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## Tacit citing: the scarcity of judicial dialogue between the global and the regional human rights mechanisms in freedom of expression cases

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### 1 Introduction

The European Convention on Human Rights (ECHR) ‘cannot be interpreted and applied in a vacuum’, the European Court of Human Rights famously held in the case of *Loizidou v. Turkey*.<sup>1</sup> The Court referred to the fact that, in its view, human rights treaties should be interpreted in the context of public international law. But what about the closer context of fellow human rights regimes, such as the International Covenant on Civil and Political Rights (ICCPR)?

Fundamental rights are almost inherently open norms, stated in rather general wording. This means that the way in which they are interpreted plays an even bigger role than in more detailed substantive norms, such as traffic laws or provisions of contract law. For the specific right to freedom of expression, the openness of the norm is even more pronounced in the sense that its precise limits are heavily contested. Article 19, ICCPR is the most important and influential formulation of freedom of expression at the international level. It has been interpreted by way of General Comments, Concluding Observations on specific countries and views of the Human Rights Committee in individual cases. A larger body of interpretation of the freedom of expression has, however, been established on the regional level, especially in Europe.

The question then arises to what extent adjudicative bodies at the global level (i.e., the Human Rights Committee) and the regional level (i.e., the European Court of Human Rights and to a lesser extent, the courts of other regional systems) interact by way of citing each other’s

<sup>1</sup> ECtHR, *Loizidou v. Turkey* (Appl. No. 15318/89), Judgment (Grand Chamber), 18 December 1996, para. 43.

standards and interpretations. Is there a certain level of dialogue between international human rights institutions as part of a phenomenon that Anne-Marie Slaughter has dubbed a ‘global community of courts’?<sup>2</sup> Or do these systems operate mostly in autonomous legal orders with relatively little interaction? This chapter will address these more general questions by focusing on possible interactions relating to the right to freedom of expression. After a short overview of the relationship between the Human Rights Committee and the European Court of Human Rights and the other regional mechanisms, this chapter will delve into the case law on freedom of expression of the European – and to a lesser extent the other regional – mechanisms to see whether and how they make use of the global norm contained in Article 19, ICCPR.

## 2 Interaction: possibilities and problems

The growth of the number of regional and global human rights treaties since World War II has also led to a myriad of supervisory mechanisms. Many, although not all, of these mechanisms allow for individual complaints to be lodged. This has led to a large body of (quasi-)jurisprudence. The increase in the number of official watchdogs of human rights has, as in other fields of international law, given rise to concerns of fragmentation. Since a large number of States are parties to not one, but a number of global and regional human rights conventions, there is a risk that differing or even conflicting interpretations may emerge of what are, at the core, similar standards. The judges or experts on the different human rights bodies may not always be inclined to follow the case law of their peer bodies. Precedent in and of itself is the product of a specific socio-legal culture. Easy borrowing may lead to misunderstandings. This is very much the case when one talks about national courts engaged in judicial borrowing.<sup>3</sup> For international human rights mechanisms, this risk may be less in so far as their memberships are typically international and their members have backgrounds in different legal systems. Nevertheless, the global and regional human rights bodies have developed in parallel rather than in inter-institutional unison.

<sup>2</sup> A. Slaughter, ‘A Global Community of Courts’, *Harvard International Law Journal*, 44 (2003), 191–219.

<sup>3</sup> R. J. Krotoszynski, “I’d Like to Teach the World to Sing (in Perfect Harmony)”: International Judicial Dialogue and the Muses – Reflections on the Perils and the Promise of International Judicial Dialogue’, *Michigan Law Review* 104 (2006), 1321–59.

Does the risk of fragmentation indeed materialise in practice? As Slaughter has asserted, there is a judicial dialogue between international courts. This happens in two distinct ways: directly and informally on the one hand, by real meetings of judges, and through case law on the other hand, whenever references are made to the dicta or ratios of other courts.<sup>4</sup> Given that judicial legitimacy is founded among others on persuasive argumentation, it may help judges to consider what other jurists have found persuasive in adjudicating similar problems. Although cross-jurisdictional borrowing in this sense is always hampered by the fact that a full and perfect understanding of the ‘other’ system is not possible, those other systems may offer inspiration. Specifically, they may point to alternative ideas about the scope and content of rights in general and of fundamental rights in particular.<sup>5</sup>

The extent to which one can truly speak of a dialogue in the sense of mutual citing of each other’s jurisprudence on an equal basis is debatable. Analysis of international case law in the past decades has shown that there are clear asymmetries in courts citing other courts.<sup>6</sup> Some courts are much more active in citing than others. This can be explained in various ways. First, the jurisprudence of a court must be persuasive, if possible supported by the positive critiques of international legal scholars.<sup>7</sup> After all, there is no hierarchy between the various judicial bodies in the field of human rights. Also, more generally, courts may have a greater inclination to make use of external jurisprudence for inspiration when they do not themselves yet possess a very large corpus of case law, when they have been trained in law schools in other legal systems<sup>8</sup> or potentially when they are well-versed in legal comparativism.

This analysis not only concerns courts in the strict sense of the word. Similar processes of dialogue may apply to a potential dialogue between regional human rights courts and the United Nations Human Rights Committee. Whereas the Committee’s views on individual communications

<sup>4</sup> Slaughter, ‘Global Community of Courts’, 195 and 201.

<sup>5</sup> Krotoszynski, ‘International Judicial Dialogue’, 1356–8.

<sup>6</sup> N. Miller, ‘An International Jurisprudence? The Operation of “Precedent” across International Tribunals’, *Leiden Journal of International Law* 15 (2002), 483–526; E. Voeten, ‘Borrowing and Non-Borrowing among International Courts’, *Journal of Legal Studies* 39–2 (2010), 547–76.

<sup>7</sup> P. M. Wald, ‘Tribunal Discourse and Intercourse: How the International Courts Speak to One Another’, *Boston College International and Comparative Law Review* 30 (2007), 23–4.

<sup>8</sup> D. S. Law and W. Chang, ‘The Limits of Global Judicial Dialogue’, *Washington Law Review* 86 (2011), 523–78.

are formally only recommendations, they do have a quasi-judicial character. The Committee itself has indicated that it perceives its views as judicial, referring to the values of impartiality and independence, the way in which it interprets the ICCPR and what it calls the ‘determinative character’ of its decisions: the answer to the question whether a State has violated the Covenant or not.<sup>9</sup>

Finally, a caveat: the following analysis bases itself mostly on explicit mentions in case law of the views or judgments of other human rights bodies. In many ways this is only a starting point for further research. The fact that jurisprudence of other bodies is not openly mentioned in a judgment does not mean it was not considered. In this respect, separate opinions, both concurring and dissenting ones, may shed some light on the extent of a possible dialogue. But to offer a fuller picture, a different kind of analysis would be necessary: research into the backgrounds of judges and Human Rights Committee members and interviews with them, to assess whether they were trained in legal comparativism or to see whether they have in some earlier capacity been active in another human rights body. With this limitation in mind, the analysis will proceed below.

### 3 A tale of two treaties

How do these more general considerations about judicial borrowing play out in the context of the Human Rights Committee’s interplay with the Strasbourg system? From a normative perspective it is important to note that almost all the States Parties to the ECHR have also ratified the ICCPR and its optional protocol, which provides for an individual complaints mechanism. When adjudicating individual complaints relating to these States, it would thus in principle make sense to interpret the obligations flowing from the ECHR in harmony with the ICCPR. The opposite might be more difficult. The very fact that the ICCPR is a global treaty and that the Human Rights Committee has a global composition makes it more difficult to justify to the legal interpretations of one regional court. That may not be seen as representative. Indeed, the Committee seems determined to safeguard its interpretative autonomy,

<sup>9</sup> HRC, General Comment No. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/GC/33, 5 November 2008, para. 11.

not just towards regional human rights case law but also vis-à-vis the findings of fellow United Nations treaty bodies.<sup>10</sup>

The first dimension of interplay is a procedural one. Since the two regimes stem from different organisations there is no formal link between them, nor – as already mentioned – a hierarchy. For applicants it is very difficult to go forum shopping between the Committee and the Court. Article 35 ('admissibility criteria'), ECHR, precludes this: it provides that the European Court will not deal with applications that have 'already been submitted to another procedure of international investigation or settlement.' The Optional Protocol to the ICCPR does, in principle, enable such a subsequent application, even if the matter has previously been addressed in a judgment of the Strasbourg Court. In practice, however, many European countries have entered reservations on this point. More specifically, the Committee of Ministers of the Council of Europe has even recommended such reservations to prevent a de facto appeal possibility beyond the European Court.<sup>11</sup> Coupled with the greater visibility and effective remedial effect of the European human rights machinery, this has driven most European applicants to bring their case to the Court rather than to the Human Rights Committee.<sup>12</sup>

The second dimension of interplay relates to the substance of human rights. The norms in the two treaties are also to a large extent similar, in the sense that the ECHR largely consists of civil and political rights, including the right to freedom of expression. There are, however, differences that have had an impact. Specifically, the possibilities to restrict human rights under the ECHR were perceived by many countries to be more extensive than under the ICCPR. This has led to declarations and reservations by a number of European States when ratifying the ICCPR. France, for example, declared that the rights to freedom of expression, assembly and association in the ICCPR would be implemented in accordance with the corresponding rights in the European Convention.<sup>13</sup> Uniformity may have seemed the main concern, but according to Yogesh Tyagi, the real reason is that the ECHR seemed to permit more leeway. Belgium, which introduced a similar declaration to the French one,

<sup>10</sup> Y. Tyagi, *The UN Human Rights Committee: Practice and Procedure* (Cambridge University Press, 2011), 653.

<sup>11</sup> Committee of Ministers of the Council of Europe, Resolution 70(17), 15 May 1970. See also: M. Nowak, *CCPR Commentary*, 2nd edn (Kehl am Rhein: Engel, 2005), 881.

<sup>12</sup> Tyagi, *UN Human Rights Committee*, 743.

<sup>13</sup> See [treaties.un.org](https://treaties.un.org). The declaration on the freedom of assembly was withdrawn on 22 March 1988.

openly acknowledged as much.<sup>14</sup> This can be seen, for example, when comparing the legitimate aims under which a State can restrict the freedom of expression. Under Article 19, ICCPR the mentioned aims are the rights and reputation of others, the protection of national security or public order, and the protection of public health or morals. The restriction clause of Article 10, ECHR seems more extensive. As the second paragraph of that Article indicates:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

This is a slightly longer list than the one in the ICCPR. In addition, Article 16, ECHR ('Restrictions on political activity of aliens') allows States to restrict the freedom of political expression of aliens, irrespective of the conditions of Article 10. The reservations thus seem to weaken the slightly higher standard of the ICCPR by referring to the ECHR text.

As a result of these procedural and substantive issues, the coexistence of the two human rights protection systems, mainly due to the position taken by a number of European States, seems somewhat uneasy. The Human Rights Committee has at times expressed its dismay about the privileged position of the ECHR in many European States as compared to the ICCPR, for example in the context of the State report of Iceland:

The Committee also expresses its concern over the apparent preference accorded, in the domestic law as well as in legal doctrine and jurisprudence, to the European Convention for the Protection of Human Rights and Fundamental Freedoms as against the International Covenant on Civil and Political Rights. In that regard, the attention of the State party is drawn to the fact that the latter guarantees a number of human rights not protected under the former and that permissible restrictions are less broad-based.<sup>15</sup>

<sup>14</sup> *Ibid.* Belgium stated: 'Articles 19, 21 and 22 shall be applied by the Belgian Government in the context of the provisions and restrictions set forth or authorized in articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, by the said Convention.'

<sup>15</sup> HRC, *Annual Report to the UN General Assembly*, UN Doc. A/49/40 vol. 1, 21 September 1994, para. 76. See also Tyagi, *UN Human Rights Committee*, 744.

A certain *jalousie de métier* towards its European counterpart seems rather apparent here. On the other hand, the constant presence of a number of Committee members from ECHR States Parties throughout the Committee's history guarantees a minimum degree of knowledge and potential 'legal empathy' with the European system of human rights protection.

#### 4 The European Court of Human Rights

To what extent does dialogue, in any shape or form, or at least mutual referencing, play out in the jurisprudence of the Human Rights Committee and the European Court of Human Rights? It has been noted by commentators that the European case law has been a source of inspiration and citation by regional human rights bodies, such as the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights, but not so much by the Human Rights Committee.<sup>16</sup> The European Court's approach, for its part, has not been consistent over the years. Magdalena Forowicz, in her work on the reception of international law in the European Court, distinguishes two strands of case law in this respect. First, the cases in which the reference directly followed from procedural or coexistence reasons, for example when an applicant had first applied to the Human Rights Committee and only later to Strasbourg. These cases reflect what she labels a rather 'uninhibited approach' to the Committee's case law and the ICCPR. The other strand of case law concerns cases where the European Court used the ICCPR to clarify the ECHR. In this category of cases, the 1980s reflect a more open approach than the subsequent decade in which the Court took more distance, and the last decade again shows a certain rapprochement.<sup>17</sup> This section will deal with the ways in which the European Court has dealt with the Human Rights Committee's work in the specific context of freedom of expression cases. The subsequent section will consider the two other regional human rights systems and the last section will assess the other side of the coin; the Committee's references to regional case law.

<sup>16</sup> D. Harris, M. O'Boyle, E. Bates and C. Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, 2nd edn (Oxford University Press, 2009), 30–1.

<sup>17</sup> M. Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press, 2010), 154.

References in the Court's case law to the ICCPR and the Human Rights Committee are both relatively recent and relatively rare. The findings here are based on a search of the Court's case law database, HUDOC, by looking for the terms 'Human Rights Committee', 'General Comment', 'ICCPR' and 'International Covenant', which yielded two handfuls of judgments.<sup>18</sup> Most of these date from the 1990s and especially the 2000s. This in itself does not say much about quantitative trends, since these last two decades are precisely the phase in which the volume of the Court's case law increased tremendously. Most references mention the Covenant itself, while a few later references also to the Committee's work. In freedom of expression cases, the latter concerns Concluding Observations on States Parties to the ICCPR rather than the Committee's views in individual applications. In what follows the ways in which the ICCPR features in the European Court of Human Rights' jurisprudence will be assessed.

The earliest mentions contrast rather than connect the European and global human rights protection systems. Two judgments against Germany, *Glaserapp* and *Kosiek* from 1986, are the earliest mentions of the ICCPR. These cases related to dismissals or failures to renew contracts of a schoolteacher and a university researcher respectively, for being associated with the extreme left or right. Both claimed that these State actions violated their freedom of expression. The Court however held that the access to a post in the civil service lay at the core of these two cases. It explicitly contrasted the ECHR with the ICCPR. The latter, in Article 25(c), includes a right of access on general terms of equality, to public service in one's country. The State Parties to the ECHR deliberately excluded such a right from the Convention.<sup>19</sup>

Another example is the media regulation case of *Groppera Radio AG and Others v. Switzerland*, in which the Court focused its analysis on the third sentence of paragraph 1 of Article 10, ECHR: 'This article shall not

<sup>18</sup> The database has been searched until 1 December 2011. Since the writing of this contribution in early 2012, developments at the Court have continued. Explicit references to the Human Rights Committee's work featured to different extents, for example, in these three cases: ECtHR, *Yıldırım v. Turkey* (Appl. No. 3111/10), Judgment, 18 December 2012; ECtHR, *Youth Initiative for Human Rights v. Serbia* (Appl. No. 48135/06), Judgment, 25 June 2013; ECtHR, *Perinçek v. Switzerland* (Appl. No. 27510/08), Judgment, 17 December 2013.

<sup>19</sup> ECtHR, *Glaserapp v. Germany* (Appl. No. 9228/80), Judgment (Grand Chamber), 28 August 1986, para. 48; ECtHR, *Kosiek v. Germany* (Appl. No. 9704/82), Judgment (Grand Chamber), 28 August 1986, para. 34.

prevent States from requiring the licensing of broadcasting television or cinema enterprises.’ The Court noted that Article 19, ICCPR did not include a comparable provision:

The negotiating history of Article 19 shows that the inclusion of such a provision in that Article had been proposed with a view to the licensing not of the information imparted but rather of the technical means of broadcasting in order to prevent chaos in the use of frequencies. However, its inclusion was opposed on the ground that it might be utilised to hamper free expression, and it was decided that such a provision was not necessary because licensing in the sense intended was deemed to be covered by the reference to ‘public order’ in paragraph 3 of the Article.<sup>20</sup>

Thus, in the Court’s view, the purpose of the media regulation provision in Article 10, ECHR was to permit States to regulate through a system of licences the technical aspects of broadcasting in particular. It did not, however, exempt such measures from Article 10(2)’s requirements for limiting the right to freedom of expression.<sup>21</sup> In this case, the ICCPR was thus used to construct an interpretation of the ECHR, which offered the widest possible safeguards for freedom of expression.

There have also been a number of positive references to the ICCPR. The Covenant surfaces in a number of alleged hate speech cases. In *Jersild v. Denmark*, about a journalist convicted for spreading hate speech by having interviewed right-wing youth on television, Article 20, ICCPR, on the obligation to combat hate speech, is mentioned by the Court as a relevant source.<sup>22</sup> In its consideration of the merits, however, the Court refers to the Convention on the Elimination of All Forms of Racial Discrimination rather than to the ICCPR. A similar mention can be found in the case of *Gündüz v. Turkey*:<sup>23</sup> the Court mentioned Article 20, ICCPR under relevant international instruments, but when concluding in the substantive part of the judgment that hate speech is not protected by Article 10, ECHR, the ICCPR is no longer explicitly mentioned. An implicit source of inspiration at most, then. In *Balsytė-Lideikienė v. Lithuania* – a case about a calendar which contained hateful

<sup>20</sup> ECtHR, *Groppera Radio AG and Others v. Switzerland* (Appl. No. 10890/84), Judgment (Grand Chamber), 28 March 1990, para. 61. The Court referred to Document A/5000 of the 16th session of the United Nations General Assembly, 5 December 1961, para. 23.

<sup>21</sup> *Ibid.*

<sup>22</sup> ECtHR, *Jersild v. Denmark* (Appl. No. 15890/89), Judgment (Grand Chamber), 23 September 1994, para. 21.

<sup>23</sup> ECtHR, *Gündüz v. Turkey* (Appl. No. 35071/97), Judgment (Chamber), 4 December 2003.

expressions – the Court again mentioned Article 20, ICCPR as a relevant source of law to be taken into account. This time, however, it referred back to it explicitly in its assessment of whether a ‘pressing social need’ existed for limiting the freedom of expression in the case. In its balancing exercise, it noted the respondent State’s obligation under international law to prohibit advocacy of national hatred – a direct reference to the provision in the ICCPR on this.<sup>24</sup>

Another positive mention of the Covenant, in the context of artworks, occurred in the case of *Müller and Others v. Switzerland*, a case about allegedly obscene artwork.<sup>25</sup> It was the first case in which the Court explicitly extended the scope of Article 10, ECHR to cover artistic expression.<sup>26</sup> The provision itself is silent on it, but the Court stated in rather lapidary fashion that artistic expressions are part of the concept of freedom of expression. To support it, it referred to the second sentence of Article 10, ECHR which mentions the media, ‘whose activities extend to the field of art’, as the Court held. Second, it found confirmation of its views in Article 19, ICCPR, which specifically mentions information and ideas ‘in the form of art’.<sup>27</sup>

In two cases about alleged attacks on people’s honour and reputation, both against Norway, the ICCPR also featured. In *Tønssbergs Blad AS and Haukom*, the State mentioned that under Article 17, ICCPR it was obliged to protect individuals against unlawful attacks on their reputation. The Court, for its part, reasoned that the newspaper’s content was not ‘capable of causing such injury to personal reputation as could weigh heavily in the balancing exercise.’<sup>28</sup> Thereby, Norway’s invocation of the ICCPR became irrelevant. An earlier case had been more successful in that sense. In *Bladet Tromsø and Stensaas*, the State had equally invoked Article 17, ICCPR. In that case, the Court took it into account when balancing the relevant factors. It held that the seal hunters, who had been the target of criticism in a Norwegian newspaper, had a right to

<sup>24</sup> ECtHR, *Balsytė-Lideikiėnė v. Lithuania* (Appl. No. 72596/01), Judgment (Chamber), 4 November 2008, para. 78.

<sup>25</sup> ECtHR, *Müller and Others v. Switzerland* (Appl. No. 10737/84), Judgment (Chamber), 24 May 1988.

<sup>26</sup> D. Shelton, ‘An Introduction to the History of International Human Rights Law’, *George Washington University Law School Legal Studies Research Paper No. 346*, at [ssrn.com](https://ssrn.com/paper/1010489) paper no. 1010489 (2007), 25 (last accessed 21 January 2014).

<sup>27</sup> ECtHR, *Müller and Others*, para. 27.

<sup>28</sup> ECtHR, *Tønssbergs Blad AS and Haukom v. Norway* (Appl. No. 510/04), Judgment, 1 March 2007, para. 93.

protection of their honour and reputation, as internationally recognised in the ICCPR.<sup>29</sup> The Court used that element to inform its own interpretation of Article 10, ECHR.

Finally, in a small number of judgments, the Human Rights Committee's work played a role. *Lepojić v. Serbia* concerned a journalist found guilty of defamation of a mayor. The applicant himself pointed out that this was part of a wider pattern of pressure exerted on the press. Under the unusual heading 'relevant international standards and findings referred to by the applicant',<sup>30</sup> the Court mentioned the Human Rights Committee's Concluding Observations on Serbia and Montenegro. In those observations, the Committee expressed its concern about 'the high number of proceedings initiated against journalists for media-related offences, in particular as a result of complaints filed by political personalities who feel that they have been subject to defamation because of their functions.'<sup>31</sup> The Court itself did not return to the issue of the possible wider pattern of pressure on the press in assessing the merits of the case. What this example shows is that individual applicants can use the Committee's work to contextualise their case.

In a case about a newspaper editor who had been sentenced by a military court, *Ergin v. Turkey (No. 6)*, the Human Rights Committee's General Comment on Article 14 ICCPR (administration of justice)<sup>32</sup> and its Concluding Observations on specific countries were mentioned under 'relevant domestic and international law and practice'. These observations, on Poland and Slovakia, related to the unacceptability of trying civilians in military courts.<sup>33</sup> In the merits of the judgment, the Court came to a similar finding by referring to 'developments over the last decade at the international level ... which confirm the existence of a trend towards excluding the criminal jurisdiction of military courts over civilians.'<sup>34</sup> An

<sup>29</sup> ECtHR, *Bladet Tromsø and Stensaas v. Norway* (Appl. No. 21980/93), Judgment (Grand Chamber), 20 May 1999, para. 65.

<sup>30</sup> Unusual in the sense that the Court rarely explicitly states that the sources were suggested by either of the parties; applicant or respondent.

<sup>31</sup> HRC, Concluding Observations on Serbia and Montenegro, UN Doc. CCPR/CO/81/SEMO, 12 August 2004, as cited in ECtHR, *Lepojić v. Serbia* (Appl. No. 13909/05), Judgment 6 November 2007, para. 40.

<sup>32</sup> HRC, General Comment No. 13: Article 14 (Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law), UN Doc. HRI/GEN/1/Rev.9, 13 April 1984.

<sup>33</sup> ECtHR, *Ergin v. Turkey (No. 6)* (Appl. No. 47533/99), Judgment, 4 May 2006, paras. 22–23.

<sup>34</sup> *Ibid.*, para. 45.

even more explicit mention followed in *Stoll v. Switzerland*, a case about a journalist who had been convicted for publishing classified information. The Court, again under relevant international legal materials, cited Concluding Observations of the Human Rights Committee, this time criticising the overly broad application of the Official Secrets Act in the United Kingdom. The Committee asserted that the State ‘should ensure that its powers to protect information genuinely related to matters of national security are narrowly utilised’.<sup>35</sup> In the merits of the case, the European Court explicitly referred to these findings to support its own argument along the same lines.<sup>36</sup>

As the above overview reflects, the number of references to the global norm of freedom of expression is limited in the jurisprudence of the European Court of Human Rights. Mostly, the Covenant has been used by the Court as an (additional) interpretative tool to give meaning to the European Convention’s own freedom of expression provision. At times, the Court has used the Human Rights Committee’s concluding country observations in the same way. It has not (yet) used the Committee’s views in individual cases.<sup>37</sup> This may not only relate to a general attitude of the Court towards the Committee’s work, but may also be to a large extent caused by a factor of a different, very pragmatic kind. The Committee’s case law on freedom of expression is still extremely limited compared to the European Court’s jurisprudence. There is in that sense less reason to engage in judicial borrowing or dialogue to solve legal issues. The same holds for why governments and applicants use the Committee’s case law so sparingly: the Court’s own case law is a much larger treasure trove in which to delve for the golden argument that makes or breaks a case. To put it differently, if one wants to know how a complicated high-tech espresso machine works, it is of little use to consult the manual for a simple coffee grinder, no matter how reputable that grinder may be.

## 5 The Inter-American and African human rights systems

The Inter-American human rights system has a tradition of being relatively open to other sources of law, not only human rights law but also

<sup>35</sup> HRC, Concluding Observations on the United Kingdom, UN Doc. CCPR/CO/73/UK, 6 December 2001, para. 21, as cited in ECtHR, *Stoll v. Switzerland* (Appl. No. 69698/01), Judgment (Grand Chamber), 10 December 2007, para. 42.

<sup>36</sup> *Ibid.*, para. 54.

<sup>37</sup> Nor has it yet referred to the Committee’s General Comment on the right to freedom of expression.

international humanitarian law. In this section, the extent of the use of Human Rights Committee case law by the Inter-American Court of Human Rights will be assessed.<sup>38</sup> The primary freedom of expression provision in the American Convention on Human Rights (ACHR) is Article 13, which is the equivalent of Articles 19 and 20, ICCPR.<sup>39</sup> Just over twenty cases of the total jurisprudence (many thousands of cases) of the Court include references to the case law of the Human Rights Committee. This in itself reflects the Court's openness, in principle, to the work of that United Nations treaty body. Virtually all of these are positive references: invoking the work of the Committee to support an interpretation made by the Inter-American Court in the judgment at hand.<sup>40</sup> In only very few cases, however, is freedom of expression the core of matter. All of these cases date from after the turn of the century.

The earliest example is the judgment of *Olmedo-Bustos and Others v. Chile*, better known as the case of 'The Last Temptation of Christ'.<sup>41</sup> It concerned the decision of Chile's highest court to prohibit the showing of the movie in the country. The Inter-American Court held that this constituted censorship in violation of Article 13, ACHR. In a rather tentative start for the Court as a whole to refer to the Committee's work in freedom of expression cases, Judge Cançado Trindade stated in a concurring opinion that under international human rights law, not only national judicial bodies but also legislative bodies have obligations. To support his argument, he pointed out that the Human Rights Committee had in a freedom of expression case called for legislative changes.<sup>42</sup>

In *Herrera-Ulloa v. Costa Rica*, the Committee's case law made it to the merits of the Inter-American Court's judgment. In the case, about a journalist who had been convicted for defamation, the Court emphasized the close relationship between freedom of expression and democracy: free formation of public opinion as the 'sine qua non' for a vibrant

<sup>38</sup> Cases have been reviewed in the case law database of the Inter-American Court of Human Rights: [corteidh.or.cr](http://corteidh.or.cr) until 1 June 2011.

<sup>39</sup> In addition, Article 14 of the American Convention on Human Rights concerns a specific right to reply in cases of inaccurate or offensive statements or ideas in the media.

<sup>40</sup> See e.g., Inter-American Court of Human Rights (IACtHR), *Heliodoro Portugal v. Panama*, Series C. No. 186, 12 August 2008, para. 11, positively referring to the Human Rights Committee's case law on enforced disappearances. And also IACtHR, *Caesar v. Trinidad and Tobago*, Series C. No. 123, 11 March 2005, para. 63, on corporal punishment.

<sup>41</sup> IACtHR, *Olmedo-Bustos and Others v. Chile*, Series C. No. 73, 5 February 2001.

<sup>42</sup> Para. 6, note 17, of his concurring opinion, citing HRC, *J. Ballantyne, E. Davidson and G. McIntyre v. Canada*, Nos. 359/1989 and 385/1989, 5 May 1993, para. 13.

democracy. To underline the consensus on this relationship, the judgment contains references to both regional case law – of the European Court and the African Commission on Human and Peoples' Rights – and global case law.<sup>43</sup> It refers, in particular, to the Human Rights Committee's views in *Aduayom and Others v. Togo*, which noted that in a democracy it is essential that 'its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticize or openly and publicly evaluate their Governments without fear of interference or punishment.'<sup>44</sup> A month later, in August 2004, exactly the same reference was made on the same point in *Ricardo Canese v. Paraguay*, a case about a presidential candidate who had been convicted for slander due to remarks made about a rival candidate in an electoral debate.<sup>45</sup> Concerns about the need for free debate and free expression for democracies are thus widely shared among global and regional human rights supervisors.

Finally, the judgment in *Ríos and Others v. Venezuela* related to the hampering by State officials of the work of journalists of RCTV television station. The Court noted the following about the criteria under which the State can regulate the work of the media:

With regard to the accreditations or authorizations for the written media to participate in official events, which imply a possible restriction on the exercise of the freedom to seek, receive, and impart information and ideas of any nature, it must be proven that their application is legal, it seeks a legitimate objective, and it is necessary and proportional in relation to the objective sought within a democratic society. The requirements for the accreditation must be clear, objective, and reasonable, and their application must be transparent.<sup>46</sup>

Most of these elements are directly taken from the Human Rights Committee's views in *Gauthier v. Canada* to which the Inter-American Court explicitly refers.<sup>47</sup> Specific criteria in the case law of the global mechanism were used here by its regional peer to elucidate the meaning of a regional human rights treaty.

The African Commission on Human and Peoples' Rights does not seem to refer to the work of the Human Rights Committee in its freedom

<sup>43</sup> IACtHR, *Herrera-Ulloa v. Costa Rica*, Series C. No. 107, 2 July 2004, para. 114.

<sup>44</sup> HRC, *Aduayom and Others v. Togo*, Nos. 422/1990 a.o., 12 July 1996, para. 7.4.

<sup>45</sup> IACtHR, *Ricardo Canese v. Paraguay*, Series C. No. 111, 31 August 2004, para. 84, citing the same UN HRC case of *Aduayom and Others*.

<sup>46</sup> IACtHR, *Ríos and Others v. Venezuela*, Series C. No. 194, 28 January 2009, para. 346.

<sup>47</sup> HRC, *Gauthier v. Canada*, No. 633/1995, 5 May 1999, para. 13.6.

of expression cases.<sup>48</sup> And the Court has not yet addressed freedom of expression cases. Any possible interaction with the African human rights system thus still lies in the future.

## 6 The Human Rights Committee

A striking feature in the Human Rights Committee's jurisprudence is the absence of any mention of regional human rights case law in the Committee's views. This seems to be in line with a broader practice. The Committee's views in cases of torture show a similar pattern.<sup>49</sup> Conversely, both applicants and respondent States do tend to invoke regional human rights case law, above all Strasbourg jurisprudence. This has occurred not only in cases directed against European States, but also in case law relating to Canada, Australia and Sri Lanka.

The earliest example is the leading Human Rights Committee case of Professor Robert Faurisson, who was convicted in France under the Gaysot Act,<sup>50</sup> which makes it an offence to question or minimise Nazi crimes, including the Shoah. Faurisson had asserted, among other things, that 'the myth of the gas chambers is a dishonest fabrication'.<sup>51</sup> According to France, in its arguments in the case, the Act was meant to counter modern forms of anti-Semitism. Contrary to what Faurisson himself claimed – that he was undertaking legitimate historical research – France argued that his views were directed against Jews. It invoked Article 5, ICCPR which prohibits the destruction of rights. Moreover, it argued that Article 20 of the Covenant obliged it to prohibit advocacy of racial or religious hatred. To support its first point, on the destruction or abuse of rights, France referred to the European Convention and case law of the (former) European Commission of Human Rights.<sup>52</sup> Article 17, ECHR, like Article 5, ICCPR, prohibits the abuse of rights. The practice of the Commission and to a certain extent the European Court had been to declare cases concerning the convictions of racist applicants inadmissible under Article 17. The Human Rights Committee, for its part, was not prepared to travel that European road.

<sup>48</sup> A full check of its case law up to 1 December 2011 showed no results in this respect.

<sup>49</sup> See Buyse (2011/2012).

<sup>50</sup> Official title: Loi no. 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xenophobe (Gaysot).

<sup>51</sup> HRC, *Robert Faurisson v. France*, No. 550/1993, 8 November 1996, para. 2.6.

<sup>52</sup> In the pre-1998 Strasbourg system, this Commission was the first port of call for applicants. It could refer cases to the Committee of Ministers of the Council of Europe or to the European Court of Human Rights.

It assessed the case of *Faurisson* on substance under Article 19 and held that the conviction had pursued a legitimate aim and was necessary. The Committee noted the possibility that measures taken under the Gaysot Act could, in other circumstances, be incompatible with the Covenant. Years later, in its new General Comment on the right to freedom of expression, adopted in 2011, the Committee became even more unequivocal on this point: 'Laws that penalise the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression.'<sup>53</sup> Notably, the Committee referred in a footnote to its 1996 *Faurisson* decision, in which it had taken a more nuanced approach. The European system has also slightly changed its position over time: cases of racism are less easily dismissed under the abuse of rights clause and increasingly dealt with on the merits under Article 10 ECHR.<sup>54</sup>

A similar issue of anti-Semitism surfaced in the case of *Malcolm Ross v. Canada*.<sup>55</sup> The applicant was a schoolteacher who had been dismissed because of his anti-Jewish writings. He invoked the European Court case of *Vogt v. Germany* which concerned a schoolteacher dismissed on account of her communist activities. In that case the Court had found a violation of the right to freedom of expression.<sup>56</sup> Canada, a State obviously not party to the ECHR, argued that the applicant's situation differed from the *Vogt* case in that *Vogt's* activities were for a lawful political party and her expressions were not discriminatory. The Committee did follow the European Court case law in holding that by removing Ross from his teaching position his freedom of expression had been restricted. But it did so without explicitly referring to the *Vogt* case. The situation did not amount to a violation of Article 19, however, since the Committee argued that such a restriction could be argued to be necessary to 'protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance'.<sup>57</sup>

<sup>53</sup> HRC, General Comment No. 34: Article 19 (Freedom of Opinion and Expression), UN Doc. CCPR/C/GC/34, 12 September 2011, para. 49.

<sup>54</sup> See e.g., ECtHR, *Féret v. Belgium* (Appl. No. 15615/07), Judgment, 16 July 2009 and H. Cannie and D. Voorhoof, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?', *Netherlands Quarterly of Human Rights* 29(1) (2011), 54–83.

<sup>55</sup> HRC, *Malcolm Ross v. Canada*, No. 736/1997, 18 October 2000.

<sup>56</sup> ECtHR, *Vogt v. Germany* (Appl. No. 17851/91), Judgment (Grand Chamber), 26 September 1995.

<sup>57</sup> HRC, *Malcolm Ross v. Canada*, para. 11.6.

In *Zeljko Bodrozic v. Serbia and Montenegro*, the facts related to the conviction of a journalist for insulting a politician in a magazine article.<sup>58</sup> The applicant referred to four classic freedom-of-expression judgments of the European Court of Human Rights: *Handyside*, *Lingens*, *Oberschlick* and *Schwabe*.<sup>59</sup> These cases related *inter alia* to the fact that freedom of expression also protects critical utterances and that the limits of permissible criticism are wider when it targets politicians than ordinary citizens. The Human Rights Committee noted in its views that ‘in circumstances of public debate in a democratic society, especially in the media, concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high.’<sup>60</sup> This reflects the Strasbourg case law very closely, but the Committee referred instead to its own jurisprudence – the case of *Aduayom and Others v. Togo*<sup>61</sup> – in which it emphasized the importance of possibilities for open criticism in relation to political parties and the political system. Interestingly, this jurisprudence was delivered later than the European cases mentioned in the *Bodrozic* case. There might thus be a possibility that the Committee was influenced by those cases, but such influence is implicit rather than explicit.

There have also been cases in which both parties referred to the European Court’s case law. In *Avon Lovell v. Australia*, a contempt of court case, the applicant referred to a friendly settlement in the ECtHR case of *Harman v. the United Kingdom*, as a result of which Australian rules on contempt of court were also adjusted.<sup>62</sup> Here, the argument seems to have been incidental as it did not play any further role in the case. Australia invoked a classic freedom of expression case, the *Sunday Times (No. 1)* judgment of the European Court relating to contempt of court.<sup>63</sup> Again, the Committee did not examine that case law but rather concluded through its own argumentation that Article 19 had not been violated.

<sup>58</sup> HRC, *Zeljko Bodrozic v. Serbia and Montenegro*, No. 1180/2003, 31 October 2005.

<sup>59</sup> ECtHR, *Handyside v. the United Kingdom* (Appl. No. 5493/72), Judgment (Grand Chamber), 7 December 1978; ECtHR, *Lingens v. Austria* (Appl. No. 9815/82), Judgment (Grand Chamber), 8 July 1986; ECtHR, *Oberschlick v. Austria* (Appl. No. 11662/85), Judgment (Chamber), 23 May 1991; ECtHR, *Schwabe v. Austria* (Appl. No. 13704/88), Judgment (Chamber), 28 August 1992.

<sup>60</sup> HRC, *Zeljko Bodrovic v. Serbia and Montenegro*, para. 7.2.

<sup>61</sup> HRC, *Aduayom and Others v. Togo*, Nos. 422/1990 a.o., 12 July 1996.

<sup>62</sup> HRC, *Avon Lovell v. Australia*, No. 920/2000, 24 March 2004, para. 5.10.

<sup>63</sup> ECtHR, *Sunday Times v. the United Kingdom (No. 1)* (Appl. No. 6538/74), Judgment (Grand Chamber), 26 April 1979, para. 47.

At times the references to European case law seem to have been even more in vain: when the applicant refers to it in her or his arguments under Article 19, but the Committee declines to assess the freedom of expression aspects of a case. In *Anthony Michael Immanuel Fernando v. Sri Lanka*,<sup>64</sup> another contempt of court case, the applicant argued that the contempt powers had not been defined with sufficient precision. The quality of the legal provision itself was thus at stake. He referred to the aforementioned *Sunday Times* case and another European case on the criteria for lawfulness, *Grigoriades v. Greece*,<sup>65</sup> to argue that a legal norm should be accessible and that its effects should be foreseeable. As to the proportionality of the sentence he received – a year of imprisonment with hard labour – he referred to proportionality criteria in the Strasbourg case *De Haes and Gijssels v. Belgium*.<sup>66</sup> Unfortunately, the Committee held his Article 19 claim to be insufficiently substantiated and therefore did not probe the issue further.

In two cases the European human rights protection system featured only from a procedural perspective. In *Dobroslav Paraga v. Croatia* the Committee noted that the applicant had registered two complaints with the European Court of Human Rights. These related to different issues and therefore did not preclude the Committee from assessing the application at hand.<sup>67</sup> And in *Jacobus Gerardus Strik v. the Netherlands* the State noted that the European Commission of Human Rights had earlier declared the applicant's case inadmissible. Although the Committee did the same, this is a far cry from any form of judicial dialogue.<sup>68</sup>

Finally, references to the other two regional mechanisms by any of the parties in cases before the Human Rights Committee are almost non-existent. A survey of the Committee's views in freedom of expression cases up to 2011<sup>69</sup> yielded no mentions of the African system or treaties.

<sup>64</sup> HRC, *Anthony Michael Immanuel Fernando v. Sri Lanka*, No. 1189/2003, 31 March 2005.

<sup>65</sup> ECtHR, *Grigoriades v. Greece* (Appl. No. 24348/94), Judgment (Grand Chamber), 25 November 1997.

<sup>66</sup> ECtHR, *De Haes and Gijssels v. Belgium* (Appl. No. 19983/92), Judgment, 24 February 1997.

<sup>67</sup> HRC, *Dobroslav Paraga v. Croatia*, No. 727/1996, 4 April 2001.

<sup>68</sup> HRC, *Jacobus Gerardus Strik v. the Netherlands*, No. 1001/2001, 1 November 2002.

<sup>69</sup> By using the electronic human rights database of the Netherlands Institute of Human Rights (SIM) at [www.uu.nl/sim](http://www.uu.nl/sim) (last accessed 27 January 2014) – and combining a search for Article 19 cases with references to the African and Inter-American regional mechanisms and treaties.

The Inter-American system surfaced in only one case. In the case of journalist *Zeljko Bodrovic*, the applicant referred to Report 22/94 of the Inter-American Commission on Human Rights on so-called 'desacato' or contempt laws in Argentina, among other references to European Court case law mentioned earlier and even United States Supreme Court jurisprudence. He used those references to substantiate his claim that Article 19 protects freedom of expression in an extensive manner, specifically in political debate.<sup>70</sup> Laws such as the one under review in the Inter-American Commission's report offer more rather than less protection to public officials in contempt cases. In *Bodrovic* the Human Rights Committee, as noted above, essentially granted the applicant's claim and held that Article 19 accords a high degree of protection for public debate about political figures, but did so with reference to its own case law rather than the cases from regional systems invoked by the applicant.

## 7 Conclusion

The overview of regional and global case law presented above shows a rather minimalist version of judicial dialogue. It may even be better to speak of intermittent listening to each other's findings. Moreover, the extent to which the various adjudicative human rights bodies show a willingness to openly use the jurisprudence of their peers differs widely.

The most striking difference is that regional bodies do refer to universal standards but the Human Rights Committee does not explicitly use regional standards or case law. Of all the adjudicative human rights bodies surveyed, the European Court has perhaps the least need to refer to external case law. Its own jurisprudence is extensive and detailed and its legitimacy is relatively high. This may explain why the ICCPR mostly features as a comparative standard in a small number of cases to inform, contrast or confirm a certain interpretation of the ECHR. The case law of the Human Rights Committee itself does not feature in European freedom of expression cases. In the Inter-American jurisprudence, references to the Human Rights Committee's case law do occur in some instances, mostly to strengthen the persuasive force of a certain interpretation

<sup>70</sup> HRC, *Zeljko Bodrovic v. Serbia and Montenegro*, para. 3.1.

the Court makes, in showing that this interpretation is in line with international trends, both coming from its global and its regional peers. And in the occasional case, the Human Rights Committee's jurisprudence is used to fill the rather open frame of a human rights norm from the American Convention.

A rather different pattern is to be seen in the views of the Human Rights Committee. Both applicants and States – remarkably both from Europe and outside it – do refer to European cases and these indeed may have at times informed the findings of the Committee. But this never occurs explicitly. Reflections of, for example, the European Court's interpretations of the freedom of expression norm can be found, but these are not mentioned as such. This cannot be explained by the fact that the Committee's own jurisprudence on freedom of expression cases is large – it is not. Nor could one say that it can only be caused by a lack of knowledge of regional systems – a sizeable portion of the Committee's members are from Europe and the Americas. Rather, the reason may be found in the fact that open citing could be seen to weaken rather than strengthen the persuasive force of the Committee's views. Explicit references to only one or a few regional systems may not be acceptable or convincing to Committee members and State Parties beyond Europe or Latin America. It could even fuel criticisms that the UN human rights system is Western rather than universal. In that sense, the current ways of 'tacit citing', learning from regional systems without too openly acknowledging it may be the highest attainable form of dialogue at this point in time. To turn the current soft silent one-way whispers into a fully-fledged dialogue requires more openness, especially on the part of State Parties to the various human rights systems and a recognition that using other treaties and their jurisprudence for elucidation or inspiration does not mean one automatically yields to or is bound by their views.

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