 3 years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay taking into account all the circumstances of the communication.

\textbf{B. Reservations to Article 5(2)(a) of the Optional Protocol: Inadmissibility of Both Parallel and Successive Complaints}

Many States fear the potential of Article 5(2)(a) of the OP. A number of States have therefore made specific reservations upon ratification or accession, for the purpose of ruling out the possibility for the Committee to consider applications previously dealt with (and closed) by other human rights bodies. This includes most European States: Austria, Croatia, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, Malta, Norway, Moldova, Romania, Slovenia, Spain, Sweden and Poland.\footnote{See the relevant page of the UN Treaty Collection, available at: treaties.un.org [last accessed 8 August 2019].}

In practice, most of these reservations seek to model the Committee’s procedural regime on the forum-duplication rule as it exists under Article 35(2)(b) of the ECHR. The reservation made by France, for instance, which is similar to that of most other European States, reads as follows:

France makes a reservation to article 5, paragraph 2(a), specifying that the Human Rights Committee shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement.

The Austrian reservation, which may be singled out, exclusively provides for inadmissibility of petitions to the Committee where the case has first been adjudicated by the European Commission on Human Rights (which, as logically confirmed by the HRC,\footnote{Althammer \textit{et al.} v Austria, supra n 14 at para 8.3; \textit{Mahabir v Austria} (944/2000), Admissibility, CCPR/C/82/D/944/2000, 26 October 2004, at para 8.3.} must today also be understood as including the ECtHR):

the Committee . . . shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Thus, the Austrian reservation does leave open the possibility for individuals to submit to the HRC a matter against Austria, which has already been dealt with by any international body other than the ECtHR, for example, the United Nations Committee against Torture.
In several cases, the HRC has had the occasion to address these reservations and to declare them valid. This practice has been codified in General Comment No 24:

Reservations have been entered which effectively add an additional ground of inadmissibility under article 5, paragraph 2, by precluding examination of a communication when the same matter has already been examined by another comparable procedure. Insofar as the most basic obligation has been to secure independent third party review of the human rights of individuals, the Committee has, where the legal right and the subject matter are identical under the Covenant and under another international instrument, viewed such a reservation as not violating the object and purpose of the first Optional Protocol. 52

Be that as it may, several States—mostly but not exclusively non-European—have not made any reservations with respect to Article 5(2)(a) of the OP. This includes, for example, Belgium, Finland, Greece, the Netherlands, Portugal and Serbia. In relation to these States, the Committee should not declare inadmissible a complaint that has already been subject to prior international action, where such action has come to an end. 53

C. The Limited Significance of Reservationsto Article 5(2)(a) of the Optional Protocol in the Practice of the Committee

Even where States have made specific reservations for the purpose of ruling out successive international human rights proceedings, the Committee has developed a very restrictive interpretation of such reservations. 54 In other words, even in the presence of a specific reservation, the practice of the Committee still contributes to making the admissibility regime under the OP much more flexible than in Strasbourg. This is due to two main jurisprudential developments in particular.

First, the Committee has adopted a strict interpretation of whether a matter has already been ‘examined’ by another human rights body (in the meaning of Article 5(2)(a) of the OP, but more importantly in the meaning of traditional State reservations to this provision). 55 In Strasbourg, a strict electa una via applies: unless the Court is convinced that ‘relevant new information’ exists under Article 35(2)(b) of the Con-
The Admissibility of Multiple Human Rights Complaints

The mere submission of an earlier petition will normally lead to a decision of inadmissibility.\(^56\) The only exception seems to be where such an earlier petition has been withdrawn at an early stage by the applicant, before having been formally registered by the competent international body.\(^57\) The Committee, on the other hand, is willing to receive and address communications in relation to matters that have already been presented to another human rights mechanism but that have led to a declaration of inadmissibility ‘for purely procedural reasons’\(^59\) or, in other words, for reasons that do not comprise a certain consideration of the merits of the case\(^60\), not even implicitly\(^61\) or in a limited manner.\(^62\)

In practice, this has been found to apply to findings by the ECtHR that the six-month limit under Article 35(1) of the Convention has elapsed,\(^63\) that there exists a concurrent international human rights claim,\(^64\) that domestic remedies have not been exhausted\(^65\) or that the application is inadmissible ratione temporis for being related to a period when the Convention had not yet entered into force vis-à-vis the respondent State.\(^66\) One can only expect the same to apply in connection with prior petitions that would be declared inadmissible by the ECtHR for falling outside the scope of the Convention ratione materiae, ratione loci or ratione personae, for being anonymous or for revealing an abuse of the right to submit a petition,\(^67\) as these are all presented as procedural grounds for inadmissibility in the Strasbourg context.\(^68\)

On the contrary, findings of admissibility by the Committee would traditionally not extend to instances where the concurrent international body has examined the merits of

\(^{56}\) This would be so, for example, where domestic remedies have been duly exhausted after an initial inadmissibility decision on this ground in Strasbourg: see ECtHR, A.D. v Netherlands Application No 21962/93, Admissibility, 11 January 1994.

\(^{57}\) See, for example, Illiu & Others v Belgium, supra n 32; Smirnova v Russia Applications Nos 46133/99 and 48183/99, Admissibility, 3 October 2002. See, however, suggesting (mistakenly?) that what matters is the existence of a concurrent decision at the time when the Court examines the application in Strasbourg, Peraldi v France, supra n 36 (repeated in Savda v Turkey, supra n 36 at para 66; and Uça v Turkey, supra n 36 at para 40).

\(^{58}\) See Sürmeli v Germany Application No 75529/01, Admissibility, 29 April 2004.


\(^{61}\) See Widowiak v Poland, supra n 59 at para 6.2. To the extent of our knowledge, this notion that inadmissibility decisions may be implicitly related to the substance of the case is isolated in the practice of the Committee.

\(^{62}\) See Hebbad v France, supra n 3 at para 6.4; Mahabir v Austria, supra n 51 at para 8.3. See also Aarrass v Spain (2008/2010), Views, CCPR/C/111/D/2008/2010, 30 September 2004, at para 9.3 (referring to ‘some degree of consideration of the substance of the case’).


\(^{64}\) See, for example, Pauger v Austria, supra n 60 at para 6.4.

\(^{65}\) See, for example, Bertelli Galvez v Spain (1389/2005), Admissibility, CCPR/C/84/D/1389/2005, 25 July 2005, at para 4.3; Widowiak v Poland, supra n 59 at para 6.2.


\(^{67}\) Also of this view, see Nowak, supra n 42 at 702.

\(^{68}\) See the Council of Europe, European Court of Human Rights, Practical Guide on Admissibility Criteria (updated on 30 April 2019).
the case, even in a very limited or preliminary manner, for example, in the context of the ECHR, by declaring a matter inadmissible for being ‘manifestly ill-founded’ in the meaning of Article 35(3) of the ECHR, or for not revealing ‘a significant disadvantage’ under the same provision.

It is interesting to observe, nonetheless, that in its recent practice the Committee seems to have shown some (further) flexibility with respect to these ‘substance-related’ grounds for inadmissibility. Presented with cases that had already been declared inadmissible in Strasbourg for being manifestly ill-founded, but in the absence of any actual substantive explanation by the ECtHR, the Committee has sometimes proceeded with an examination of the merits of communications. In the *Achabal Puertas v Spain* case, the Committee considered that the ‘limited reasoning contained in the succinct terms of the Court’s letter does not allow the Committee to assume that the examination included sufficient consideration of the merits’ and, accordingly, declared the communication admissible. This line of reasoning had already been suggested — though in less obvious terms — in the *Aarraass v Spain* case. This evolution seems to suggest that, today, a very limited or preliminary examination of the merits by another international body may not suffice anymore to consider that the same matter has already been ‘examined’ elsewhere.

In a more general fashion, it is well known that the ECtHR tends to be somewhat elusive when it comes to inadmissibility findings. Until recently at least (the ECtHR now seems to have developed a somewhat more meaningful communication in this respect), Strasbourg applicants whose case did not pass the admissibility bar were merely informed that the Court had decided so ‘in light of the requirements under articles 34 and 35 of the European Convention on Human Rights’ (among other comparable wordings). As this makes it impossible to elucidate the nature of the grounds for admissibility that have actually been applied by the Court, whether purely procedural or substance-related, when confronted to such generic letters of inadmissibility by the ECtHR, the HRC has consistently considered subsequent communications relating to the same facts as admissible.

In short, the Committee has adopted a very restrictive understanding (that is, an interpretation that is favourable to authors of communications) of whether a matter has already been ‘examined’ in the meaning of reservations to Article 5(2)(a) of the OP.

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71 See, indirectly suggesting this solution, *Kollar v Austria*, supra n 60 at para 8.4.


73 *Aarraass v Spain*, supra n 62 at para 9.4.


76 Phuong, supra n 10 at 390.
Secondly, and even more significantly, the Committee has developed a doctrine to the effect that it will address claims that have already been submitted to another international body (and that have led to an actual consideration of the merits) where the ICCPR provides ‘greater protection’ with respect to the specific rights involved. This well-established practice of the Committee certainly is an extraordinary avenue for procedural flexibility in relation to the admissibility of communications.

One clear example of this approach developed by the Committee relates to Article 10 of the Covenant, a provision specifically concerned with conditions of detention. No direct equivalent can be found in the ECHR. For this reason, the Committee has suggested that petitions based on this specific provision may be declared admissible even when an earlier application has already been dealt with by the ECtHR with respect to the same facts and author.\(^77\) The Committee has developed a similar reasoning with respect to the right of access to public office other than the legislature, based on Article 25(b) and (c) of the ICCPR.\(^78\)

Another well-established example of this approach concerns the principle of equality and non-discrimination. As it is enshrined in Article 26 of the ICCPR, non-discrimination is a free-standing right, while Article 14 of the ECHR may only be invoked in connection with other rights protected in the Convention. In light of this difference in nature, in factual circumstances where non-discrimination could not have been invoked in relation to other rights,\(^79\) the HRC has considered the ICCPR to provide ‘greater protection’ and has repeatedly found communications admissible even when the same matter had already been submitted to the ECtHR:

The Committee on earlier occasions has already decided that the independent right to equality and non-discrimination embedded in article 26 of the Covenant provides a greater protection than the accessory right to non-discrimination contained in article 14 of the European Convention. The Committee has taken note of the decision taken by the European Court on 12 January 2001 rejecting the authors’ application as inadmissible . . . in the absence of an independent claim under the Convention or its Protocols, the Court could not have examined whether the authors’ accessory rights under article 14 of the Convention had been breached. In the circumstances of the present case, therefore, the Committee concludes that the question whether or not the authors’ rights to equality before the law and non-discrimination have been violated under article 26 of the Covenant is not the same matter that was before the European Court.\(^80\)

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\(^77\) *Mahabir v Austria*, supra n 51 at para 8.5.

\(^78\) *Paksas v Lithuania*, supra n 14 at para 7.3.


\(^80\) *Althammer et al v Austria*, supra n 14 at para 8.4. See, similarly, *Karakurt v Austria*, supra n 15 at para 5.4; *Petersen v Germany* (1115/2002), Admissibility, CCPR/C/80/D/1115/2002, 1 April 2004, at para 6.7; *Mahabir v Austria*, supra n 51 at para 8.5. Faced with the exact same question in the reverse situation, European organs have, on their side, considered that parallel discrimination-based petitions in Strasbourg and Geneva related to ‘the same matter’ and justified inadmissibility: see, for example, ECtHR, *Pauger v Austria* Application No 24872/94, Admissibility, 9 January 1995.
Beyond Covenant rights that do not have an immediate equivalent in the ECHR or in other concurrent treaties (be it that they are simply absent from those instruments or that their scope is conceived in a clearly different manner), the question of the limits of this ‘greater protection’ doctrine certainly arises. Would the Committee go as far as to systematically review the interpretations and substantive practice of other international human rights bodies? In *Rogl v Germany*, the Committee seems to have consolidated a somewhat more careful approach. It clarified that ‘the mere fact that the wording of the provisions vary is not enough, of itself, to conclude that an issue now raised under a Covenant right has not been “considered” by another human rights body.’

The Committee further observed that a ‘material difference in the applicable provisions . . . must be demonstrated.’ In other cases, the Committee decided that the rights invoked must ‘differ in substance’ to justify admissibility despite prior consideration by another human rights body. What constitutes a ‘material’ or a ‘substantive’ difference in protection certainly remains up for debate.

In practice, when comparing with equivalent ECHR rights, the Committee has found no such ‘material difference’ to exist with respect to the freedom of association under Article 22(1) of the Covenant, the prohibition of slavery and forced labour under Article 8 of the Covenant, the right to respect for private and family life under Article 17 of the Covenant or the right to be informed of the reasons for arrest under Article 9(2) of the Covenant.

The same has usually been found concerning the right to a fair trial under Article 14 of the ICCPR. In the *Kollar* case, for instance, the ECtHR had already dismissed the applicant’s arguments based on the fact that the breach of fairness that he had allegedly suffered in the context of disciplinary proceedings instituted by his former employer was not attributable to a body exercising public power. The Committee, to which the author subsequently referred the matter, found the communication to be inadmissible in the following terms:

Despite certain differences in the interpretation of article 6, paragraph 1, of the European Convention and article 14, paragraph 1, of the Covenant by the competent organs, both the content and scope of these provisions largely converge. In the light of the great similarities between the two provisions, and on the basis of the State party’s reservation, the Committee considers itself precluded from reviewing a finding of the European Court on the applicability of article 6,

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82 Ibid.
84 *Rogl v Germany*, supra n 81 at para 9.4.
85 *Althammer et al. v Austria*, supra n 14 at para 8.3; *Mahabir v Austria*, supra n 51 at para 8.5.
86 *Althammer et al. v Austria*, ibid. at para 8.3; *Mahabir v Austria*, ibid. at para 8.5; *Rogl v Germany*, supra n 81 at para 9.4.
87 *Aarrass v Spain*, supra n 62 at para 9.5.
88 See, for example, *Aarrass v Spain*, ibid. at para 9.6; *Rogl v Germany*, supra n 81 at para 9.4.
89 See *Kollar v Austria*, supra n 60 at para 2.9.
paragraph 1, of the European Convention by substituting its jurisprudence under article 14, paragraph 1, of the Covenant. 90

In other cases, however, the Committee adopted the very opposite position. In Lederbauer v Austria, for instance, the author was a civil servant who argued that his suspension and dismissal from office following disciplinary proceedings had violated his right to a fair trial. He had first seized the ECtHR, which, in accordance with its well-established case law at that time, 91 had considered that this matter fell outside the scope of ‘civil rights and obligations’ in the meaning of Article 6 of the ECHR. The Committee considered Mr Lederbauer’s communication admissible regardless:

The Committee observes that, despite a considerable degree of convergence between article 6 of the Convention and article 14, paragraph 1, of the Covenant, the scope of application of both articles, as developed in the jurisprudence of the Court and the Committee, differs with respect to proceedings before judicial bodies entrusted with the task of deciding on the imposition of disciplinary measures. . . . It follows that the [existence of a previous action before the ECtHR] does not bar the Committee from examining the author’s claims under article 14, paragraph 1. 92

This position, however, has been harshly criticized by a Member of the Committee who wrote in her dissenting opinion:

It is certainly ambitious to say that a ‘matter’ is not covered by the reservation simply because the Committee prefers to take a different view of the merits, in contrast to the European Court. . . . The accession of States parties to the optional protocol of the International Covenant on Civil and Political Rights is not irreversible, and some caution in the exercise of our jurisdiction may be more faithful to the purpose of the reservation. 93

Be that as it may, Lederbauer v Austria was not unprecedented. A similar approach had already been favoured in Casanovas v France. In that case, the Committee had also considered a communication admissible—though the same facts had already been submitted to the ECtHR—after observing differences in the scope of application of the right to a fair trial under the ICCPR and under the ECHR, respectively. 94

The Aarrass v Spain case is another example of this tendency, in connection with yet another substantive right. In that case, the Committee found, with few developments

90 Ibid. at para 8.6.
91 See especially Pellegrin v France Application No 28541/95, Merits and Just Satisfaction, 8 December 1999 [Grand Chamber], at paras 68–71. The Court has since then changed its approach: see Vilho Eskelinen and Others v Finland Application 63235/00, Merits and Just Satisfaction, 19 April 2007 [Grand Chamber], at paras 50–62.
92 Lederbauer v Austria, supra n 83 at para 7.2 (references omitted).
93 Ibid. at dissenting opinion of Committee Member Ruth Wedgwood, para 6.2 (references omitted).
and pursuant to a sensibly less demanding standard (which does not appear to have been reiterated since then), that the right to an effective remedy under Article 2(3) of the ICCPR was ‘not fully congruent with the provisions of the European Convention on Human Rights’.

4. Inadmissibility of Multiple Complaints: Scope Ratione Fori

With respect to those precise mechanisms with which the ECtHR or the HRC may not be seized concurrently, the ECHR refers to ‘the Court or . . . another procedure of international investigation or settlement’. By contrast, the OP merely reads ‘another procedure of international investigation or settlement’.

The practical implication of the difference in wording between the two instruments is that successive petitions to the Committee are not excluded per se. In other words, as has already been clarified above, the same matter may normally be referred to the Committee more than once, although this has occasionally been considered an ‘abuse of the right of submission’ under Article 3 of the OP. Although the possibility for recurrent petitions before the Committee in the same case may seem somewhat peculiar—especially as, theoretically, this opens the door to endless litigation in Geneva with respect to one and the same case—it is but the logical consequence of the admissibility in Geneva of multiple complaints more generally. To put it clearly, if the HRC is given the opportunity to be presented with cases already decided—for example—by the ECtHR, it would seem inconsistent for it not to also be empowered to ‘review’ its own decisions.

For the rest, the concrete practice of the ECtHR and of the HRC is to a large extent—though not entirely—comparable as regards what should qualify as ‘another procedure of international investigation or settlement’.

The Committee considers that only prior petitions before other judicial or quasi-judicial organs will trigger the inadmissibility bar. This would include individual petitions to the European Court (and historically Commission) of Human Rights, to the Inter-American Commission of Human Rights, to the African Commission or Court of Human and Peoples’ Rights or to other UN treaty bodies.

On the other hand, complaints to bodies entrusted with a more general mission to address global human rights issues—as opposed to individual petitions—will not prevent the HRC from further dealing with a complaint. In the Blancov case, for instance, the arbitrary detention of the author in Nicaragua had been denounced by a series of human rights bodies. Yet, upon submission of an individual communication, the Committee unsurprisingly found that

95 Aarrass v Spain, supra n 62 at para 9.5.
96 See above at section 3.
99 See Akwanga v Cameroon, supra n 19 at para 6.2.
100 See Zwart, supra n 10 at 175; Hennebel, supra n 54 at 391; Joseph, supra n 74 at 72; Tyagi, The UN Human Rights Committee: Practice and Procedure (2011) at 467.
The general investigation, by regional and intergovernmental human rights organizations, of situations affecting a number of individuals, including the author of a communication under the Optional Protocol, does not constitute the "same matter" within the meaning of article 5, paragraph 2(a). 

Thus, general studies by, or procedures within, intergovernmental organizations should not affect the admissibility of individual petitions.

Also unable to make a communication to the Committee inadmissible are concurrent actions before special rapporteurs or working groups within the United Nations Human Rights Council, as well as the complaint procedure before the same organ (the former 'resolution 1503 procedure' before the Human Rights Commission). The same applies to State reporting procedures before UN treaty bodies.

In short, a complaint to the HRC will be declared admissible despite any pending or previous extra-conventional procedure established within the former Commission on Human Rights or the current Human Rights Council of the UN.

Admissibility decisions have similarly been found in relation to a complaint procedure before the Asian Development Bank, proceedings before the Committee on Freedom of Association of the International Labour Organization, representations before the Inter-Parliamentary Union and an extra-conventional complaint with UNESCO. In the Sayadi & Vinck v Belgium case, by contrast, the Committee left unanswered the question whether a UN Sanctions Committee constituted ‘another procedure of international investigation or settlement’ within the meaning of the OP.

The practice of the ECtHR on this aspect has proved somewhat more restrictive. When ‘ascertaining whether the nature of the [concurrent] supervisory body, the procedure it follows and the effect of its decisions are such that the Court’s jurisdiction is excluded’, the Court has not always reached similar solutions as the Committee. Major differences—which should be carefully kept in mind by potential applicants in

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106 See, for example, Djebrouni v Algeria, supra n 103 at para 7.2; Boudjema v Algeria (2283/2013), Views, CCPR/C/121/D/2283/2013, 30 October 2017, at para 7.2.


111 Supra n 31 at para 7.3.

112 See Hennebel and Tigroudja, supra n 2 at S23 (observing ‘une interprétation très large’ by the ECtHR of what ‘another procedure of international investigation or settlement’ is).

113 OAO Nefnyanaya Kompaniya Yukos v Russia, supra n 37 at para S22.
order to avoid jeopardizing too quickly the possibility of a referral to the ECtHR—
include ECtHR decisions to the effect that prior action before the Committee on
Freedom of Association of the International Labour Organization,114 or before the UN
Working Group on Arbitrary Detention,115 will lead to inadmissibility in Strasbourg.

On the other hand, the Court has agreed with the Committee that the ‘resolution
1503 procedure’ of the former UN Human Rights Commission should not be under-
stood as ‘another procedure of international investigation or settlement’,116 nor should
proceedings before the UN Working Group on Enforced or Involuntary Disappear-
ances117 or before the UN Special Rapporteur on the promotion and protection of the
right to freedom of opinion and expression.118

It seems to us that the Strasbourg position on whether special procedures within the
UN Human Rights Council (that is, thematic or country-specific special rapporteurs
and working groups) should be considered as ‘another procedure of international
investigation or settlement’ under Article 35(2)(b) of the ECHR is not fully consistent.
While the Court has found that prior action before the Working Group on Arbitrary
Detention constituted a bar to admissibility,119 it has decided the opposite regarding
the Working Group on Enforced or Involuntary Disappearances.120 It is true that the
Working Group on Arbitrary Detention is, to date, the only UN special procedure
formally allowing for submission of individual complaints.121 Yet, the exact mandate
and missions of all UN special procedures differ in many respects, to the extent that no
easy comparison or classification seems practical. Thus, the position of the ECtHR is
a source of uncertainty for potential applicants, especially with respect to the numer-
ous other working groups and special rapporteurs that have not (yet) been expressly
considered by the Court for admissibility purposes.

5. Concluding Thoughts

Procedural differences in the admissibility regimes in Strasbourg and in Geneva generally tend to be overlooked, though they may be of great practical significance in human
rights litigation.122

With respect to forum duplication in particular, the ECtHR has adopted a very strict
position, based on the understanding that 'the situation where several international
bodies would be simultaneously dealing with applications which are substantially the
same would be incompatible with the spirit and the letter of the Convention'.123 As

114 POA & Others v United Kingdom, supra n 33 at paras 26–33; Greek Federation of Bank Employee Unions v
Greece Application No 72808/10, Admissibility, 6 December 2011, at para 38.
115 Peraldi v France, supra n 36. See also Illiu & Others v Belgium, supra n 32.
116 Celinku v Greece Application No 21449/04, Merits and Just Satisfaction, 5 July 2007, at para 40.
117 Malsagova & Others v Russia Application No 27244/03, Admissibility, 6 March 2008.
119 Peraldi v France, supra n 36. See also Illiu & Others v Belgium, supra n 32; Savda v Turkey, supra n 36 at para
66; Uça v Turkey, supra n 36 at para 42; Gürdeniz v Turkey Application No 59715/10, Admissibility, 18
120 Malsagova & Others v Russia, supra n 117.
121 See the relevant page of the UN Office of the High Commissioner for Human Rights, available at: www.
ochr.org/EN/Issues/Detention/Pages/Complaints.aspx [last accessed 6 August 2019].
122 See Heffernan, supra n 46 at 80.
123 OAO Neftyanaya Kompaniya Yukos v Russia, supra n 37 at para 520.
has been shown throughout this article, the HRC, on the other hand, has interpreted both Article 5(2)(a) of the OP and State reservations thereto in a flexible manner that is generally favourable to the admissibility of parallel or successive petitions. Historically, this permissive approach may be due to the rather late creation of the Committee and, as a result, to the necessity for it to affirm itself rapidly as a central mechanism in an already competitive global human rights system.

While some have sought to nuance this view, the possibility for multiple human rights complaints on the same matter has usually been seen as a threat to the unity and consistency of substantive human rights jurisprudence. Uncontestably, forum duplication may lead to several human rights bodies adopting different—or even plainly contradictory—views on a similar issue. In the Correia de Matos case, for instance, the author had not been allowed to conduct his defence in person in the criminal proceedings against him. The Committee found that Portugal had breached the author’s right to a fair trial under Article 14(3)(c) of the ICCPR, although the ECtHR had previously reached the exact opposite conclusion in connection with the same matter, and in light of (the identically worded) Article 6(3)(c) of the ECHR.

On a different level, forum duplication may certainly be further questioned in the context of the debate on the proliferation and alleged inefficiency of the general human rights landscape. It is true that, as it is understood in Geneva, theoretically Article 5(2)(a) of the OP opens the door to endless litigation with respect to one and the same case. This is despite the fact that, as Tomuschat puts it, ‘[l]egal protection by international bodies is a scarce resource’. And yet, in a more general, victim-orientated perspective, the possibility for multiple human rights complaints certainly is of great potential. For this reason, human rights practitioners and petitioners should surely not overlook the significant differences in approach between the HRC and the ECtHR on this issue.

124 McGoldrick, The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights (1994) at 187; Nowak, supra n 42 at 698; Phuong, supra n 10 at 386.
125 Zwart, supra n 10 at 173.
126 Helfer, supra n 1 at 398 (maintaining that ‘[t]he value of forum shopping, and successive petition forum shopping in particular, lies in reducing the chances of ... inadvertent divergences and conflicts by providing jurists with a structured setting in which to communicate with each other about common legal questions’).
127 See, for example, Ghandhi, ‘The Human Rights Committee and the Right of Individual Communication’ (1986) 57 British Yearbook of International Law 201 at 230 (noting that any subsequent complaint in Geneva would weaken the initial decision adopted in Strasbourg, ‘especially if the Committee disagree[s] with the European institutions and come[s] to the conclusion that a breach or breaches of rights covered in both instruments ha[ve] occurred’).
128 Carlos Correia de Matos v Portugal, supra n 53.
129 Carlos Correia de Matos v Portugal Application No 48188/99, Admissibility, 15 November 2001. See, commenting on this judicial disagreement, Walker, ‘International Human Rights Law: Towards Pluralism or Harmony? The Opportunities and Challenges of Coexistence: The View from the UN Treaty Bodies’ in Buckley, Donald and Leach (eds), Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems (2017) 493 at 504–5. It is interesting to note that, in yet another case filed in Strasbourg by the same applicant (in relation to a subsequent set of events), the Grand Chamber of the ECtHR has recently reiterated its view that denial of the possibility to conduct one’s own defence is not necessarily a breach of the right to a fair trial: see Carlos Correia de Matos v Portugal Application No 56402/12, Merits and Just Satisfaction, 4 April 2018 [Grand Chamber]. Fragmentation between Geneva and Strasbourg therefore persists on this issue.
130 Tomuschat, Human Rights: Between Idealism and Realism, 3rd edn (2014) at 258.
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