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Public prosecutors and the right to personal liberty: An analysis of the jurisprudence of the UN Human Rights Committee and the European Court of Human Rights

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Abstract
This article discusses the approach of the United Nations Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) to interpreting and applying the right to personal liberty, in particular in relation to the judicial control of the deprivation of liberty. It appears that both institutions adopt an interpretative approach that aligns with the object and purpose of the right. However, in the application to individual cases, unlike the ECtHR, the HRC fails to clarify the scope of the relevant provision of the ICCPR, specifically, the independence and impartiality of the public prosecutor as 'an other officer authorised by law to exercise judicial power'. That situation may ultimately undermine a more effective attainment of the object and purpose of the right to personal liberty. The article argues for the HRC to adopt a more systematic approach to interpreting and applying that right in particular and the provisions of the ICCPR in general.

Keywords
Right to personal liberty, public prosecutors, officer authorised by law, independence, impartiality, Article 9(3) ICCPR, Article 5(3) ECHR

1. INTRODUCTION

This article discusses the approach of the United Nations Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) in interpreting and applying the right to personal liberty,

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in particular in relation to judicial control of detention by a judge or 'an other officer authorised by law' pursuant to Article 9(3) of the International Covenant on Civil and Political Rights (ICCPR) and Article 5(3) of the European Convention on Human Rights (ECHR) respectively. These provisions permit judicial control of deprivation of liberty by a judge or any other officer authorised by the domestic law of contracting States, to exercise judicial power. There is a considerable body of scholarly research on the right to personal liberty,[1] but what is often overlooked in these studies is the scope of the institutional requirement for judicial control of the deprivation of liberty. That requirement assumes significance in particular in civil law-oriented jurisdictions where under domestic law, both judges and prosecutors may be institutionally competent to exercise judicial control. With the advent of the European Public Prosecutor's Office in the prosecution of crimes affecting the EU's financial interests, there is a renewed focus on the competence of domestic public prosecutors in judicial control of arrest and detention, particularly with regard to their independence and impartiality.[2] This renewed focus is important not only for European Union budget-related crimes, but also for the right to personal liberty as guaranteed under international and regional human rights law. The HRC and ECtHR have often been called upon to decide on the competence of the prosecutor as 'an other officer authorised to exercise judicial power' taking into account their independence and impartiality. This article analyses their response to that question and in so doing expands on knowledge of the right to personal liberty in relation to the requirements for the independence of public prosecutors.

The article applies the general rules of treaty interpretation as outlined in the Vienna Convention on the Law of Treaties 1969 (VCLT)[3] as an analytical framework to assess the interpretative approach adopted by the HRC and the ECtHR in interpreting Article 9(3) ICCPR and Article 5(3) ECHR respectively. It finds that both institutions, in applying the object and purpose approach to interpretation, have arrived at an identical understanding of the concept of 'an other officer authorised by law to exercise judicial power'. However, in the application to individual cases, unlike the ECtHR, the HRC fails to systematically analyse the specific nature of the prosecutor's independence. Moreover, both institutions demonstrate a variance in the way that they outline the two dimensions of prosecutorial independence. The HRC takes the view that the prosecutor must be objectively independent from the executive hierarchy in order to be considered as 'an other officer authorised by law' to exercise judicial power. Nevertheless, this is done with insufficient analysis and unsatisfactory justification for its decisions. In addition, it decides on the subjective independence of the prosecutor without outlining in specific terms the basis of that determination. In contrast, the ECtHR conducts a more systematic analysis of the specific nature of the prosecutor's independence and outlines more clearly the substantive requirements for both the subjective and objective independence of the prosecutor. As a result of the discrepancy in

1. Andrew Ashworth, 'Negotiating the Fundamental Right to Personal Liberty: Four Problem Cases: F.W. Guest Memorial Lecture 14 March 2012' (2013–2014) 13 *Otago Law Review* 1; Laura-Stella Enonchong, 'Mental Disability and the Right to Personal Liberty in Africa' (2017) 21(9) *The International Journal of Human Rights* 1355; Claire Macken, *Counter-Terrorism and the Detention of Suspected Terrorists: Preventive Detention and International Law* (Routledge 2011) 39–67; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd ed, Oxford University Press 2013) 303–340; Claire Macken, 'Preventive Detention and the Right of Personal Liberty and Security under the International Covenant on Civil and Political Rights, 1966' (2005) 26(1) *Adelaide Law Review* 1.
2. European Public Prosecutor's Office, <https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office_en> accessed 15 November 2021.
3. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (entered into force January 27 1980).

their approach, the HRC has failed to clarify the scope of Article 9(3) ICCPR, a situation which may ultimately undermine a more effective attainment of the object and purpose of that provision. Although the HRC is not obliged to follow the approach of the ECtHR, it is argued that the HRC should justify its approach in greater detail, in the interest of the universality of human rights, the need to enhance the legitimacy of its decisions and the need to provide States with clearer guidance on their obligations under Article 9(3) ICCPR.

These arguments are developed further in the sections that follow. Section 2 discusses the general rules of treaty interpretation pursuant to Articles 31–33 of the VCLT to provide a framework for analysing the interpretative approach of the HRC and the ECtHR. Section 3 offers a brief exploration of key concepts related to the prosecutor, namely impartiality and the subjective and objective dimensions of independence. It then provides an analysis of the interpretation of the right to personal liberty, focusing on Article 9(3) ICCPR and Article 5(3) ECHR. This is followed by Section 4, which discusses the subjective and objective independence of the prosecutor as manifested in the jurisprudence of the HRC and the ECtHR. In Section 5, the article advances an argument in support of the HRC's adoption of a more systematic approach to interpreting and applying Article 9(3) in particular and the provisions of the ICCPR in general.

2. TREATY INTERPRETATION ACCORDING TO THE VCLT

2.1. The general rules

The general rules of interpretation of international law are contained in Articles 31–33 of the VCLT.[4] The crux of interpretation is laid out in Article 31(1), which identifies the ordinary meaning of the text as a basic starting point, to be considered taking into account the context and the object and the purpose of the treaty.[5] The context as per Article 31(2) is comprised of the text, its preamble, and annexes and agreements relating to the treaty made by one or more parties and accepted by the other parties as an instrument related to the treaty. In addition, subsequent agreements made in relation to the treaty's application, subsequent practice, and any relevant rules of international law applicable in the parties' relations shall be considered together with the context.[6] Other features such as preparatory documents (*travaux préparatoires)* are assigned a supplementary role.[7]

Unlike the context which has been clearly outlined, the VCLT does not elucidate on the meaning of 'object and purpose'. Nevertheless, a treaty's object and purpose, broadly speaking,

4. Despite their general nature, they apply to specialised treaties such as human rights treaties. Julian Arato, 'Accounting for Difference in Treaty Interpretation Over Time' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds) *Interpretation in International Law* (Oxford University Press 2015) 205–209. See also Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012) 50.
5. Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42(1) *Vanderbilt Journal of Transnational Law* 905, 911.
6. VCLT, Article 31(3). For an exploration of subsequent practice and the evolutive approach, see generally Julian Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and their Diverse Consequences' (2010) 9(1) *The Law and Practice of International Courts and Tribunals* 443.
7. Although *travaux préparatoires* have become more significant in treaty interpretation. See Martin Ris, 'Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties' (1991) 14(1) *Boston College International and Comparative Law Quarterly* 111; Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 109.

may be summarised as the 'essential goals' of the treaty, the very 'essence' of its existence.[8] The interpretation of a treaty in the 'light of its object and purpose' is arguably an overriding goal of interpretation, to give effect to the intended aims and objectives of the parties at the time of its conclusion. Interpretation which is guided by the object and purpose of a treaty has a particular relevance for human rights treaties, to ensure that the goals of the treaty are achieved and that States respect their obligations to provide effective protection of human rights. An interpretation which reflects as closely as possible the overarching objective of protecting human rights has an additional benefit of elucidating on State responsibility in respect of the human rights concerned, thereby contributing to its effectiveness as explored below.

2.2. Interpretation and effectiveness

The principle of effective interpretation is important to treaty interpretation by, inter alia, ensuring that treaties have their proper effect.[9] The principle is not explicitly stated in the VCLT, but it is implicit in Article 31(1). As effectiveness cannot be assessed in a vacuum, the principle entails an assessment of treaty obligations that are 'embodied in the text, in light of the object and purpose' of the treaty.[10] This suggests that an interpretation that prevents the attainment of a treaty's objective is contrary to the principle of effectiveness. By extension, effectiveness entails reading a treaty provision so as to create positive obligations on the State where such obligations would result in achieving the purpose of the instrument or the specific provision in question. With respect to human rights treaties, the overarching object and purpose from a generalist perspective is the protection of individual rights,[11] as confirmed by the ECtHR in relation to the ECHR[12] and the HRC in relation to the ICCPR.[13] Interpretation in that respect requires that human rights treaty provisions are interpreted in a manner sufficiently favourable to the effective protection of the rights that they guarantee.[14]

In addition, State obligations arising from such interpretation should be geared at attaining the best possibilities for protecting the rights that they guarantee rather than an approach which renders such obligations illusory. An important way of facilitating this is by ensuring clarity and justification for decisions taken by treaty bodies that assume a pivotal role in treaty interpretation. That can be achieved through a more systematic analysis of the provisions that they interpret, taking into account the context or specific institutional dynamics through which provisions are applied. The decisions of treaty bodies make significant incursions into State sovereignty and although by ratifying international treaties, States accept to be bound by these obligations, they are still keen to guard their sovereignty.

8. David Jonas and Thomas Saunders, 'The Object and Purpose of a Treaty: Three Interpretive Methods' (2010) 43(3) *Vanderbilt Journal of Transnational Law* 565, 567.
9. Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 393.
10. ibid 394.
11. Mechlem (n 5) 912.
12. *Ireland v the United Kingdom* App no. 5310/71, (ECtHR, 18 January 1978), para 239; *Soering v The United Kingdom* App no. 14038/88 (ECtHR, 7 July 1989), para 87.
13. United Nations Human Rights Committee, General Comment No. 24(52) para 17.2 *IHRR* (1995) 10.
14. Mechlem (n 5) 912.

In the following section, the article discusses Article 9(3) ICCPR and Article 5(3) ECtHR respectively. It explores the extent to which their approach reflects the object and purpose of the right to personal liberty. Through an analysis of their jurisprudence, it will demonstrate that despite their common interpretative approach, there is significant discrepancy in the extent to which they clarify the scope of the prosecutor as 'an other officer authorised by law to exercise judicial power'. To do so more effectively, the section first provides a definition of the key concepts of impartiality and independence as they relate to the role of the prosecutor.

3. THE RIGHT TO PERSONAL LIBERTY UNDER THE ICCPR AND ECHR

3.1. Impartiality and independence: A conceptual exploration

It is not uncommon for scholars to discuss judicial independence and impartiality in the same context as though they were synonymous concepts.[15] Although they may be related, they are distinct concepts which together aim to safeguard the objectivity and fairness of judicial proceedings. That explains why in the judicial control of the right to personal liberty, it is important for the prosecutor to possess those qualities.

Impartiality denotes the absence of prejudice or bias in adjudication.[16] The HRC has stated that impartiality 'implies that judges must not harbour any preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties'.[17] Impartiality is said to have both an objective and a subjective dimension.[18] This has been elaborated in the jurisprudence of the ECtHR, where an assessment of impartiality takes into account the personal conviction of the particular judge (subjective test) and whether the tribunal and its composition or other aspects offered sufficient guarantees to exclude any doubts as to impartiality (objective test).[19]

The other concept, independence, is difficult to define, and there are various dimensions and subprinciples associated with it.[20] Nevertheless, a basic understanding of the concept refers to a judge's ability to exercise autonomy in decision making. For the purpose of better outlining the features of independence as used in this article and with reference to the public prosecutor, the concept can be understood to have an external and an internal dimension.[21] External independence is usually

15. See generally, Diego Papayannis, 'Independence, Impartiality and Neutrality in Legal Adjudication' (2016) 28(1) *Journal of Constitutional Theory and Philosophy of Law* 1.
16. *Morice v France* App no.29369/10 (ECtHR [GC], 14 April 2015), para 73. See also Papayannis (n 15) 1.
17. *Karttunen v Finland*, Communication No. 387/1989 (HRC, 5 November 1992), UN Doc. CCPR/C/46/D/387/1989, para 7.2.
18. Leandro Mancano, 'You'll Never Work Alone: A Systemic Assessment of the European Arrest Warrant and Judicial Independence' (2021) 58(3) *Common Market Review* 683, 699.
19. *De Cubber v Belgium* App no. 9186/80 (ECtHR, 26 October 1984), para 26; *Morice v France* (n 16), para 76. See also Mancano (n 18) 699.
20. Mancano (n 18) 713. For instance, the institutional and individual dimensions of judicial independence. See Laura-Stella Enonchong, 'Judicial Independence and Accountability in Cameroon: Balancing a Tenuous Relationship' (2012) 5(3) *African Journal of Legal Studies* 313.
21. The internal and external dimensions of independence are understood in a similar way with reference to prosecutors. See Consultative Council of European Prosecutors (CCPE), 'Opinion No 13(2018) on the Independence, Accountability and Ethics of Prosecutors' 23 November 2018, para 31 & 34.

understood in terms of the separation of powers doctrine,[22] implying that this dimension of independence is concerned with external pressures or interference from external institutions, in particular the executive or the legislature.[23] In this article, I refer to this dimension as the objective dimension of independence.

Internal independence, on the other hand, relates to pressure from within (the judiciary[24] or the prosecution service as the case may be).[25] In this sense, independence is concerned with the ability of a judge or prosecutor to act autonomously in discharging their duties without interference or pressure from amongst their colleagues, for instance from a hierarchical superior. The internal dimension of independence is linked to impartiality from the perspective of an objective appearance of independence.[26] For instance, the absence of sufficient safeguards to guarantee independence from colleagues (for example, a hierarchical superior) may raise objective doubts as to impartiality.[27] In the context of public prosecutors, this is a bit more complex when the institutional arrangement of prosecution services in some continental jurisdictions (such as France and Switzerland) is considered. In such systems, it is not unusual for public prosecutors to receive instructions from their hierarchical superiors.[28] The view of the Consultative Council of European Prosecutors on this issue is instructive. It notes that a hierarchical structure is common, but the relationship between the different layers of authority must be governed by transparent lines of authority, accountability, and responsibilities in order to inspire public confidence, and that checks and balances must exist.[29] This implies at least that *specific* instructions must not be given to a prosecutor in a particular case, as this would undermine their independence and impartiality.[30] A further connection between impartiality and internal independence can be gleaned from potential internal functional arrangements. For instance, where a judge appears subsequently in the same proceedings in which they previously acted as a prosecutor or an investigator during pre-trial proceedings, this puts the objective appearance of their independence (impartiality) to doubt, as it would be unrealistic to presume that the judge is free of bias.[31] In this article, I refer to the internal dimension as subjective independence.

22. This applies to both judges and prosecutors.
23. For prosecutors, see CCPE, 'Opinion No 13 (2018)' (n 21), paras 31 & 34. For the judiciary, see Stephen Burbank, 'The Architecture of Judicial Independence' (1999) 72 *Southern California Law Review* 315, 336; Joost Sillen, 'The Concept of Internal Judicial Independence in the Case Law of the European Court of Human Rights' (2019) 15(1) *European Constitutional Law Review* 104, 105.
24. Sillen, (n 23) 104; Mancano (n 18) 699. This dimension is expressed in Section 1.4 of the Bangalore Principles of Judicial Conduct (ECOSOC 2006/23). See also *Agrokompleks v Ukraine* App no. 23465/03 (ECtHR, 6 October 2011), where internal judicial independence was compromised due to the President of the Higher Arbitration Court giving specific directions to his deputies to reconsider the ruling in a case.
25. CCPE, 'Opinion No 13 (2018)' (n 21) paras 31, 7, 39.
26. Mancano (n 18) 698.
27. *Parlov-Tkalčić v Croatia* App no. 24810/06 (ECtHR, 22 December 2009).
28. See for instance Mancano (n 18) 713.
29. CCPE: 'Opinion No. 9(2014) on European Norms and Principles Concerning Prosecutors (the Rome Charter)' 17 December 2014, paras 40 & 41.
30. CCPE, 'Opinion No 13 (2018)', (n 21) paras 39 -43. A prosecutor is not compelled to comply with, and should be able to appeal such instructions – paras 42 & 43. See also, 'The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutor's Guide' (2014) p. 8 para 2.1.
31. *De Cubber* (n 19); *Piersack v Belgium,* Application No. 8692/79 (1982) ECHR 6.

3.2. Overview of the right to personal liberty

The right to personal liberty in essence deals with the lawfulness of any deprivation of liberty. The freedom from deprivation of liberty is not absolute, but the right ensures that individuals are protected from arbitrary arrest and detention. The right is protected in several international and regional human rights instruments.[32] Article 9 ICCPR and Article 5 ECHR seek to protect that right by imposing both substantive and procedural guarantees. Both instruments begin with the recognition that everyone is entitled to their personal liberty and they reinforce the fundamental principle of legality, stating that any deprivation of liberty must be on grounds established by law and in accordance with a procedure established by law.[33] Given that the right is not absolute and can be restricted under certain circumstances, both instruments go further to provide procedural standards intended to pre-empt arbitrariness. Thus, anyone who has been arrested must be informed promptly, in the language that they understand, of the reasons for their arrest and, in the case of arrests in connection with criminal charges, to be informed promptly of any charges against them.[34] Further, anyone arrested or detained must be brought promptly before a judge or judicial officer and shall be entitled to trial within a reasonable time or to release pending trial (bail).[35] That element is the subject of the present contribution and shall be revisited below. In addition, anyone deprived of their liberty shall be entitled to take proceedings before a court, to determine the lawfulness of their detention (habeas corpus),[36] and shall have an enforceable right to compensation where their right to personal liberty has been violated.[37]

3.3. Article 9(3) ICCPR, Article 5(3) ECHR, and 'an other officer authorised by law'

Article 9(3) ICCPR and Article 5(3) ECHR deal with the requirement to present promptly a person deprived of their liberty before an authority exercising judicial power in order that a decision on their remand should be taken. A contentious issue has often hinged on the nature of the competent authority to exercise judicial control due to the choice implicitly accorded to States in that respect. In some civil law-oriented jurisdictions where prosecutors are authorised to exercise certain judicial powers, such as powers to remand suspects in custody, this has often raised questions regarding the State's compliance with the relevant provisions under the ICCPR and ECHR where applicable. In the light of the centrality of these provisions to the discussion, a reproduction of the relevant passages is deemed necessary.

Art 9(3) ICCPR provides that:

> Anyone arrested or detained on a criminal charge shall be brought promptly before *a judge or other officer authorised by law to exercise judicial power* and shall be entitled to trial within a reasonable time or to release.

32. Universal Declaration of Human Rights, (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Article 9; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58, Article 6; American Convention on Human Rights, Article 7; Convention on the Rights of Persons with Disabilities, GA Res 61/106, UN Doc A/RES/61/ 106, Article14.
33. ICCPR, Article 9(1) and ECHR, Article 5(1). The ECHR, Article 5 (1) goes further to state what the permissible grounds are in subsections a-f.
34. ICCPR, Article 9(2) and ECHR, Article 5(2).
35. ICCPR, Article 9(3) and ECHR, Article 5(3).
36. ICCPR, Article 9(4) and ECHR, Article 5(4).
37. ICCPR, Article 9(5) and ECHR, Article 5(5).

Article 5(3) ECHR:

> Everyone arrested or detained in accordance with the provisions of paragraph 1 (c)[38] of this Article shall be brought promptly before *a judge or other officer authorised by law to exercise judicial power* and shall be entitled to trial within a reasonable time or to release pending trial.

The language of both provisions indicates that the State has been accorded discretion to appoint two categories of persons competent to exercise judicial control of the deprivation of liberty. This implicitly recognises the diversity that exists within States in terms of the institutional arrangements for guaranteeing the right to liberty. First, there is mention of a 'judge' which presupposes a judicial officer. Second, the provisions include an 'other officer authorised by law to exercise judicial power'. It is clear that these categories of persons are not identical although they are envisioned to exercise a similar function with respect to personal liberty.[39] The ECtHR affirms that 'the "officer" is not identical with the "judge" but must nevertheless have some of the latter's attributes, that is to say they must satisfy certain conditions each of which constitutes a guarantee for the person arrested'.[40]

The purpose of bringing an arrested or detained person promptly before a judge or other officer authorised by law is to ensure judicial control of the deprivation of liberty to prevent arbitrariness or unlawfulness. Accordingly, the judge or other officer must be in a position to make the decision as to whether or not a suspect should be remanded in custody. Besides possessing the authority to decide on remand, a key consideration is that of independence. The judge or officer should possess the qualities of independence and impartiality. The question of the independence of the 'other officer' remains a contentious issue particularly in European continental jurisdictions, where public prosecutors exercise wide competences including making decisions on remand.[41] In some of these jurisdictions, the prosecution forms part of the executive, and prosecutors can also be career judges thereby being considered part of the judiciary.[42] In some cases, they may intervene in a criminal matter both as investigating authority and prosecuting authority, in which case their independence and impartiality would be subject to doubt. This presents a problem in terms of compliance with Article 9(3) ICCPR or Article 5(3) ECHR on the basis that as 'an other officer authorised by law to exercise

38. Paragraph 1(c) relates to arrest or detention on criminal charges.
39. *Schiesser v Switzerland* App no. 7710/76 (ECtHR, 4 December 1979), para 27.
40. ibid para 31.
41. Hans de Doelder, 'The Public Prosecution Service in the Netherlands' (2000) 8(3) *European Journal of Criminal Law and Criminal Justice* 187; Jacqueline Hodgson, 'Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice' in Erik Luna and Marianne Wade (eds), *The Prosecutor in Transnational Perspectives* (Oxford University Press 2012) 122; Barbara Huber, 'The Office of the State Prosecutor in Europe: An Overview' (1992) 63(3) *Revue Internationale de Droit Pénal* 557; Antoinette Perrodet, 'The Public Prosecutor' in Mireille Delmas-Marty and John Spencer (eds), *European Criminal Procedure* (Cambridge University Press 2002) 415, 426, 429.
42. In respect of the prosecution service in France, Sweden and the Netherlands see, P. Verrest, 'The French Public Prosecution Service' (2000) 8(3) *European Journal of Criminal Law and Criminal Justice* 210, 223–224; Akila Taleb and Thomas Ahlstrand, 'The Public Prosecutor, Its Role, Duties and Powers in the Pre-trial Stage of the Criminal Justice Process – A Comparative Study of the French and Swedish Legal Systems' (2011) 82(3) *Revue Internationale de Droit Pénal* 523.

judicial power', a prosecutor must necessarily be independent and impartial.[43] How have the HRC and the ECtHR approached this issue?

3.4. The Human Rights Committee and Article 9(3) ICCPR

The HRC was presented with the opportunity to respond to that issue in *Kulomin v Hungary*,[44] where the complainant was arrested by the Hungarian police and charged with murder. He was initially remanded in custody by the police and subsequently on the orders of the public prosecutor. Further renewals of his pre-trial detention were authorised by the public prosecutor, although it is not clear from the facts of the case that it was always the same prosecutor. After spending over a year in detention, the complainant was eventually tried. In the complaint to the HRC, no specific provisions of the ICCPR were invoked, but the HRC determined that the complaint raised, inter alia, issues under Article 9 ICCPR. On the question of whether Article 9(3) was breached because the 'other officer authorised by law' was a public prosecutor, the State argued in the negative. In its defence, the State advanced the argument that the provision was understood to mean that the 'other officer authorised by law' referred to 'officers with the same independence towards the executive as the Courts'.[45] In Hungary, at the time of the arrest and detention, the Chief Public Prosecutor was elected by and responsible to parliament. All other prosecutors were subordinate to and answerable to the Chief Prosecutor and not the executive. There was no institutional link between the prosecutor's office and the executive. In that regard, according to the State, prosecutors such as the one who authorised Kulomin's detention fell within the meaning of other authorised officers envisaged in Article 9(3) ICCPR.

In determining Hungary's compliance with Article 9(3), the HRC commenced by referring to the object and purpose of the provision, which was to 'bring the detention of a person charged with a criminal offense under judicial control',[46] to prevent their arbitrary detention. To achieve the object and purpose, the officer authorised by law needed to possess the same level of independence as a judge who would typically exercise such a duty. In doing so, the HRC affirms that two categories of authorities are permitted to supervise judicial control of detention. The HRC took the view that the public prosecutor in that case lacked the institutional objectivity and impartiality necessary to be considered an officer authorised by law to exercise judicial power within the meaning of Article 9(3). It stated:

> 'The Committee considers that, it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. In the circumstances of the instant case, the Committee is not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an 'officer authorised to exercise judicial power' within the meaning of article 9(3).'[47]

43. This requirement does not negate the need for accountability, which in this context is partly fulfilled by the requirement for review under article 9(4) ICCPR and article 5(4) ECHR. See for instance Giuseppe Di Federico, 'L'indépendance du Ministère Public et le Principe de la Responsabilité en Italie: l'analyse d'un cas déviant d'un point de vue comparé' (1998) 38(1) *Droit et Société* 71.
44. *Kulomin v Hungary,* Communication No. 521/1992 (HRC, 6 May 1992), U.N. Doc. CCPR/C/50/D/521/1992 (1996).
45. ibid para 10.4.
46. ibid para 11.2.
47. ibid para 11.3.

The Committee did not examine the details of the organisational structure of the public prosecuting authority and the nature of its allegiance to different institutions such as the executive or the legislature. It did not comment on the structure described earlier by the State. The decision failed to clarify the particular circumstances in that case which informed the view that the prosecutor lacked the requisite independence. The decision seems to suggest categorically that the public prosecutor in the Hungarian type of system lacked the independence and impartiality necessary to be considered a competent authority for the purpose of Article 9(3). But what is the justification?[48] It may be that the HRC's decision was influenced more by the objective independence of the prosecutor as opposed to their subjective independence. This position however is difficult to support for at least two reasons. First, it is neither explicitly stated in the decision nor is it implicit in any aspect of the HRC's analysis. Second, the structure described by the State gives no indication of an element of lack of objective independence of the prosecutor and the HRC did not comment on that. On the other hand, the role of the prosecutor in extending the detention order may possibly raise doubts as to their subjective independence in renewing the detention order. This strand of argument is perhaps more plausible particularly if the extension was ordered by the same prosecutor who made the initial order, as this would undermine the appearance of their independence as perceived at the time of the decision making. It would have been helpful for the HRC to address the issue of the institutional arrangements, as well as the nature and role of the prosecutor, to provide clarity on the basis of its decision.

According to an individual opinion expressed by HRC member Nisuke Ando in *Kulomin*, the HRC's reasoning was not sufficiently persuasive as it was unsatisfactory to state 'in the circumstances of the instant case' without going into details about the specific circumstances which demonstrated that the public prosecutor was neither independent nor objective or impartial. After reviewing the details of the Hungarian system, Ando noted that prosecutors in the Hungarian system were granted certain judicial powers and could investigate and prosecute crimes. He further noted that the prosecutor who decides on a request for extension was different from the prosecutor who made the request. He acknowledged however that such a system could be susceptible to excessive pre-trial detention. Nevertheless, it was possible within such a system that the prosecutor's decision on the extension of pre-trial detention could be impartial and objectively justified. Thus, it was, according to him, unacceptable for the HRC to have declared categorically that the prosecutor lacked the institutional objectivity and impartiality to be considered an authorised officer within the meaning of Article 9(3) without clarifying 'the detailed circumstances of the instant case on which it bases its finding'.[49] Undoubtedly, Ando's opinion is an individual opinion with no bearing on the outcome of the case. It nevertheless demonstrates a major flaw in the majority's approach to interpreting the scope of the 'other officer' required under that provision. Moreover, as an individual opinion, it has the potential to help shape future developments and clarification of the law.[50]

48. See in that respect the individual opinion of Committee Member Mr Nisuke Ando in *Kulomin* (n 44).
49. ibid.
50. Ram Prakash Anand, 'The Role of Individual and Dissenting Opinion in International Adjudication' (1965) 14(3) *International and Comparative Law Quarterly* 788, 7931, 801.

The principle established in *Kulomin* is now well entrenched and has been followed in other cases.[51] In *Bondar (on behalf of Ismailov) v Uzbekistan*,[52] the applicant's spouse was arrested by the National Secret Service of Uzbekistan and charged with treason and illegal storage of ammunition. The applicant was subsequently remanded in custody on the orders of the General Prosecutor of the Military Prosecutor's office. The HRC in restating the requirements of Article 9(3), reiterated its approach in *Kulomin* to the effect that it was inherent to the exercise of judicial power that the relevant authority possessed or exhibited the qualities of independence, objectivity, and impartiality in relation to the issues dealt with. It held that in the circumstances of the *Ismailov* case, it was not satisfied that the public prosecutor could be characterised as having the institutional objectivity and impartiality necessary to be considered as an authority envisaged within the meaning of Article 9(3).[53] No further explanation was offered for that reasoning.

A similar approach was adopted in *Platanov v Russian Federation*,[54] where the applicant was arrested on suspicion of murder and detained on the orders of the prosecutor. He was eventually found guilty and handed a custodial sentence of 20 years. The HRC, again with reference to *Kulomin*, noted the object and purpose of Article 9(3) as intended to bring persons charged with a criminal offence under judicial control and that the relevant officer exercising such control should possess the three qualities of independence, objectivity, and impartiality.[55] In the present case, the HRC was not satisfied that the public prosecutor could be characterised as having the institutional objectivity and impartiality to satisfy Article 9(3).[56] This approach was also adopted in *Ashurov v Tajikistan*,[57] where the HRC did not elaborate on the nature of the prosecutor's independence before declaring that it did not comply with Article 9(3).

The jurisprudence of the HRC on Article 9(3) demonstrates a consistent reliance on the approach adopted in *Kulomin*, which accords little deference to individual States' institutional arrangements. The approach has not evolved to assess the particular circumstances of each case that informs the decision on the incompatibility of the domestic system for securing judicial control of arrest or detention. Although the decisions of the HRC consistently reflect the object and purpose of Article 9(3) and the inherently problematic nature of the independence of public prosecutors, it is submitted that such a position is unsatisfactory as it does not sufficiently clarify the substantive requirement of 'an other officer' and therefore provides little practical guidance to States in terms of institutional arrangements that are not in compliance with Article 9(3). In that respect, it may diminish the effectiveness of the provision in terms of its domestic application by State parties.

51. Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (OUP 2013) 857. See for instance, *Zheludkova v Ukraine*, Communication No.726/1996, UN Doc CCPR/C/76/D/726/1996(2002) para 8.3; *Bandajesvsky v Belarus*, Communication No.1100/2002, UN Doc CCPR/C/86/D/1100/2002 (2006) para 10.3.
52. *Ismailov v Uzbekistan,* Communication No. 1769/08 (HRC 16 January 2008), UN Doc CCPR/C/101/D/1769/2008.
53. ibid para 7.3.
54. *Platonov v Russian Federation*, Communication No. 1218/2003 (HRC 27 May 2003), UN Doc CCPR/C/851/D/1218/2003(2003).
55. ibid, para 7.2.
56. ibid para 7.2.
57. *Ashurov v Tajikistan,* Communication No. 1348/2005 (HRC, 20 March 2007), U.N. Doc. CCPR/C/89/D/1348/2005 (2007), para 6.5.

3.5. The European Court of Human Rights and Article 5(3) ECHR

Like the HRC, the ECtHR has examined this issue in a number of cases, beginning with *Schiesser v Switzerland*.[58] In that case, the applicant handed himself to the police after initially fleeing from them. He was brought before the Winterthur District Attorney (DA) who heard him in the absence of a defence counsel and subsequently ordered his remand in custody. There was a strong suspicion that he had committed or had attempted to commit several offences of aggravated theft and that he might abscond or suppress evidence. The applicant unsuccessfully appealed the DA's remand order to the Zurich Public Prosecutor (PP). In the ECtHR, the applicant alleged a breach of Article 5(3) of the ECHR by Switzerland on the ground that the DA could not be regarded as an 'officer authorised by law to exercise judicial power'. He argued that the DA did not provide the necessary guarantee of independence because in certain cases, he acted as a prosecuting authority and he was subordinate to the PP's office and through that office to the Department of Justice and the Government of the Canton of Zurich (local government).

Prior to determining the issue in question, the ECtHR addressed the interpretation of the 'other officer authorised by law' with reference to the object and purpose of Article 5 ECHR. It stated that, read in its context, the ordinary meaning of that expression was in harmony with the object and purpose of Article 5 which was to 'ensure that no one should be arbitrarily disposed of his liberty'. In that regard, Article 5(3) requires that the judge or other officer should have the capacity to decide on the detention of the suspect and must necessarily possess the requisite independence in order to make that decision impartially so as to prevent arbitrary detention. Having reaffirmed that view, it was necessary for the ECtHR to examine the institutional structure of the DA and the prosecuting authority in more detail to determine compliance with Article 5(3). The DA is both a prosecuting authority and an investigating authority in cases before a single judge or a District Court, under the supervision of the Public Prosecutor. The PP in turn is responsible to the Department of Justice and the local government and may be required to submit a report on the conduct of criminal proceedings or to receive specific orders or instructions. In relation to the DA, the PP is authorised to issue directives to him regarding the conduct of investigations. Nevertheless, the DA receives no special orders or instructions from the PP concerning the DA's powers to order remand in custody.

After affirming the judicial nature of the DA's function, the ECtHR noted that the essence of Article 5(3) was to ensure that a competent authority exercising judicial function must necessarily exhibit certain attributes of a judge, 'each of which constitutes a guarantee for the person arrested'.[59] According to the ECtHR, 'the first of such attributes is independence from the executive', which did not imply that the officer 'may not be to some extent subordinate to other judges or officers provided that they themselves enjoy similar independence'.[60] In the present case, the ECtHR noted that the DA intervened exclusively in his capacity as an investigating authority to determine whether the applicant should be remanded in custody and in conducting enquiries with a view to obtaining evidence to charge him or to release him. The DA did not act as a prosecutor; he neither drew up the indictment nor represented the prosecutor at the subsequent trial.[61] In addition, the DA exercised his discretion conferred by law as he received no instructions from the PP, the Department of Justice or the local government in relation to his decision to remand the

58. *Schiesser* (n 39).
59. *Schiesser* (n 39) 31.
60. ibid.
61. ibid para. 34.

applicant in custody.[62] Consequently, '[i]n these conditions, the Court considers that in the present case he [DA] offered guarantees of independence that are sufficient for the purposes of Article 5 para. 3 (art. 5-3).'[63]

This distinction was elucidated in another decision of the ECtHR. In *Huber v Switzerland*,[64] the complainant was brought before the DA for questioning as a witness but was later remanded in custody on the orders of the DA on allegations of providing false evidence. She was subsequently prosecuted on an indictment drawn up by the same DA. The ECtHR held that in this case the DA was not a competent officer authorised by law. It drew a distinction with the earlier decision in *Schiesser* by emphasising that in *Schiesser,* the DA had not been involved in the trial proceedings whereas in *Huber,* the DA had exercised both investigative and prosecutorial functions in the same matter, thus calling into question his impartiality. The ECtHR stated in *H.B. v Switzerland*[65] that in determining the requirement of judicial control of the right to personal liberty, it would be necessary to consider whether the investigating authority/prosecutor would be entitled to intervene in subsequent proceedings on behalf of the prosecuting authority in the same matter.[66] Where that entitlement exists, it puts to doubt the objectivity and independence of the investigator/prosecutor as they would be intervening in the same matter.

It can be gleaned from the above case law analysis that the ECtHR often refers to the object and purpose of Article 5(3) ECHR, whilst determining the scope of the prosecutor's independence. This is taken much further through a systematic analysis of the specific nature of the prosecutor's independence. In that way, the ECtHR provides a clearer indication or justification for determining that a prosecutor did not exhibit the requisite level of independence to comply with Article 5(3) ECHR.

4. OBJECTIVE VERSUS SUBJECTIVE INDEPENDENCE IN THE JURISPRUDENCE OF THE HRC AND THE ECTHR

From the preceding analysis of the jurisprudence of the HRC and the ECtHR, it can be deduced that two dimensions of the prosecutor's independence are important – subjective independence and objective independence.[67] In a number of the cases, objective independence hinged on the hierarchical relationship between the prosecutor and the ministry of justice, a branch of the executive. In contrast, subjective independence hinged on how the prosecutor was perceived in relation to their role in the specific case. Both dimensions of independence are important to achieve the object and purpose of preventing arbitrary deprivation of liberty. The dimensions of independence impact on the prosecutor's ability to be impartial in considering whether a suspect should be remanded in custody. As discussed below, the HRC and ECtHR refer to the two dimensions of independence, although they differ in the extent to which these dimensions are outlined and demarcated.

4.1. The HRC

The HRC views the issue of objective independence in the context of the institutional arrangements relating to the prosecutor. As was noted in *Kulomin* and the other cases discussed, the HRC was

62. ibid para. 35.
63. ibid para 35.
64. *Huber v Switzerland* App no. 12794/87 (ECtHR, 18 February 1997).
65. *H.B. v Switzerland*, App no. 26899/95 (ECtHR, 5 April 2001).
66. ibid paras 55 and 57.
67. Discussed in Section 2 above.

concerned about the position of the prosecutor in relation to the executive. In *Torobekov v Kyrgyzstan*, where the applicant's remand in custody was authorised by the public prosecutor, the HRC focused on the objective independence of the prosecutor in deciding against their suitability to be considered as an other officer authorised to exercise judicial power within the meaning of Article 9(3) ICCPR.[68] Similarly, in *Reshetnikov v Russian Federation,*[69] the HRC was concerned with the objective independence of the prosecutor in holding that the latter's position was incompatible with Article 9(3).

Nevertheless, the decisions also indicate a concern with subjective independence, but unfortunately the HRC does not often elaborate on this. That could be inferred from *Kulomin* as was noted earlier, although more details would have been helpful. A further inference could be drawn from a Concluding Observation on Tajikistan when the HRC raised concerns about the fact that the prosecutor remained responsible for authorising arrests.[70] It stated that the situation 'creates an imbalance in the equality of arms between the accused and the prosecution, as the procurator may have an interest in the detention of those who are to be prosecuted.' From that statement, the HRC seems to be expressing concerns with the subjective appearance of the prosecutor's impartiality which is undermined when the prosecutor may appear to have an interest in detaining the suspect. In such a situation, the object and purpose of Article 9(3) ICCPR would potentially be undermined, as impartiality in determining a suspect's remand in custody amounts to arbitrariness.

Regrettably, this dimension of independence is not clearly articulated in the jurisprudence of the HRC, and it seems that the focus is on the objective independence of the prosecutor. Even in the latter instance, the HRC does not systematically examine the State's institutional arrangements to clearly outline the features of the objective independence which are inimical to the proper exercise of justice within the meaning of Article 9(3) ICCPR. One reason why clarity is important is due to the diversity of institutional arrangements within Member States of the ICCPR. The language of Article 9(3) demonstrates that 'an other officer' is not limited to judges or even prosecutors and may include other officials such as investigating judges, military commanders or liberty and custody (detention) judges.[71] Thus, clarity on how and why an officer does not qualify as a judicial officer under Article 9(3) will assist a State to identify any such deficiencies in its system of judicial control of the deprivation of liberty. This in turn ensures that the aims and objectives of Article 9(3) are met not only in terms of preventing the arbitrary deprivation of liberty, but also in enabling a State to exercise its discretion in authorising other officers to exercise judicial power while complying with Article 9(3) ICCPR.

The need for clarity and the issue of deference to institutional variations within States can be gleaned from the approach of the Court of Justice of the European Union (CJEU) in assessing the independence of public prosecutors in relation to the issuing of European Arrest Warrants (EAW). In this context, the independence and impartiality of the prosecutor is vital in order to be considered as a judicial authority under Article 26 of the Council Framework Decision on the

68. *Torobekov v Kyrgyzstan,* Communication No. 1547/2007 (HRC, 21 November 2011), U.N. Doc. CCPR/C/103/D/1547/2007 (2011), para. 6.2.
69. *Reshetnikov v Russian Federation,* Communication No. 1278/2004 (HRC, 23 March 2009), U.N. Doc. CCPR/C/95/D/1278/2004 (2009), para 8.2.
70. Consideration of Reports Submitted by States Parties Under Article 40 Of the Covenant. Concluding Observations: Tajikistan (CCPR/CO/84/TJK, 2005), para 12.
71. See (n 41) and (n 42).

EAW.[72] The CJEU's approach was demonstrated in an examination of the prosecution services in Germany[73] and Lithuania,[74] where it performed a systematic analysis of the prosecution services in each country, examining closely the nature of the specific arrangements guaranteeing the prosecutor's independence. The CJEU found that the German prosecutor did not exhibit the qualities of independence expected of an issuing authority due to the possibility of the prosecutor receiving *specific* instructions from the executive.[75] In comparison, the Lithuanian public prosecutor was regarded as being capable of acting freely without external influence.[76] As highlighted by Valsamis Mitsilegas, this approach ensured that the CJEU did not 'exclude, in principle, public prosecutors from the concept of judicial authority'.[77] In that way, the CJEU is said to have clarified the substantive requirements for the independence of a judicial authority for the purposes of the EAW with potential impact for organising domestic criminal justice systems.[78]

The HRC's apparent blanket approach to prosecutors exercising judicial power, seems to demonstrate a certain institutional preference and may attract accusations of institutional bias and interference with State sovereignty. This approach risks undermining the effectiveness of the ICCPR by making the provision irrelevant or by fostering claims relating to its illegitimacy. In discounting individual State institutional arrangements without providing specific reasons for doing so, the HRC may cause States to be reluctant to adopt wholesale changes to their systems. Whereas by identifying the specific inadequacies in the institutional arrangements, States might be provided with clearer guidance and may be more willing to address these institutional deficiencies than engaging in a comprehensive overhaul of an institutional approach that is integral to a legal or judicial tradition and system.

4.2. The ECtHR

Unlike the HRC, the jurisprudence of the ECtHR on Article 5(3) ECHR indicates a practice of examining both the objective and subjective appearance of independence, given its significant role in determining compliance with stated provision.[79] In *Nikolova v Bulgaria*, the ECtHR stated that independence implies independence from both the executive and the parties, and that the 'objective' appearance at the time of the detention decision is of primary significance.[80] Thus, where it appears that the 'officer' may intervene on behalf of the prosecuting authority at a subsequent trial, their independence and impartiality will be open to doubt.[81] *Nikolova* concerned an applicant who was arrested on the 24th of October 1995 and brought before an investigator who

72. Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States, 2002/584/JHA, O.J. 2002, L 190/1.
73. Joined Cases C-508/18, OG (Public Prosecutor's Office Lubeck) and C- 82/19 PPU*, PI* (Public Prosecutor's Office of Zwickau) EU:C:2019:456.
74. Case C-509/18 *Minister for Justice and Equality v PF* (Prosecutor General of Lithuania) EU:C: 2019:457.
75. Joined Cases C-508/18, OG and C- 82/19 PPU*, PI* paras, 76–77, 81–83, 88.
76. Case C-509/18 (n 74), para 55.
77. Valsamis Mitsilegas, 'Autonomous Concepts, Diversity Management and Mutual Trust in Europe's Area of Criminal Justice' (2020) 57(1) *Common Market Law Review* 45, 67.
78. ibid, 68–69.
79. Jean Cedras, 'Le Spécificité du Juge d'Instruction Francais au Seins des Procédures Pénales Européennes' (2010) 18(1) *Revue Internationale de Droit Pénal* 233, 239.
80. *Nikolova v Bulgaria,* App no. 31195/96 (Commission Decision, 27 February 1997), para 49.
81. ibid para 49.

had no powers to make a binding decision on her detention. Moreover, the investigator was not procedurally independent from the prosecutor and could act as a prosecutor in any subsequent trial of the applicant in the same matter. The ECtHR held that in those circumstances, the officer could not be regarded as an officer authorised by law to exercise judicial power within the meaning of Article 5(3) ECHR.

In *Assenov and Others v Bulgaria* the ECtHR went further to expressly recognise the centrality of the objective appearance of independence, while noting that this preceded the question of whether the prosecutor who had confirmed the detention in a particular case actually conducted the prosecution later.[82] The fact that they may be able to intervene subsequently puts their subjective independence to doubt. The ECtHR reiterated that a judicial officer who orders a detention may carry out other duties. However, their 'impartiality is capable of appearing open to doubt' if they are entitled to interfere in subsequent proceedings as a representative of the prosecuting authority.[83] This was consistent with an earlier decision in *Brincat v Italy*,[84] where the ECtHR held that although the deputy public prosecutor lacked territorial jurisdiction to prosecute the applicant, the material fact was that at the time that the deputy prosecutor took the decision to confirm his detention, it was possible for the deputy prosecutor to intervene in subsequent proceedings. The prosecutor's independence and impartiality at the time of decision making was open to doubt.[85] In more recent decisions, the ECtHR reaffirmed the importance of the objective and subjective independence of the 'other officer', the latter of which is compromised where that officer investigates and can later intervene in the proceedings as a prosecutor, potentially undermining the object and purpose of Article 5(3) ECHR.[86]

The ECtHR clarifies the relevant qualities of the prosecutor through a two-pronged interpretative process. First, there is a baseline against which each State's features are analysed and this is underpinned by an interpretation of the meaning of 'an other officer' which relies on the object and purpose of Article 5(3) ECHR. This requirement for early intervention permits the authorities to work towards achieving the overall objective of Article 5 to wit the prevention of unlawful or arbitrary detention. The ECtHR determines that for that objective to be achieved, the authorised officer needs to possess the quality of independence exhibited by judges, a quality necessary to respond to issues of justice impartially and fairly. Arguably, at this stage, the ECtHR's approach bears some similarity with the approach of the HRC to the extent that the HRC in the cases discussed earlier, frequently referred to the necessity for the other officer to possess the quality of independence in order to exercise judicial control of deprivation of liberty. However, the ECtHR goes further. This is done in the second phase of its approach during which it dedicates considerable space to examining systematically the specific arrangements of the defending State. It is at this stage that the ECtHR attempts to analyse both the subjective and objective independence of the 'other officer'. This stage is crucial, as it is where the ECtHR demonstrates deference to individual institutional arrangements adopted by States. It does not simply reject the public prosecutor as an incompetent authority under Article 5(3) ECHR, but demonstrates in more detail why this may be the case.

82. *Assenov and Others v Bulgaria*, App no. 24760/94 (Commission Decision, 10 July 1997) , para 135.
83. ibid.
84. *Brincat v Italy*, App no. 13867/88 (ECtHR, 26 November 1992), para 21. See also *Hood v The United Kingdom*, App no.27267/95 (ECtHR, 18 February 1999), para. 57.
85. *Brincat* (n 84) para. 21.
86. *Moulin v France* App no. 37104/06 (ECtHR, 23 November 2010).

That approach was exemplified in *Moulin v France* where the applicant, a lawyer in Toulouse, was arrested on 13 April 2005 and detained in police custody. She was brought before the deputy public prosecutor on 15 April and the latter ordered her detention pending subsequent transfer to appear before the investigating judge in Orléans. On 18 April, she appeared before the investigating judge in Orléans and was subsequently remanded in custody and placed under investigation. The ECtHR had to determine, amongst other things, whether there was a breach of Article 5(3) ECHR in relation to the deputy public prosecutor in Toulouse. The ECtHR noted that, as per the Constitution, different rules regulated sitting judges and public prosecutors in France, although both formed the judicial corpse.[87] Prosecutors were institutionally subordinate to a common hierarchy – the Minister of Justice – who is a member of the government and therefore the executive power. By law, prosecutors conducted criminal proceedings on behalf of the State and on account of their institutional subordination to the Ministry of Justice, and they received written instructions on prosecution from the Minister of Justice, even though they could exercise independence in developing their oral arguments in the interest of justice.[88] Nevertheless, given the circumstances, prosecutors did not exhibit the level of independence from the executive within the meaning of Article 5(3) ECHR.[89] It follows that the deputy public prosecutor in Toulouse did not fulfil the qualities of independence and impartiality required by Article 5(3).[90] Arguably, the Court clearly demonstrated the importance of the objective independence of the relevant authority to exercise judicial control of the deprivation of liberty.

The ECtHR adopted a similar approach to the Polish system where the pretrial proceedings were carried out by the prosecutor who was subject to a hierarchy.[91] In *Niedbala v Poland*, [92] the ECtHR stated that an officer authorised by law to exercise judicial power must be independent of the executive and the parties.[93] Even where objective independence is confirmed, the ECtHR still assesses subjective independence through its systematic analysis. In *Van der Sluijs v The Netherlands*,[94] a commanding officer (*auditeur militair*) was responsible for advising on the remand of the applicants in custody. Although objectively he was independent from the military authorities, the ECtHR held that his subjective independence was still in question.[95] The rationale was that the commanding officer could subsequently intervene as a prosecutor in the same matter after referral to the military court. In which case, he will not be independent from the parties during the preliminary proceedings and may have an interest in detaining the applicant.[96] This demonstrates that despite the officer's objective independence, it was still necessary to consider how his role in the

87. ibid para 56.
88. ibid.
89. ibid para 57.
90. ibid para 59.
91. Celina Nowak, 'Judicial Control of the Prosecutor's Activities in the Light of the ECHR' (2014) 2 *European Criminal Law Association Forum/EUCRIM* 60, 61.
92. *Niedbała v Poland*, App no. 27915/95 (ECtHR, 4 July 2000).
93. See also *Ganchev v Bulgaria* App no. 57855/00 (Commission Decision, 25 November 1996), para 21–22; *Nikolova* (n 80) paras 28, 29, 45–53 and *Shishkov v Bulgaria* App no. 38822/97 (ECtHR, 9 January 2003) paras 53–54.
94. *Van der Sluijs and others v The Netherlands* App no. 9362/81 (ECtHR, 22 May 1984).
95. ibid para 44.
96. See also *Pauwels v Belgium* App no. 10208/82 (ECtHR, 26 May 1988) and *De Jong, Baljet and Van den Brink v The Netherlands* App no. 8805/79, 8806/79 and 9242/81 (Commission Decision, 11 October 1982), where the ECtHR applied *Scheisser* in deciding that the *auditeur-militair* lacked independence due to the possibility of acting as prosecutor in the same case after conducting the preliminary proceedings.

proceedings might affect his impartiality from a subjective perspective. A more systematic analysis therefore provided better clarity on the specific nature of the commanding officer's independence.

It may be argued that the ECtHR applies an approach which better identifies the deficiencies within a State's mechanisms for judicial control in respect of the role of the prosecutor. By referring to 'a judge' or 'other officer' authorised by law, the ECtHR implicitly recognises that within Member States, different institutional arrangements may be possible. Thus, in applying the baseline of the independence of the 'other officer', the ECtHR endeavours to achieve the objective of article 5(3) ECHR by conducting a distinctive assessment of each State's individual arrangements. The purpose of that analysis is to determine whether the institutional arrangements provide the other officer with sufficient levels of independence to impartially and objectively exercise judicial control over the deprivation of liberty. In that way, the ECtHR is able to demonstrate its aversion towards unlawful or arbitrary detention, whilst being careful not to arbitrarily discount domestic institutional arrangements without satisfactorily justifying it. That assessment was confirmed by the ECtHR when responding to a question relating to Article 5(3) ECHR on the issue of promptness in bringing a suspect before a judge or other officer authorised by law to exercise judicial power.[97] The ECtHR stated that 'it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.'[98]

That approach is commendable to the extent that by taking cognisance of institutional idiosyncrasies in individual State arrangements, the ECtHR endeavours to render the right effective rather than impose illusory State obligations and seeks to render the ECHR's 'safeguards practical and effective'.[99] It is argued that, by so doing, the ECtHR has more clearly and persuasively outlined the requisite characteristics of the public prosecutor in jurisdictions where exercise of their authority would invoke Article 5(3) of the ECHR. A perceived advantage is the persuasive potential in triggering change in domestic systems. For instance, in France, the role of the prosecutor and investigating judges had been an issue for political debate for many years until the jurisprudence of the ECtHR in *Moulin*[100] (in particular)[101] finally prompted reform of these roles to be more in compliance with Article 5(3) of the ECHR.[102] Similarly, the decision in *Niedbala,* discussed earlier, prompted a change of the law in Poland.[103]

5. ADVOCATING FOR THE ADOPTION OF A MORE SYSTEMATIC APPROACH BY THE HRC

In relation to Article 9(3) ICCPR, in each of the cases discussed, the HRC appears to adopt an approach which fails to provide clear justification for its decisions. Having noted some of the

97. *Wemhoff v Germany* App no. 2122/64 (ECtHR, 27 June 1968).
98. ibid para 8.
99. *Loizidou v Turkey* App no. 15318/89 (ECtHR, 18 December 1996), para 72.
100. Resolution CM/ResDH (2013) 240: Moulin Contre France (no. 37104/06) Bilan d'action du Gouvernement Francais, confirming the amendment of the French Penal Code to reflect the decision of the ECtHR in *Moulin* relating to Article 5(3) ECHR.
101. See also *Medvedyev and others v France*, App no. 3394/03 (ECtHR, 29 March 2010).
102. Cédras (n 79) 239–240; Hodgson, 'Guilty Pleas' (n 41) 133.
103. The decision of the ECJ in PI generated debates about strengthening the independence of the German prosecutor. See Mitsilegas (n 77) 69; Kevin Mariat, 'Le Retour de la Question de L'indépendance du Ministère Public sur la Scène Politique Allemande' *Dalloz Actualité* (Paris, 13 October 2021) Pénal.

weaknesses in that approach, it is argued here that the HRC can enhance its approach to interpreting and applying Article 9(3) and the ICCPR more generally by engaging in a more systematic analysis of individual State arrangements to highlight the specific ways in which the prosecutor falls short of the requirements of Article 9(3). In addition to the fact that the approach potentially recognises the diversity of institutional arrangements within Member States of the ICCPR, it is essential for at least three reasons.

First and more generally, the HRC assumes a pivotal role in the international human rights protection mechanism. It is a quasi-judicial body that makes non-binding General Comments and provides final views on individual communications or concluding observations on States' human rights reports. Considering their non-binding nature, in particular, its views on individual communications, their persuasive value needs to be anchored on some methodological and ideologically sound basis.[104] This is particularly necessary as both authoritarian and advanced liberal democracies often seek justification for resisting the expansive rulings of international jurisdictions as overly intrusive.[105] In the absence of sound methodological and ideological foundations for its decisions, the political acceptability and tolerability of the HRC's interference with State sovereignty may be diminished or eroded.[106]

Second, despite the non-binding nature of its decisions (and other procedures within the HRC) they are of real legal significance.[107] The HRC has developed 'considerable interpretative case law',[108] which provides jurisprudence and 'can result in indications of appropriate redress'.[109] In addition, the HRC's decisions can contribute to community expectations of appropriate State behaviour in relation to human rights treaty obligations.[110] The International Court of Justice (ICJ), for instance, ascribes great weight to the interpretations adopted by the HRC, as the HRC was established specifically to supervise the application of the ICCPR. To discharge its mandate, it is necessary that the HRC's decisions are clear. This is a relevant attribute to maintain and enhance the significant impact that its decisions have on individuals and in shaping State behaviour. Nigel Rodley asserts that the HRC needs to 'achieve the necessary and the essential consistency of international law',[111] which individuals as beneficiaries of treaty rights and States as entities to discharge treaty obligations are entitled to. Considering this potential, it is necessary that the HRC adopts a methodological approach which affords clarity and 'better reasoned justifications of human rights views in individual cases'.[112]

Third, a more systemic analysis will contribute to clear and consistent jurisprudence on international human rights law, and enhance the principle of universalism which is essential to human rights enforcement. Universalism is significantly reinforced by the decisions of international

104. Dominic McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee' (2016) 65(1) *International and Comparative Law Quarterly* 21, 43.
105. Erik Vieter, 'Borrowing and Non-borrowing among International Courts' (2010) 39(2) *Journal of Legal Studies* 547, 556.
106. McGoldrick (n 104) 43.
107. Nigel Rodley, 'The Role and Impact of Treaty Bodies' in Dinah Shelton (ed) The Oxford Handbook of International Human Rights Law (Oxford University Press 2013) 639.
108. This was the view of the ICJ in relation to the ICCPR, Article 9 as expressed in *Ahmadou Sadio Diallo* (*Republic of Guinea v Democratic Republic of Congo)* ICJ GL No 103 (2012) ICJ Rep 324.
109. Rodley (n 107) 634.
110. ibid 639.
111. ibid 640.
112. ibid 642.

courts and tribunals as they interpret and apply the provisions of international treaties. Their jurisprudence forms the basis for trans-judicial dialogue, which helps to shape conceptions of human rights both at the international and national level. Anne-Marie Slaughter argues that trans-judicial dialogue is necessary for the concept of universality, since no international jurisdiction has the monopoly of determining the scope and content of rights through interpretation.[113] This position is also supported by Gilbert Guillaume, former president of the ICJ, who notes that 'dialogue among judicial bodies is crucial'.[114] According to Slaughter, '[c]ollective judicial deliberation, through awareness, acknowledgment, and use of decisions rendered by fellow human rights tribunals' assists in framing the universal conceptions of human rights.[115] Admittedly, it is not expected that international jurisdictions will be identical in every single aspect of interpretation and application. Due to the proliferation of international jurisdictions, there is a risk of conflicting jurisprudence emerging from the interpretation of similar international rules by different treaty bodies.[116] Thus, a limited degree of variation is not unexpected. Nevertheless, as noted by Stephanie Berry, such variations may have the potential to undermine core human rights principles such as universalism.[117] Universalism is enhanced by the unity and coherence of international law, which can be promoted by judicial dialogue.[118] Often, courts and tribunals refer to the grounds on which other jurisdictions arrived at a particular decision, and rely on these grounds as the basis for cross-fertilisation. Without a clearly outlined normative basis for a decision or a certain interpretation, judicial dialogue may be impeded as judges would have no fundamental basis to justify cross-citations and eventually the tendency to arrive at conflicting decisions on common human rights norms may become more prevalent.

An alternative argument may be anchored in the decisive approach adopted by the HRC stating that public prosecutors inherently fall outside the scope of the other officer envisaged by Article 9(3) ICCPR. In that case, the HRC could be credited for instituting a system which appears to reinforce the principle of consistency relevant to an effective enforcement of human rights. This inheres in the fact that the HRC's jurisprudence is consistent in categorically demonstrating that public prosecutors are not the competent judicial authorities to determine a suspect's remand in custody. Consider, for instance, the principle of subsidiarity, which underpins the basis for domestic application of international human rights. If States are to enforce their international human rights obligation effectively, there is a need for consistency at the international level on the basis that it adds to the persuasive authority of the decisions of international bodies, such as the HRC. That, in turn, forms a significant basis for domestic courts to interpret and apply the international obligation at the domestic level.

113. Anne-Marie Slaughter, 'A Typology of Transjudicial Communications' (1994) 29(1) *University of Richmond Law Review* 99, 122.
114. Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice to the United Nations General Assembly of 26 October 2000. Available at < https://www.icj-cij.org/public/files/press-releases/9/2999.pdf> at p. 5. accessed 3 February 2021.
115. Slaughter (n 113) 122.
116. Address by H.E. Judge Gilbert Guillaume (n 114).
117. Stephanie Berry, 'A 'good faith' interpretation of the right to manifest religion? The diverging approaches of the European Court of Human Rights and the UN Human Rights Committee' (2017) 37(4) *Journal of Legal Studies* 672, 673.
118. Magnus Killander, 'Interpreting Regional Human Rights Instruments' (2010) 7(13) *Sur- International Journal on Human Rights 145, 153–154;* Slaughter (n 113).

Nevertheless, the HRC's approach remains unsatisfactory. As noted previously, the language of Article 9(3) ICCPR indicates that States have the discretion to vest authority over judicial control in a judge or another officer authorised by law to exercise judicial power. It may therefore be necessary that clear guidance is provided to States when such an officer is deemed not to satisfy the requirements of Article 9(3) ICCPR. In fact, in its submission to the HRC regarding the then-proposed New General Comment No. 35 on Article 9, the International Committee of Jurists stated that 'further clarity on the meaning of an "other officer authorised by law to exercise judicial power", relevant to determinations called for under article 9(3), would be welcomed'.[119]

6. CONCLUSION

The right to personal liberty is a fundamental right. Although not absolute, its importance is partly inherent in the procedural requirements imposed by treaty provisions pre-empting unlawful and arbitrary restrictions. This article has demonstrated that both the HRC and the ECtHR have recognised the importance of the right and have endeavoured to reflect its object and purpose in their respective jurisprudence. Nevertheless, they have diverged in their approach to determining the substantive requirements for 'an other officer' exercising judicial authority. The HRC has been unclear as to the scope of a State's obligations under Article 9(3) of the ICCPR, potentially undermining its effective application at the domestic level, as States have insufficient guidance on the scope of the other officers authorised to exercise judicial control over the deprivation of liberty.

On the other hand, the ECtHR has applied a more systematic assessment of the institutional arrangements of States. This approach is consistent with the institutional requirement for judicial control given that the requirement is expressed in both the ICCPR and ECHR in terms that afford States discretion in developing domestic institutional measures. The ECtHR's approach provides more practical guidance to States on the compatibility of their institutional arrangements with the requirement of Article 5(3) ECHR.

The article has argued for the HRC to adopt a more systematic approach to analysing individual prosecutorial arrangements. This will support the HRC in determining individual communications in a more principled, clear, and practical way with potentials to contribute to the consistency of international human rights law. In addition, States would be provided with more clarity on the scope of their obligations to ensure the independence of the officer in charge of judicial control of the deprivation of liberty. Moreover, a more systematic analysis promotes sensitivity to the local socio-political context, as the HRC would be demonstrating that it has not simply and casually discounted a State's domestic arrangements. This has the distinct advantage of enhancing the persuasive appeal of the HRC's decisions, hence their legitimacy, which in turn impacts on their effectiveness. States are more likely to implement decisions or recommendations when they are persuaded by the legitimacy of the decisions and are convinced that the international adjudicating body has recognised its subsidiary role in the implementation of treaty obligations.

119. International Commission of Jurists, 'ICJ Submission to the Human Rights Committee on its Half-Day of General Discussion in Preparation for a General Comment on Article 9 of the ICCPR' (12 September 2012) <https://www.ohchr.org/Documents/HRBodies/CCPR/GConArticle9/ICJ.pdf> accessed 10 January 2021, 1.

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