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Written Replies to Questions

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Universality of human rights

Human rights apply universally, i.e. they apply to all people equally. At the same time, however, different concepts and understandings of human rights are repeatedly explained by citing the existence of cultural differences or specificities. Authoritarian regimes also regularly use this argument in order to call into question the application of some aspects of human rights. What lends topicality to this debate? What potential dangers does it harbour? And how can the claim to universality of human rights be defended in today's international debate with regard to cultural specificities? (SPD)

The universality of human rights speaks to different features of the idea of human rights and its practice as part of the international order.

First at the level of ideas, the universality of human rights helps us to clarify why we, as human beings, find human rights important and why we seek to institutionalise and protect them globally through the establishment of robust human rights standards and institutions. It is because human rights concern all human beings regardless of who and where they are that all members of the international community should find them important and worth protecting not only as a matter of domestic policy, but also as an integral part of the international order.

Second, at the level of practice, the universality of human rights means that states should co-operate internationally to protect the human rights of all individuals everywhere under the auspices of international organisations. This is by setting common standards and providing oversight mechanisms. While the United Nations has been the key global organisation for the protection and promotion of human rights since 1945, the universality of human rights as a matter of international practice further requires mainstreaming of human rights across the international order and various other international and regional regimes as well as bilateral agreements. This, for example, has been done by inserting the need for the protection of human rights in the preamble of the 2015 Paris Agreement on Climate Change.

Third, the universality of human rights require that practical and institutional steps to ensure that the promise of the universality of human rights is made continuously. This is because neither human

rights nor their claim to universality are static, and the meaning of specific rights require interpretation in the light of changing realities. It is for this reason that human rights treaties are famously titled 'living instruments'.

The realisation of the universality of human rights requires constant adjustment with a view to defining the scope of human rights and the correlating duties required for their realisation in the light of changing political, social and economic conditions. The latter is particularly pertinent given the grand challenges of our times that seriously threaten the universal promise of human rights. Four such major grand challenges that require us to think and adapt the practice of human rights, its doctrines and institutions are the real time impacts of the climate crisis, the global rise of authoritarian practices and domestic threats to established democracies, the deepening entrenchment of inequalities between and within states and the lack of regulation on transnational corporations with important effects for the realisation of human rights (as recently manifested through the swift, uncontrolled policy changes at the social media company Twitter).

The universality of human rights, however, does not mean that: a) everyone has the same human rights-based duties everywhere, b) that all human rights are absolute rights, and c) that all human rights must be realised identically in all places. Respect for cultural, religious and political diversity is part of human rights practice. The challenge for the effective realisation of human rights therefore frequently turns to important questions that ask how we respect diversity to ensure universality. This challenge is not limited to certain parts of the world, it is a challenge that should be understood as universal and continuing in and of itself everywhere.

Regarding the question of who has duties to ensure the universal realisation of human rights, human rights law points to the role of states as primary duty bearers and introduces the concept of 'jurisdiction' to allocate duties to specific states. This means that states have primary duties to ensure the rights of those who are within their jurisdiction. This typically occurs when an individual is on the territory of a state, but there are also circumstances where the primary duty may also be extra-territorial. This can be when a person's enjoyment of rights is controlled by a state, for example in case when a state detains individuals overseas, uses remote surveillance or saves lives outside its territory. In addition, states have a primary responsibility to regulate their corporations so that they do not abuse human rights at home or abroad. The same can also be said with respect to states' obligations to regulate international organisations, so that they do not abuse human rights with respect to their policies and operations.

These observations do not mean that other organs of domestic and international society have no human rights-based duties or that states do not have any duties towards individuals beyond their jurisdiction. The universality of human rights calls for duties on all organs of society. These duties, however, are understood as secondary duties, not as primary ones. Corporations, for example, have duties to respect human rights. In addition, states have duties to ensure that international institutions can function properly to ensure the promotion of the universality of human rights.

Some human rights are absolute. The prohibition of torture, inhuman and degrading treatment and the prohibition of slavery, and servitude are two well-known and well-established absolute rights. These rights, like all rights, apply to everyone, and in addition they must be respected and protected at all times and their violations should attract universal jurisdiction in cases of violations. Most human rights recognised in international human rights treaties, however, are qualified rights. These include the right to family life, the right to health, freedom of expression or the right to the enjoyment of one's culture. For qualified rights, we would still say that they apply to everyone and have a claim to universality. But this does not mean that these rights cannot be legitimately restricted to protect, inter alia, the rights of others, public health or public order under concrete

circumstances. In the case of qualified rights therefore, the universality of these rights does not mean that they may not be legitimately restricted, in particular, to protect the rights of others. You will remember, of course, such debates balancing the right to privacy against public health needs here during the peak of the pandemic.

An important bulk of human rights law interpretation since the 1948 Universal Declaration of Human Rights in Europe, the Americas, Africa and at the level of the United Nations focuses precisely on this latter question: how to distinguish legitimate infringements of qualified rights from their violations. This has been and continues to be a dynamic process of collective learning. UN Human Rights Treaty Bodies, for example, have, in consultation with UN member states and members of civil society, issued extensive general comments on a broad range of how to protect qualified rights. On some occasions, they have updated these general comments to reflect the dynamic evolution of rights. The tests of effective interpretation of human rights to ensure that human rights benefit human beings in practical terms while assessing transparently the proportionality of the concrete restrictions to the legitimate aim pursued are some of the important ways to ensure that qualified human rights are respected and not arbitrarily violated. In this respect, supporting international institutions to realise the universality of human rights is crucial for a collectivised understanding of when restrictions or under protection of human rights are arbitrary or amount to abuse of public powers.

The protection of absolute and qualified rights, therefore, requires effective and accountable institutions that are overseen by domestic and international mechanisms. These mechanisms are not only courts, parliaments, and the executive. National Human Rights Institutions, Equality Commissions, active civil society and well-entrenched policies concerning human rights education across societies also play crucial roles. Having regional and global oversight over domestic institutions through well-supported regional human rights courts and the UN human rights institutions further help the protection of all rights and ensure a healthy human rights culture that embraces universality and diversity.

In this respect, it is also important to note that international human rights law recognises and protects the right to culture for everyone. In other words, from the perspective of human rights law, cultural specificities or differences are not necessarily threats to the universality of human rights, but are, in effect, part of the universal human rights that individuals enjoy. The right to one's enjoyment of one's culture, however, is a qualified right, which means it can be legitimately restricted in concrete circumstances. The latter requires more focus on how universal human rights are specified in concrete instances. Specification of human rights, however, cannot be done in an abstract way. This is why oversight and accountability institutions are central to ensure the universality of human rights domestically and internationally. There is no principled tension between claiming that human rights should apply to everyone and to hold that cultural specificities should be valued and protected as a matter of human rights. The tension is one that needs to be resolved in each concrete case by employing principles of interpretation and concretisation of human rights. The latter foremost requires robust institutions, both domestically and internationally and good faith political engagement.

A key challenge to the everyday practice of human rights in contemporary times is ensuring that qualified rights are not restricted disproportionately, arbitrarily or in ways that constitute the abuse of human rights. Authoritarian states pose a threat in this regard because they do not respect well-established principles used to assess when a restriction can be legitimate and instead restrict human rights to pursue ulterior political purposes, such as the punishment and silencing of government critics. Authoritarian states may also react negatively to international oversight in the name of a blanket defence of state sovereignty. The human rights-based international order established with

the advent of the UN Charter, however, has the precise aim of refuting such a defence of state sovereignty. Such practices should be called out and identified for what they are, violations of human rights in ways that are arbitrary or abusive. International human rights courts and bodies have a crucial role to play here.

It is, however, important to underline that the risks to the universal promise of human rights can also manifest themselves in democratic states. This can be in threats to our democracy or freedom of expression, or through the back-sliding of our right to protest, or in the form of disproportionate restrictions to human rights of minority groups or non-citizens, including asylum seekers, refugees, short- and long-term migrants. Those who uphold the universality of rights in our democractic states cannot take their eyes of the ball here.

To what extent are human rights an "integral part of the international order", if many countries subordinate them to the collective (China) or to a religion (Islamic states)? (AfD)

International human rights law and the principles of interpretation of human rights have been an important part of the international order since 1945. Human Rights are enshrined in all global and regional human rights treaties in all regions of the world. The ratification rates of human rights treaties are some of the highest in the world both at the level of the UN and in Africa, the Americas and in Europe. The UN Convention on the Rights of the Child has, near universal ratification (the US has not ratified this Convention). The Covenant on Economic, Social and Cultural Rights has 171 ratifications, including China (but not the United States) and the Covenant on Civil and Political Rights has 173 ratifications including the US (but not China). The UN Convention against Torture, has 173 state parties, including China and the United States. The UN Convention on the Rights of Persons with Disabilities has 185 state parties The right to individual petition before the UN Committee on the Rights of Persons with Disabilities has been accepted by Saudi Arabia. This has enabled individuals to bring complaints against Saudi Arabia at the international level and, in turn, has led to international oversight of Saudi Arabia's human rights practices through an expert quasi-judicial body for the first time.

What is, however, of concern is how states have used reservations (conditional acceptance of legal human rights obligations) to these treaties under the guise of cultural specificities to undercut the universal application of human rights. On a positive not are the important examples of states withdrawing such reservations from the UN Women's Rights Treaty, CEDAW. This further shows that the realisation of the universality of human rights in practice is a constant work in progress. This requires, inter alia, robust international institutions, human rights education, and a constant review of and adaptation to new threats. Human rights violations must be consistently monitored by states – who in turn can never be complacent about their own human rights records or turn to that most anti-human rights of discourses: "whataboutism". In order to positively contribute to the universal promise of human rights, one can never conceive human rights violations to be solely about the failings of others.

Which (one) human right do you see as the most important in the context of "systemic competition" and why? (AfD)

An important principle that supports the universality of human rights is the recognition that human rights are interdependent and indivisible. This is not merely a slogan. In many concrete circumstances in people's lives, more than one human right is at stake and the lack of protection of the one right leads to the lack of protection of another. Groups protest peacefully because they have no access to economic, social or cultural rights. Their peaceful protest can be quashed by the authorities leading to violations of their civil and political rights. The very same individuals may face

torture in detention leading to violations of their dignity, integrity and liberty. It is for this reason that it is hard to pinpoint a single human right being the 'most important'. Human rights thinking requires a holistic analysis of all rights as well as the need to constantly articulate new human rights in the face of contemporary challenges. The right to water or the right to internet access, for example, were not in original human rights treaties of the 1950s and 1960s. Today, they are an important part of our understanding of human rights and what universality of human rights requires.

In addition, our contemporary world is riddled with online disinformation, misinformation and targeted hate campaigns. These are fuelled by online echo chambers and bubbles which serve to undermine a healthy global dialogue about the past, present and future of human rights for all and lead to the collectivisation of denial - further weaking the societal support for human rights across the globe. One may, therefore, argue that ensuring access to facts, and information and defending public media are particularly pressing concerns not only to fight authoritarian regimes and their abuse of human rights but also threats to and the backsliding of our hard-won democracy and human rights.

The necessity of strengthening international and regional human rights systems and institutions

How does human rights protection at the regional level of the Council of Europe interact with protection at the level of the United Nations? What reform proposals exist for the respective systems to safeguard human rights and what contribution could the accession of the European Union to the European Convention on Human Rights make to enhancing human rights protection? (ALLIANCE 90/THE GREENS)

The relationship between the UN and the Council of Europe human rights standards

Regional and international human rights systems were established in the aftermath of the Second World War to support the entrenchment of human rights cultures both domestically and internationally. They are relatively young institutions in the light of human history, but their contributions have been significant. Today, there are regional human rights systems in the Americas, Africa and Europe through human rights courts. There are also sub-regional systems in Africa, such as Ecowas. In Asia, there is an inter-governmental system under the auspices of ASEAN. These regional human rights systems, however, do not cover the entire globe, and, in that respect, the UN human rights system is the only forum for addressing human rights issues in all countries. The US and Canada, whilst part of both the UN and the OAS human rights systems, also do not recognise the compulsory jurisdiction of the Inter-American Court of Human Rights and therefore their human rights practices are only subject to oversight via the UN and the Inter-American Commission on Human Rights. The same can also be observed with respect to member states of the African Union. A small number have accepted the oversight of the African Court on Human and Peoples' Rights. The uneven coverage of states by regional protection system makes the UN system also all the more valuable as a forum, but also vulnerable to political pressure.

Countries that are part of robust regional human rights systems and the UN show more positive outcomes in ensuring the domestication of human rights. In that respect, the UN human rights system and the regional human rights systems can offer multiplier effects for ensuring effective protection for human rights in the long run rather than systemic competition. One important reason for this is that the UN system, alongside offering two general human rights treaties (the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Civil and Political Rights (ICESCR)), is also comprised of specific and implementation-focussed treaties covering women's rights, racial discrimination, the prohibition of torture, enforced disappearances, children's rights and rights of persons with disabilities, amongst others. These treaties that focus on

specific rights or specific groups are capable of complementing the more broad and abstract list of rights in the European Convention on Human Rights, in particular.

In Europe, the existence of the Council of Europe and EU standards and institutions alongside the UN show that multiple human rights standards and institutions do not necessarily lead to competition, but to constructive complementarity. The UN human rights treaties focussing on women's rights, rights of persons with disabilities and children's rights, for example, have improved regional human rights standards in Europe over time. The protection of women against all forms of violence is a case in point. The text of the European Convention on Human Rights does not specifically protect women from violence, but in Opuz v. Turkey, a 2008 ground-breaking judgment on violence against women, the European Court of Human Rights directly referred to the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to develop the European Convention's standards on violence against women. This development also led the Council of Europe to conclude the Council of Europe Convention on preventing and combating violence against women and domestic violence in 2010. A direct aim of this treaty is the better implementation of CEDAW in Europe, therefore, both building on and implementing UN protections concerning violence against women.

It must be noted that there have also been tensions between the interpretation of the UN and the European standards for human rights protections. These have manifested themselves in concrete individual petition cases, inter alia, concerning the limitations on the manifestation of religious beliefs by Muslim women covering their hair and parts of their face and cases of collective expulsions of individuals pushed backs at Europe's borders. In both of these, the UN Human Rights Committee and the UN Committee on the Rights of the Child found violations of human rights, whereas the European Court of Human Rights did not - even though the facts of the cases were similar if not identical. In academic scholarship, these instances of diverging interpretation are interpreted as important signs that human rights interpretation in Europe is at risk of becoming too particularistic and conservative.

EU Accession to the European Convention on Human Rights

With its 46 members, the Council of Europe is the key human rights protecting and promoting institution in wider Europe. The importance of the Council of Europe not only stems from its ability to bring together both EU and non-EU member states around common values of democracy, rule of law and human rights, but also due to the central role that is played by the European Court of Human Rights in interpreting the European Convention on Human Rights (comprised of absolute and qualified civil and political rights) with a view to ensuring a common understanding of human rights standards and also acting as a court of last resort in cases of disagreement. The European Court of Human Rights has established important standards to interpret human rights and identify human rights violations. But, as I point out above, the European Court of Human Rights should continue to do so in a complementary way to the United Nations.

Having said this, the unique co-existence of the Council of Europe and the European Union as two separate institutions for 27 member states of the EU have been a long-standing concern in European public policy about the systemic differences they may engender in the interpretation of human rights in Europe. This is because whilst EU law is binding on all EU member states, the very same laws may contradict the human rights interpretation under the European Convention on Human Rights. Indeed, there have also been actual instances of such conflicts, for example, concerning Dublin regulations or European arrest warrants. This means that domestic judges may find themselves in a situation of conflict as to whether their decisions following EU law may be in contravention of the European Convention on Human Rights.

This issue has been firmly on the agenda of the EU since the Lisbon Treaty, anticipating the EU accession to the ECtHR as a way to cohere human rights interpretation in Europe. A treaty for the accession of the EU to the European Convention on Human Rights was concluded in 2013, but the Court of Justice of the European Union in its (*Opinion 2/13*) in 2014 did not find the accession agreement compatible with the EU law. On a positive note, the accession negotiations started again in 2019 and the European Commission elaborated four main areas of concern for upcoming negotiations: 1, the EU specific mechanisms of the procedure before the ECtHR, 2, inter-party applications under Article 33 ECHR and references for an advisory opinion from national courts to the European Convention of Human Rights under Protocol No.16, 3, the principle of mutual trust and, 4, the EU's Common foreign and security policy (CFSP). At the time of writing, it seems that the EU and the CoE have made important progress with respect to the first three of these issues and there is reason for optimism that the negotiations may be coming to an end in 2023. If this is indeed the case, this new negotiation agreement will be first reviewed by the Court of Justice of the European Union and then by the European Court of Human Rights.

The accession of the EU to the European Convention on Human Rights is capable of averting the risks of systemic competition between the European Convention on Human Rights and its interpretation by the European Court of Human Rights and that of EU Law, emitted by EU and interpreted by the Court of Justice of the European Union. This accession agreement is all the more important in the current political context due to the decay of rule of law protections in some of member states. In times when domestic institutions (including domestic courts) are not effectively capable of protecting human rights, it becomes all the more important that the institutional responses emitted by international courts and organs are robust, coherent and complementary.

The political significance of the EU's accession to the European Convention on Human Rights, however, also has all the more significance due to new threats to the effective protection of human rights alongside authoritarian practices undermining the rule of law. New threats to the effective protection of human rights are pertinent in the context of the increasingly pervasive use of artificial intelligence by states and the discriminatory effects of such use in policy areas ranging from border control to criminal justice and social security as well as in the context of the climate crisis and the effects of inadequate climate response measures as to mitigation, adaption and loss and damage. Europe's human rights architecture will need to respond to these threats with the aim of guiding public policy. It is not only crucial that these responses are coherent for the future of human rights protections in Europe, but also in ensuring that Europe's responses complement or set examples for other parts of the world. While European states and institutions cannot, of course, address all human rights challenges outside Europe, they can and must stand as an effective beacon for human rights protections globally through their own institutions and through the United Nations.

What reasons lie behind the ever increasing number of rulings by the European Court of Human Rights which are not implemented and what options exist to tackle the problem of non-implementation, particularly in view of increasing authoritarianism amongst the members of the Council of Europe? (ALLIANCE 90/THE GREENS)

A key challenge for the effectiveness and the long-term sustainability of the European human rights system is delayed, deficient or non-implementation of the judgments of the European Court of Human Rights. As of January 2022, 47% of the leading judgments (defined as human rights judgments that identify systemic problems rather than isolated violations) handed down by the European Court in the last 10 years are still pending implementation, according to data collected by the European Implementation Network, the civil society organisation which I chair that advocates for the full and effective implementation of human rights judgments. This means that there are

around 1,300 leading judgments pending implementation for an average time of six years and two months.

When leading judgments of the European Court of Human Rights are not implemented, it means that violations of human rights are likely to continue domestically. Non-implementation of leading judgments also leads to similar applications due to non-implementation, increasing the caseload of the European Court of Human Rights and undermining its already limited capacity. This general implementation crisis affects many states of the Council of Europe.

A new additional challenge are 'Article 18 Judgments'. Article 18 judgments refer Convention rights being violated in pursuit of an unlawful ulterior purpose or a hidden agenda by the domestic authorities as prohibited by Article 18 of the ECHR. The non-implementation of these judgments poses additional challenges. Article 18 judgments typically concern the intimidation, silencing or punishment of individuals who are essential to the healthy functioning of a democracy based on rule of law. These individuals can be opposition members of parliament, human rights defenders, lawyers, members of civil society, journalists and judges. The non-implementation of such judgments pose an important challenge not only for individuals who are imprisoned, criminalised or disciplined, but also for the future authority and integrity of the European human rights system. This is because Article 18 violations are loud warnings that the only political regime compatible with the effective protection of Convention rights, a democracy based on the rule of law, is at risk. Article 18 judgments in conjunction with Article 5 ECHR (the right to liberty and security of person) have been the only instances where the Committee of Ministers of the Council of Europe has initiated infringement proceedings. These were with respect to Azerbaijan and Turkey. Whilst the infringement proceeding in the case of Azerbaijan enabled the release of an opposition politician, the Turkish human rights defender Mr. Osman Kavala has remained behind bars in Turkey for over five years despite an infringement proceeding judgment.

The reasons for the non-implementation of human rights judgments (in particular leading judgments) can be categorized under three themes.

First, some of these reasons concern the lack of institutional capacity, institutional co-ordination between different ministries or different levels of government, bureaucratic inertia, a busy parliamentary schedule (in cases where legal reforms are needed) or lack of knowledge of the case law by judiciaries (in cases where change in judicial practice is needed). The reason for non-implementation in these situations is related to shortcomings in capacity and institutional infrastructure.

Second are the perceived political and economic costs of implementation. This can be when an incumbent government does not wish to bear these costs close to an election. Here reasons for non-implementation are not about institutional deficiencies, but the unwillingness of authorities to take what they perceive to be unpopular decisions.

The third set of reasons are an outright resistance to human rights oversight all together. In this case, state authorities do not agree with the outcome of a judgment and they refuse to implement it, thus undermining the authority of the whole system.

Whilst all three reasons for non-implementation are important and need to be tackled, the third set of reasons are, clearly, of particular concern.

These serious implementation challenges require the rethinking and strengthening of existing mechanisms for supervising the implementation of human rights judgments in Europe. Foremost, they

show not only that the UN human rights system (a much larger community of states with very mixed human rights records without a judicial oversight mechanism) is fragile, but also that the European human rights system may not be up to the task of effectively addressing contemporary human rights challenges, even though it has a full-time human rights court. The Court is not only burdened with a huge backlog of cases, non-implementation of its judgments also undermines its authority.

It is important to note that the Council of Europe has now made the non-implementation of human rights judgments as one of its strategic priorities. This issue has also been addressed by the Report of the High-Level Reflection Group of the Council of Europe in October 2022. It is hoped that the fourth summit in the history of the Council of Europe that will be held in Iceland on May 16-17, 2023 will provide enduring solutions in this respect. 2023 will no doubt be a crucial year for the future of the strength of human rights protections in Europe, in particular, following the Russian act of aggression in Ukraine and its subsequent expulsion from the Council of Europe.

Measures that need to be taken to improve the implementation of the judgments of the European Court of Human Rights at the level of the Council of Europe fall under three categories.

Firstly, the implementation of the European Court's judgments is seriously underfunded. This is despite the risk non-implementation poses to human rights domestically and to the authority of the European system as a whole. Much work on addressing institutional shortcomings cannot be done without adequate funding and strengthening the implementation monitoring work done by the Council of Europe.

Second, the monitoring of the implementation of judgments is carried out through quarterly meetings of the Committee of Ministers of the Council of Europe. This level of monitoring, however, is not adequate in cases where urgent measures need to be taken (such as immediate release from prison) and where organising and maintaining a permanent dialogue with national authorities as soon as a judgment is delivered is crucial. For this, the procedures of the Committee of Ministers need to be revised so that a permanent dialogue is established - not only at the political and technical level, but also with the judiciaries, informing them of what the European court judgments require to achieve their implementation.

Finally, the non-implementation of human rights judgments needs to be subject to graduated sanctions in case of non-compliance. At the moment, the Committee of Ministers has very limited tools. It can issue Interim Resolutions, it can initiate infringement proceedings (which it has done only twice) and, in case of non-compliance with infringement proceedings, it can expel a state from the Council of Europe. It is necessary to develop procedures that lie between interim resolutions, infringement procedure and expulsion, which can create real and credible pressure to implement judgments. These can range from requiring government ministers to attend hearings at the Committee of Ministers in person (allowing cases to become high on their agenda and ensure effective accountability) to considering monetary sanctions as well as graduated sanctions short of expulsion, before this ultimate sanction may be considered.

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