***The Center for International Business & Human Rights***

***The University of Oklahoma College of Law***

February 20, 2019

Dear UN Human Rights Committee:

Thank you for the opportunity to submit comments on draft General Comment 37 (GC 37). Please find attached my Just Securityblog *(The Use of Regional Jurisprudence in UN Draft General Comment on the Freedom of Assembly)*, which provides recommendations on draft GC 37.

I would also like to take this opportunity to thank alumni and students who are involved with the University of Oklahoma College of Law’s Center for International Business & Human Rights and helped to shape our Center’s views with research and discussions involving draft GC 37, including Jason Bollinger, Brooke Hamilton, Jason Hubert, Madalyn Martin, Jenny Puckett, Hannah White, Shae Weathersbee, and Rebeca West.

Best wishes for your important work,

Evelyn Aswad

Director, Center for International Business & Human Rights

Herman G. Kaiser Chair in International Law

University of Oklahoma College of Law

Norman, OK

**The Use of Regional Jurisprudence in UN Draft General Comment on the Freedom of Assembly**

By [Evelyn Aswad](https://www.justsecurity.org/author/aswadevelyn/)

(Published on Feb. 7, 2019 on *Just Security* blog as part of its [*mini-forum*](https://www.justsecurity.org/tag/freedom-of-assembly/)*on Draft General Comment 37)*

My reflection on the UN Human Rights Committee’s [Draft General Comment No. 37](https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx) (GC 37), which covers freedom of assembly under the International Covenant on Civil and Political Rights (ICCPR), focuses on one topic: the significant use of citations to regional human rights mechanisms. The work of the UN’s Human Rights Committee and special procedures of the United Nations is of critical importance. I write this reflection in the spirit of promoting the UN human rights machinery’s important role as it seeks to champion broad international human rights protections for all.

**A Recent Break with Decades of Precedent**

From 1981-2014, the Human Rights Committee adopted [35 General Comments](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11) without citing to regional human rights mechanisms or jurisprudence. It cited to such regional sources for the first time in its 2018 [General Comment No. 36 on the right to life](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f36&Lang=en). Draft GC 37 continues the Committee’s new approach by citing to 51 sources drawn from regional human rights mechanisms. Indeed, about 28% of the footnotes (i.e., 42 out of 151 footnotes) contain regional sources. Of the footnotes that contain regional citations, about 83% include either European Court of Human Rights (ECtHR) decisions or guidance from the Organization for Security and Cooperation in Europe (OSCE), with the former making up most of those sources.

**The *United Nations* Human Rights System v. *Regional* Human Rights Systems**

The Committee’s recent shift in citing to regional sources in its interpretations of the ICCPR matters for a variety of reasons. To begin with, it is risky to tether ICCPR interpretations to regional human rights jurisprudence/mechanisms that may provide fewer protections than the ICCPR, particularly for the inextricably linked fundamental freedoms of expression, religion, and assembly. Reliance on favorable regional interpretations could have the unintended consequence of paving the way for unfavorable regional interpretations of these freedoms (and other rights) to eventually migrate into the UN human rights machinery’s view of the ICCPR.

The scope of these three fundamental freedoms differs significantly in the UN system and regional systems, including the ECtHR. As noted by the UN Special Rapporteur on freedom of opinion and expression (the “Special Rapporteur”) in [his 2019 report to the General Assembly (¶¶ 26-27)](https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf), ECtHR jurisprudence is less protective of freedom of expression than the UN system. He notes, for example, that the ECtHR condones criminal blasphemy bans and atrocity denial laws whereas the UN system does not.

In addition, the Special Rapporteur highlights that the ECtHR deems highly offensive speech an “abuse” of the right to speak and therefore outside of the protection of the European Convention on Human Rights, which has been called a [“guillotine” approach](https://rm.coe.int/16800c170f). The UN system, on the other hand, does not treat highly offensive speech as unprotected. Rather, the UN machinery analyzes whether all speech restrictions meet ICCPR Article 19’s tripartite test of (1) legality (e.g., is the ban improperly vague?), (2) necessity (i.e., is the restriction, *inter alia,* the least intrusive means?), and (3) legitimacy (is the restriction imposed for a legitimate public interest purpose?), as set forth in [General Comment 34 (¶¶50-52](https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf)) and the [Special Rapporteur’s recent report (¶¶13, 16](https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf)).

Similarly, the UN system affords freedom of religion more protection than does the ECHR system, as highlighted by [the Human Rights Committee’s disagreement with the ECtHR’s approach to restrictions on religious dress](https://www.ejiltalk.org/the-un-human-rights-committee-disagrees-with-the-european-court-of-human-rights-again-the-right-to-manifest-religion-by-wearing-a-burqa/). The ECtHR also has approved of restrictions on the freedom of assembly, including the complete [dissolution](https://hudoc.echr.coe.int/eng#{"itemid":["001-122183"]}) of a group that promoted racist views, on the basis of reasoning that likely would not have met the UN machinery’s tripartite test.

The risk of unfavorable regional norms migrating into (and narrowing) the UN machinery’s view of ICCPR protections is not only foreseeable, but already evident in the Committee’s draft. For example, Draft GC 37 states at ¶ 57 that assemblies that fall within the scope of ICCPR Article 20’s prohibitions on war propaganda or advocacy of national, racial, or religious hatred that constitutes incitement to particular harms must be banned. It only mentions in a footnote that any such bans must meet the tripartite test of legality, necessity and legitimacy. This treatment of the tripartite test as an after-thought, rather than a rigorous precondition for banning expression, departs from views of the Committee and the Special Rapporteur and leans more toward the ECtHR’s approach to offensive speech.

What’s more, the draft heightens the risk of collapsing ICCPR and regional norms and creating confusion when it says (in paragraph 3) that the ICCPR’s protection for freedom of assembly is “articulated in similar general terms in other *international*, including *regional*, instruments. The content of the right has been elaborated upon by *international* bodies” (emphasis added), which the footnote defines as encompassing regional sources that include the [Arab Charter on Human Rights](http://hrlibrary.umn.edu/instree/loas2005.html). While the Arab Charter has a similar provision to the ICCPR’s article on freedom of assembly, it contains other provisions that risk narrowing assembly rights significantly, including that men and women are equal “within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments” (Art. 3, ¶3), that freedom of expression may only be “exercised in conformity with the fundamental values of society” (Art. 32, ¶2), and that political participation rights are subject to limitations not found in the ICCPR (Art. 24, ¶¶1-4, 7).

Indeed, the UN system (in which all UN member states can participate) and the various regional systems (which are developed by and open to only particular groupings of states) focus on different treaties or other instruments and have different monitoring mechanisms that do not consistently interpret human rights in the same way. By using language that seems to lump the UN and regional mechanisms into one “international” system, Draft GC 37 risks exacerbating existing (and misguided) critiques that the UN’s human rights system is unworkable because of numerous conflicting interpretations between UN bodies and regional human rights machinery, an argument which I have refuted [elsewhere](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3478888).

Citing to regional jurisprudence in general comments also risks giving momentum to the increasing propensity of countries to improperly use regional human rights machinery as a shield against findings of ICCPR violations. For example, when the Special Rapporteur advised Germany that its [NetzDG law did not comply with the ICCPR protections for freedom of expression](https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-DEU-1-2017.pdf), Germany defended itself [by citing to ECtHR jurisprudence](https://www.ohchr.org/Documents/Issues/Opinion/Legislation/Reply_Germany21Oct2016.pdf) that was more permissive of speech restrictions than the UN system. As noted by [the Special Rapporteur (¶ 26](https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf)), “[r]egional human rights norms cannot … be invoked to justify departure from international human rights protections.”

Finally, this novel practice of citing to regional norms in general comments risks adversely affecting the impact and stature of the Human Rights Committee itself in the long run. Ironically, if the Committee’s intention in citing to regional norms is to attract more countries into supporting the Committee’s views, it may unfortunately have the opposite effect. How will the majority of ICCPR State Parties who are not parties to the European Convention on Human Rights or members of the OSCE react to the fact that the vast majority of the regional citations are from these two Europe-focused bodies? Will they wonder if general comments have become a way to import European norms into UN human rights treaties? Is it fair for a particular region with abundant human rights jurisprudence to disproportionately influence interpretations by the UN’s human rights machinery?

Might other western countries, such as the United States—which has often disagreed with the ECtHR’s decisions on the freedoms of religion, expression, and assembly—invoke the Committee’s new practice as a reason to (further) distance themselves from general comments? Will questions arise about why Draft GC 37 does not include citations to other regional human rights instruments, such as [ASEAN’s Declaration on Human Rights](https://asean.org/asean-human-rights-declaration/), which itself was criticized by the Obama Administration [for departing from UN human rights standards](https://2009-2017.state.gov/r/pa/prs/ps/2012/11/200915.htm)? These are all important concerns that bear careful consideration.

**Ways Forward**

If the objective of citing to regional instruments and jurisprudence in general comments is to bring more countries into the ICCPR tent, this goal is better achieved by a number of best practices already reflected in the Committee’s work, including its [diverse membership](https://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx), its transparency measures such as making its deliberations on Draft GC 37 available for viewing on the UN website, and its request for the views of stakeholders around the world in [preparing](https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC37.aspx) and [finalizing](https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx) GC 37.

What’s more, it is unnecessary to cite to regional sources to justify many of the conclusions in Draft GC 37. For example, a significant number of footnotes contain citations to both UN sources and regional jurisprudence as support for particular conclusions. In such cases, the regional citations may be superfluous and the Committee should consider dropping them, given the risks outlined above.

Also, the Committee should seek out additional UN sources that could render even more regional citations unnecessary. For example, footnote 25 of Draft GC 37 cites to two ECtHR decisions for the proposition that governments should protect protesters from interference by non-state actors. If the Committee’s prior work—as set forth in concluding observations, decisions on individual complaints, and general comments—does not provide a sufficient basis for such a conclusion, the Committee could turn to other entities within the UN’s human rights machinery as potential sources before resorting to citing regional norms. In the case of footnote 25, for instance, the UN Special Rapporteur on freedom of assembly has already observed that members of assemblies should be protected from non-state actor interference in his [2012 report to the Human Rights Council (¶ 33)](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf).

**Conclusion**

In sum, cherry picking favorable regional interpretations of human rights requirements to cite to in the footnotes of general comments risks facilitating the migration of unfavorable regional norms into the UN system, as well as alienating many ICCPR State Parties by privileging the jurisprudence of certain regional mechanisms over others. The Committee should avoid citing to regional jurisprudence unless is it absolutely necessary to do so. While it may certainly be useful for the Committee to follow and discuss human rights developments at the regional level, the new practice of relying on regional citations in general comments has more disadvantages than benefits.