ECHOES OF STRASBOURG IN GENEVA
— The Influence of ECHR Anti-Torture Jurisprudence on the United Nations Human Rights Committee —

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Introduction

Experts often pride themselves on their particular expertise and experience rather than openly avowing the insights gained from others. In a juridical context one can add to this that legal systems are not always open to "foreign moods, fads, and fashions" as the late Justice Scalia of the United States Supreme Court phrased it in a famous dissenting opinion.[1] Matters are not fundamentally different for international human rights institutions. These seem to rely mainly on their own corpus of knowledge. Only a few, such as the Inter-American Court of Human Rights, explicitly use the jurisprudence of their peers on a larger scale. On the one hand, this may not come as a surprise: each institution assesses applications on alleged human rights violations on the basis of a specific treaty. Human rights monitoring mechanisms co-exist rather than standing in a hierarchical relationship towards each other. On the other hand, there are arguments weighing in favour of legal borrowing within the human rights field. The problems at hand and the content of the applicable legal norms may be similar. In addition, human rights are relatively open norms which always require a specific interpretation in order to apply them in concrete situations. If one international human rights institution has argued that a certain practice — such as corporal punishment in schools — is contrary to human rights law, then the reasoning which has led to that conclusion can serve as

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[1] *Lawrence v. Texas*, 539 U.S. 558 (2003).

inspiration for other guardians of human rights to arrive at their own conclusions.

In this article the influence of the European Court of Human Rights' case-law on the United Nations Human Rights Committee will be analysed. This particular choice of supervisory bodies enables us to trace such potential influence adequately since both the Court and the Committee supervise treaties which mainly concern civil and political rights: the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). Both are legally binding elaborations of the Universal Declaration of Human Rights. Many of the rights in the two treaties are, as a consequence, formulated in a similar way. This facilitates a systematic comparison between the case-law of the two supervisory institutions. To map the possible influence of the Court's jurisprudence on the Committee's work as precisely and concretely as possible, I will focus on the prohibition of torture and inhuman and degrading treatment.

I. Fragmentation and Inspiration

The number of international judicial and quasi-judicial institutions has grown immensely in the past two decades. Thus, the countering of possible fragmentation seems to be a recurring theme in discussions on international law. The ever-growing specialisation within public international law has yielded a wide range of separate regimes, each with their own norms and procedures and sometimes lacking sufficient awareness of developments within other legal sub-fields. This may and can lead to contrary obligations for states. This phenomenon can also be detected within sub-fields of international law, whenever different supervisory bodies exist in parallel while supervising similar norms. How should a state act if one supervisor for example judges that the position of certain minorities should be actively improved by the state, whereas another institution assesses that positive discrimination is contrary to equal treatment?

Somewhat paradoxically, the trend of specialisation and fragmentation has been accompanied by the emergence of a global community of courts, as Anne-Marie Slaughter labeled it in a famous 2003 article.[2] She referred to the increasing "dialogue" between international judicial institutions. This dialogue does not only occur socially and professionally, through conferences and seminars at which judges meet, but also through jurisprudence. According to Slaughter this has led to constitutional cross-fertilization by way of mutual citations — a tool for judges to strengthen the persuasive force and quality of their own views and judgments.[3] Using the case-law of other international judges can serve as a source of new in-

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[2] Anne-Marie Slaughter, "A Global Community of Courts," *Harvard International Law Journal*, Vol. 44, No. 1 (2003), pp. 191-219.

[3] *Ibid.*, pp. 195 and 201.

sights or inspiration and can help yield better argued judgments.

Does the rise of the community of courts help to counter the trend of fragmentation? In order to answer that question, it is important to assess to which extent and in which way the international judicial dialogue occurs. As early as 2002, Nathan Miller showed in a quantitative survey that virtually all international judicial bodies refer to their peers in their case-law.[4] He counted over 180 cases. The way in which this happened, however, certainly did not reveal a balanced picture. Some courts are much more active in citing external jurisprudence than others. The European Court of Human Rights, for example, is much more often cited by others than that it cites others itself. A more important finding in Miller's research was that there is no discernible pattern in the subject-matter cited — both procedural and substantive law — but that the overwhelming majority of citations is either positive or neutral: 173 out of 184 cases.[5] This seems to imply that the often-feared fragmentation is not all too problematic in practice, at least in those cases in which judges explicitly acknowledge the interpretations of their judicial peers. Nevertheless, the amount of citations on the total of all international judgments of the past few decades remains particularly limited. Although judges rarely explicitly distance themselves from other international courts, it could very well be that this happens implicitly by taking a different approach without citing contrary evidence or diverging interpretations from other courts. Be that as it may, the mutual engagement of international courts in general seems to reflect an ethos of courtesy towards each other.

Similar quantitative research of 2009, by political scientist Erik Voeten, reveals that the trend of asymmetric citing has continued in the past decade.[6] These citations have two characteristic features. First, they are used to increase the persuasiveness of a court's own argumentation, but not because the external jurisprudence is binding upon the citing court. Formally, there is no hierarchy between most international courts. Secondly, judges who do cite case-law of other institutions become vulnerable to the criticism that they go beyond their mandate — which usually is the interpretation and application of a specific treaty within a particular geographical or thematic context. Voeten argued that courts facing intensive scrutiny from the state parties to the relevant treaty have more reason to be

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[4] Nathan Miller, "An International Jurisprudence? The Operation of 'Precedent' Across International Tribunals," *Leiden Journal of International Law*, Vol. 15, No. 3 (2002), pp. 483-526. He included, amongst others, the case-law of the International Court of Justice, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Court of Justice of the European Union, and the European Court of Human Rights (hereinafter ECtHR).

[5] *Ibid.*, p. 492.

[6] Erik Voeten, "Borrowing and Non-Borrowing among International Courts," *Journal of Legal Studies*, Vol. 39, No. 2 (2010), pp. 547-576.

reticent in citing external sources. His analysis reveals that the European Court of Human Rights, whose judgments are closely followed by ECHR state parties, indeed cites others infrequently.[7]

The above can also be deemed applicable to the Human Rights Committee. Although the Committee is not a formal court of law, it does play a role similar to regional human rights courts: it assesses whether state action or inaction complies with the treaty it monitors. That supervision does not fundamentally differ from a judgment — neither in the structure nor in the language used. This also appears from the Committee's General Comment 33 on obligations under the additional protocol (on the right of individual petition) to the ICCPR. In this Comment, the Committee goes into the similarities with judicial bodies: "a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions." In addition, the members of the Committee are part of the international community of human rights experts.

II. Relationship Human Rights Committee — European Court

In many ways, the Human Rights Committee is the younger sibling of the European Court of Human Rights. It largely focuses on similar rights, but it faces the double challenge of having to monitor human rights globally rather than regionally, but with fewer tools than the European Court has at its disposal. The text of the ICCPR, dating from 1966, provides for the creation of a Committee (Article 28) as a supervisory body to monitor the implementation of state obligations under the Covenant. The ICCPR itself does not grant the Committee any other role than to discuss state reports. Since 1981 the Committee has, on its own initiative, drafted General Comments to elucidate a number of rights and provisions from the Covenant. The right of individual petition is included in a separate, optional protocol to the ICCPR, which entered into force in 1976 — simultaneously with the Covenant itself. This stands in sharp contrast to the ECHR in which, since Protocol 11 of 1998, such a right is part and parcel of the system rather than an option. At the beginning of 2016, 115 out of a total of 168 state parties had ratified the optional protocol to the ICCPR[8] — including almost all state parties to the European Convention on Human Rights. To this optional character one may add that the Committee in the procedure on individual complaints only delivers so-called "views" which are not as such legally binding. Even if one accepts that the Committee is the most authoritative interpreter of the Covenant and that states

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[7] *Ibid.*, pp. 3-4.

[8] Numbers found on the United Nations Treaty website, *available at* <https://treaties.un.org>.

only act in good faith if they have due regard to the Committee's views, the Committee's jurisprudence clearly still stands on a weaker legal foundation than the case-law of the ECHR. State parties to the European Convention are bound to abide by the Court's judgments.[9] In addition, they actively monitor the implementation of these judgments through the Council of Europe's Committee of Ministers. Lacking such a similar formal overview procedure on implementation, the Committee has developed its own practice of trying to keep track on follow-up action (or lack thereof) by states. This different legal and institutional context makes the Human Right Committee very dependent on the persuasive power of its views, even more than the European Court. In theory, that could be an inducement to explicitly borrow from external jurisprudence in order to convince states that the Committee is not reading novel obligations into existing provisions, but rather connecting to accepted and existing views.

The two supervisory bodies, the Committee and the Court, have been set up under different human rights treaties and do not have any formal link. Nevertheless, they often face similar human rights issues. The reason for this lies primarily with the comparable subject-matter of the rights included in the two treaties, ICCPR and ECHR. In both cases these are mainly civil and political rights, such as the freedom of expression, the freedom of religion, and the prohibition of torture. The preambles of both treaties refer to the Universal Declaration, on which both treaties were based. And even the specific formulation of rights shows great similarities. The limitations clauses of many rights, for example, are comparable: a state can only restrict most rights if it is provided by law and necessary to achieve one of a number of explicitly listed legitimate aims. All of this taken together means that on substantive grounds it would be possible for both institutions to use each other's jurisprudence.

From the perspective of an applicant there is a (negative) link between the two human rights protection regimes. The European Convention, through the admissibility requirements, prevents the Court from dealing with a case which is "substantially the same as a matter that has ... already been submitted to another procedure of international investigation or settlement and contains no relevant new information."[10] Article 5 of the first Optional Protocol to the ICCPR is more flexible in this respect. It stipulates that the Committee shall only deal with applications if the "same matter is not being examined under another procedure of international investigation or settlement." This precludes simultaneous assessments of complaints by the European Court and the Human Rights Committee, but does enable individuals to submit their application to the Committee *after* the European Court has dealt with it. The Committee for example assessed the case of *Hendriks*

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[9] Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 46.

[10] *Ibid.*, Art. 35.

v. Netherlands[11] on child custody, although the Strasbourg institutions had already dealt with the case.[12] Since this created an ulterior form of human rights authority beyond the European system, the Committee of Ministers of the Council of Europe recommended state parties to the ECHR only to ratify the protocol to the ICCPR with a reservation: concerning those applications which had previously been dealt with by Strasbourg, states would not recognise the jurisdiction of the Human Rights Committee.[13] A large number of European states, including France, Spain, Germany and Italy have indeed done so.[14] Other states, such as the United Kingdom, have chosen not to ratify the Protocol to the ICCPR. Only a few states, such as the Netherlands, have deliberately chosen to ratify without such a reservation.[15] State parties which had ratified the Protocol to the ICCPR before acceding to the ECHR did not have the option to make such a reservation. The possibility of a subsequent assessment by first the Strasbourg and then the Geneva human rights mechanisms thus applies only to a limited number of European states. It is for those states that possible contradictory interpretations between the European Court and the Human Rights Committee could be most directly problematic.

Finally, it should be noted that the linkages between these European and global human rights bodies are formally irrelevant for most state parties to the ICCPR's first Optional Protocol: for African, American and Asian states the ECHR is merely a regional treaty that does not bind them. The interpretations of human rights by the *European* Court of Human Rights are thus certainly not automatically guiding or acceptable. This does not only apply to the content of interpretations but also to the intensity of review; a regional human rights mechanism can more easily assume shared values and norms than a global guardian of human rights.[16] It is within this context that the Human Rights Committee has to function.

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[11] *Hendriks v. Netherlands*, Decision of the Human Rights Committee (hereinafter HRC) of 12 August 1988, No. 201/1985.

[12] *Hendriks v. Netherlands*, Decision of the European Commission of Human Rights of 8 March 1982, Application No. 8427/78.

[13] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev. ed., 2005), p. 881.

[14] Jakob Möller and Alfred de Zayas, *United Nations Human Rights Committee Case Law 1977-2008: A Handbook* (2009), p. 101.

[15] The others are Portugal and Cyprus. Nowak, *supra* note 13, pp. 881-882.

[16] P.R. Ghandhi, "The Human Rights Committee and Articles 7 and 10(1) of the International Covenant on Civil and Political Rights, 1966," *Dalhousie Law Journal*, Vol. 13, No. 2 (1990), p. 761.

III. A Sample of the Committee's Jurisprudence: the Prohibition of Torture

The prohibition of torture is phrased as follows in Article 3 ECHR: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." The ICCPR contains very similar wording in Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." With the exception of the phrase on experimentation, there is no significant difference between the two provisions. The Committee uses the label "cruel" interchangeably with "inhuman" treatment or punishment.[17] A human right which is formulated in such a similar fashion enables an assessment of the possible influence of one human rights body's work on that of another.

The European Convention surfaces in a number of ways in the case-law[18] of the Human Rights Committee.[19] First, when an applicant refers to European case-law to stress an issue of admissibility. This occurred in a case against Bosnia on enforced disappearances where the events at stake had started before Bosnia had ratified the ICCPR. The applicants thus felt compelled, with reference to Strasbourg jurisprudence, to claim that enforced disappearances represent continuing violations under human rights law.[20]

Secondly, the ECHR may come up as an argument when the applicant uses European jurisprudence to strengthen his or her substantive claim. In the case of *Osbourne v. Jamaica* the applicant had been sentenced at the national level to ten strokes with the "tamarind birch."[21] Osbourne argued that such a punishment was cruel, inhuman and degrading. In doing so he referred to the landmark *Tyrer v. United Kingdom* judgment of the European Court.[22] In *Tyrer*, the Court had concluded that similar strokes with a birch, inflicted by police officers on a teenager

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[17] Nowak, *supra* note 13, pp. 163-165.

[18] Strictly speaking, the Committee's "views" are not case-law or jurisprudence of a judicial institution. For reasons of style I will nevertheless refer to its work as jurisprudence.

[19] The references to case-law used in this article have been found by searching the electronic database of the UN High Commissioner for Human Rights *available at* <http://juris.ohchr.org> for Article 7 cases in which the ECHR or European Court featured. This yielded a total of almost 60 findings, of which the most relevant ones are dealt with here.

[20] *Rizvanović v. Bosnia and Herzegovina*, Decision of the HRC of 23 May 2014, No. 1997/2010, para. 2.13. The reference made was to *Varnava and Others v. Turkey*, Judgment of the ECtHR of 18 September 2009, Application Nos. 16064/90 a.o. References to case-law of the Inter-American system were simultaneously made. In the case, the argument was not contested by the state and thus the Committee did not specifically go into it.

[21] *Osbourne v. Jamaica*, Decision of the HRC of 13 April 2000, No. 759/1997.

[22] *Tyrer v. United Kingdom*, Judgment of the ECtHR of 25 April 1978, Application No. 5856/72.

on the Isle of Man amounted to a violation of Article 3 ECHR. In *Osbourne* the Human Rights Committee came to the same conclusion — a violation — but without any explanation or argumentation for that finding. In doing so, the Committee implicitly continued down the road it had set out in its own *General Comment* on Article 7 ICCPR. In that Comment, the Committee had already stated that the forbidden forms of treatment in that provision "must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure."[23] In subsequent cases of the same kind, applicants kept referring to *Tyrer*, whereas the Committee rather noted its views in *Osbourne*.[24] If there has been any influence from Strasbourg to Geneva in this respect, it has remained completely implicit.

When do applicants make references to the case-law of the European Court? Mainly, they use it as an argumentative tool in order to convince the Committee that a certain situation amounts to a human rights violation.[25] This may either entail defining or enlarging the scope of an individual right or state obligation, a balancing of interests to the benefit of the applicant, or even to serve as proof of a factual situation. Logically, states will argue the other way around and in doing so they also use European case-law — even non-European states. In an expulsion case Canada used ECHR jurisprudence to argue for a higher burden of proof for the applicant.[26] The complainant, Ms P.K., feared that expulsion would expose her to ill-treatment by a Pakistani movement which she had left. With a reference to the European *Bensaid v. United Kingdom* judgment[27], Canada argued that a higher burden of proof concerning possible danger was appropriate in situations where the main danger came from a non-state actor rather than a state.[28] Although the Human Rights Committee did indeed conclude that the applicant had not sufficiently proven the alleged danger, it again did so without explicitly addressing the reasoning of its European peer institution, as had been put forward by Canada.

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[23] HRC, General Comment No. 7, 30 May 1982.

[24] See *e.g.*, *Errol Pryce v. Jamaica*, Decision of the HRC of 15 March 2004, No. 793/1998. In *M.G. v. Germany*, Decision of the HRC of 23 July 2008, No. 1482/2006, the applicant referred to the *Tyrer* case too, but that related to the alleged degrading character of a certain treatment. In that case, the Committee again did not explicitly go into the ECtHR case, but only referred to its own previous case-law.

[25] An example is *Allioua and Kerouane v. Algeria*, Decision of the HRC of 20 November 2014, No. 2123/2012, in which reference was made to ECtHR jurisprudence to specify the state obligation to put a stop to the continuing violation of the prohibition of enforced disappearances.

[26] *P.K. v. Canada*, Decision of the HRC of 3 April 2007, No. 1234/2003.

[27] *Bensaid v. United Kingdom*, Judgment of the ECtHR of 6 February 2001, Application No. 44599/98.

[28] *P.K. v. Canada*, *supra* note 26, para. 4.6.

Finally, an example of a case in which the applicant used the Court's case-law to adduce proof for a specific state practice is *X v. Korea*, in which reference was made to the European Court's case of *Keshmiri v. Turkey* to show that Turkey had engaged "in detention and forcible returns of refugees to the Republic of Iran."[29]

There are also instances in which only the state invokes the jurisprudence of the European Court. In *Pustovoit v. Ukraine*, the state argued that the alleged blindfolding of the applicant had not caused injury or suffering. In doing so it referred to case-law of the European Court in which it held that the effects of blindfolding a person had to be assessed in order to conclude whether it amounted to inhuman or degrading treatment. The Committee avoided delving into the legal issue, as it held that the claim on this point had not been sufficiently substantiated.[30]

In some cases, both the applicant and the state use Strasbourg case-law to further their cause. One might expect that in such situations, the Committee might feel more inclined to address such references explicitly. The case of *Mansour Ahani v. Canada*[31] centred on an impending expulsion to Iran. In their pleadings both Ahani and Canada referred to the *Chahal*-judgment[32] of the European Court. Still, the Committee did not go into that point. In a complaint against the Netherlands, *Arusjak Chadzjian and others*, expulsion to Armenia was at stake. Both the applicants and the state built their argumentation on ECHR foundations.[33] The complaint, however, was declared non-admissible by the Committee since the national proceedings did not show any serious defects. Again, echoes from Strasbourg fell on deaf ears. Nevertheless, it is the very subject-matter of expulsion and extradition in which the clearest influence of ECHR jurisprudence on the Committee's work surfaces. Before going into that, we can already conclude at this point that both individuals and states have adduced European case-law but that this does not guarantee at all that the Committee follows that trail.

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[29] *X. v. Korea*, Decision of the HRC of 15 May 2014, No. 1908/2009, para. 5.4. The ECtHR case referred to is: *Keshmiri v. Turkey*, Judgment of the ECtHR of 13 April 2010, Application No. 36370/08.

[30] *Pustovoit v. Ukraine*, Decision of the HRC of 12 May 2014, No. 1405/2005.

[31] *Mansour Ahani v. Canada*, Decision of the HRC of 15 June 2004, No. 1051/2002.

[32] *Chahal v. United Kingdom*, Judgment of the ECtHR of 15 November 1996, Application No. 22414/93.

[33] *Arusjak Chadzjian v. Netherlands*, Decision of the HRC of 5 August 2008, No. 1494/2006. The Strasbourg judgment to which both applicant and state referred is: *Said v. Netherlands*, Judgment of the ECtHR of 5 July 2005, Application No. 2345/02.

IV. Death Row

The Strasbourg *Soering v. United Kingdom* judgment[34] from 1989 is a *cause célèbre* in the human rights field. The German *Soering* was suspected of murdering the parents of his girlfriend in the American state of Virginia. It was very likely that he would face the death penalty. Virginia was known for long periods of "death row" (on average six to eight years) — the phenomenon of awaiting execution in detention. When *Soering* was arrested in the United Kingdom, the United States asked for his extradition. *Soering* tried to prevent this, amongst others by lodging an application in Strasbourg. The judgment in his case is a landmark in two respects. First, because the Court concluded that states are also accountable under the ECHR if extradition to another state entails a "real risk" of treatment contrary to the Convention in that other state.[35] Secondly, the Court held that "death row" under certain circumstances can amount to a violation of Article 3 ECHR. For an assessment of the circumstances, the Court took the following criteria into account: the length of detention on death row, the age and mental state of the detainee, and the existence of alternatives — in this case the alternative was extradition to Germany. The outcome in *Soering*'s case was that the United Kingdom would violate the prohibition of ill-treatment if it would extradite him. This judgment has had a large impact on the extradition and expulsion policies of state parties to the European Convention.[36]

Which effect did this key judgment of the European Court have on the case-law of the Human Rights Committee? It is important to note that the Committee faced a different reality than its European peer. Whereas Europe, even in the time of *Soering*, was already largely becoming a death penalty-free zone — a trend that has continued since — many non-European states still maintain the death penalty and some of them also apply it. Among these are state parties to the ICCPR. This entails that applications concerning death row do not only feature in the Committee's case-law on extradition or expulsion, but also in cases relating to the states in which people were held on death row. In this section, I will focus on

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[34] *Soering v. United Kingdom*, Judgment of the ECtHR of 7 July 1989, Application No. 14038/88.

[35] Later, the European Court of Human Rights extended this principle to situations of expulsion of foreigners: *Cruz Varas v. Sweden*, Judgment of the ECtHR of 20 March 1991, Application No. 15576/89, para. 69.

[36] Since *Soering*, the so-called *non-refoulement*-principle has been applied mostly in cases in which either the right to life or the prohibition of ill-treatment was at stake. Nothing, however, prevents the application of this principle to situations in which other human rights could be violated. See also: Maarten den Heijer, "Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights," *European Journal of Migration and Law*, Vol. 10, No. 3 (2008), pp. 277-314.

cases relating to death row as such. In the subsequent section, *non-refoulement* to states where ill-treatment may occur will feature. For both themes the *Soering* judgment has proved to be a recurring frame for the Committee's work.

The first application to the Human Rights Committee which seemingly led to discussions on the possible value of following the *Soering*-precedent was *Barrett and Sutcliffe v. Jamaica* in 1992. Jamaica was still formally upholding the death penalty, although no one had been executed there for years.[37] When the two applicants in the case submitted their complaint, they had been in detention on "death row" for ten years. In its views on the case, the Committee held:

> [A]n element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies is inherent in the review of the sentence: thus, even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies.[38]

Although the Committee considered that ten years was "disturbingly long," most of the delays in the appeals procedures at the domestic level had been caused by the applicants. It is on that particular issue that *Soering* for the first time explicitly came up in Genevan discussions. Committee member Christine Chanet referred to the judgment to argue that in matters of life and death the speed with which a convicted person chose to avail himself of appeal procedures should not influence the assessment under Article 7 ICCPR. One cannot expect anyone to "to hurry up in making appeals so that he can be executed more rapidly," Chanet stated.[39] This reflects what the European Court held in *Soering*: "it is equally part of human nature that the person will cling to life by exploiting those safeguards [possibilities to appeal, A.B.] to the full."[40]

A year later, debate on the issue continued in *Kindler v. Canada*, a case on extradition to the United States.[41] The Committee maintained its position that long periods of death row, even under strict detention conditions, cannot in general be labelled as cruel, inhuman or degrading treatment in cases where the person involved himself, through his actions, contributes to the length of the death row.

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[37] *Randolph Barrett and Clyde Sutcliffe v. Jamaica*, Decision of the HRC of 30 March 1992, Nos. 270/1988 and 271/1988.

[38] *Ibid.*, para. 8.4.

[39] *Ibid.*, Individual Opinion of Ms. Christine Chanet.

[40] *Soering*, *supra* note 34, para. 106.

[41] *Joseph Kindler v. Canada*, Decision of the HRC of 30 July 1993, No. 470/1991.

Thus, only to the extent that the length of the period in detention can be attributed to the state, it may be salient in the assessment of a possible violation. The Committee did weigh several other circumstances, with "careful regard," as it phrased it, to the *Soering* judgment. It did indeed apply the other *Soering* criteria mentioned above, to which the Committee added the proposed method of execution of the death penalty as a relevant consideration. On the basis of these *Soering* criteria the Committee distinguished the *Kindler* case from the facts in *Soering* and concluded that extradition to the United States would not entail a violation of Article 7 by Canada.[42] An illustrative example of respectful co-existence of human rights bodies: criteria are copied, but partly given a different application. By explicitly referring to *Soering* but simultaneously emphasizing its own interpretation the Committee had the best of both worlds. On the one hand, it strengthened its connections to the international human rights supervision community, specifically to one of its most renowned peers. And on the other hand it stressed its own independent position as interpreter of the prohibition of ill-treatment in the ICCPR.

In subsequent cases the Committee kept reiterating that long periods of death row did not *as such* violate the ICCPR, unless there were "compelling circumstances" which required a different outcome.[43] Complainants, for their part, regularly kept referring to *Soering*. The application of the *Soering* criteria, with an increasing awareness of the psychological impact of death row on detainees, did in some cases compel the Committee to conclude that Article 7 had been violated. For example when detention combined with ostensible inaction by the state caused demonstrable psychological problems.[44]

This partial application of *Soering* did not end the discussions, however. In another death row case, *Errol Johnson v. Jamaica* the Committee revisited the issue of long periods of death row.[45] It did not change its stance, specifically since it did not want to appear to give states any inducement for quick executions in order to prevent a violation of the ICCPR. The Committee emphasized its revulsion over the phenomenon, but subtly indicated it was bound by the possibilities the ICCPR left to states to apply the death penalty:

> [T]he Committee does not wish to convey the impression that keeping condemned prisoners on death row for many years is an acceptable way of treating them. It is not. However, the cruelty of the death row phenomenon is first and foremost a function of the permissibility of capital punishment

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[42] *Ibid.*, paras. 15-16.

[43] See, *e.g.*, *George Graham and Arthur Morrison v. Jamaica*, Decision of the HRC of 25 March 1996, No. 461/1991, para. 10.3.

[44] See, *e.g.*, *Clement Francis v. Jamaica*, Decision of the HRC of 25 July 1995, No. 606/1994.

[45] *Errol Johnson v. Jamaica*, Decision of the HRC of 22 March 1996, No. 588/1994.

> under the Covenant. This situation has unfortunate consequences.[46]

In the *Johnson* case the Committee also included another pithy statement, which elicited the reaction of six dissenting members. About the subjective effect of death row on detainees, the majority stated: "Life on death row, harsh as it may be, is preferable to death."[47] The dissenters, in turn, emphasized the negative psychological consequences of this form of detention. In two subsequent cases, six dissenting Committee members again took a stance against the majority position on the death row phenomenon. In the *Bickaroo* and *LaVende* cases — both Communications lodged against Trinidad and Tobago, the death row periods were almost sixteen and eighteen years respectively. Still, the Committee did not find violations of Article 7 ICCPR. The dissenters voiced their concerns:

> Keeping a person detained on death row for so many years, after exhaustion of domestic remedies, and in the absence of any further explanation of the State party as to the reasons thereof, constitutes in itself cruel and inhuman treatment. It should have been for the State party to explain the reasons requiring or justifying such prolonged detention on death row; however, no justification was offered by the State party in the present cases.[48]

The single voice of Chanet, the dissenter in *Barret and Sutcliffe*, had grown to a choir of dissenters, albeit still a minority. Again, the applicants in these cases had made reference to the *Soering* case, but to no avail. In later case-law the Committee's position remained as it was. Anyone who could demonstrate that additional compelling circumstances — beyond and above death row as such — applied to his or her case, might convince the Committee to find a violation of the ICCPR.[49] But those who could not, were less successful.[50] This makes the

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[46] *Ibid.*, para. 8.4.

[47] *Ibid.*

[48] Individual opinion of Fausto Pocar, Prafullachandra Natwarlal Bhagwati, Christine Chanet, Pilar Gaitan de Pombo, Julio Prado Vallejo and Maxwell Yalden, in: *Ramcharan Bickaroo v. Trinidad and Tobago* and *LaVende v. Trinidad and Tobago*, Decisions of the HRC of 29 October 1997, Nos. 555/1993 and 554/1993.

[49] *Colin Johnson v. Jamaica*, Decision of the HRC of 20 October 1998, No. 653/1998. In a later case, an applicant argued that imposition of a mandatory death sentence also amounted to a violation of Article 7 ICCPR, again with reference to *Soering*. The Committee did indeed find a violation, but of the right to life (Article 6 ICCPR) and did not deal with the prohibition of inhuman or degrading treatment or punishment separately. Nor did it go into the reference to the *Soering* case. See: *Johnson v. Ghana*, Decision of the HRC of 6 May 2014, No. 2177/2012.

[50] *McCordie Morrison v. Jamaica*, Decision of the HRC of 3 November 1998, No. 663/1995.

Committee's stance look rather as one of evidential matters than of principle.

After *Soering* a second echo from Strasbourg resounded in Geneva. In 2005 the European Court of Human Rights held that the trial of Abdullah Öcalan, leader of the armed Kurdish movement PKK, had not been fair.[51] This particular kind of violation of Article 6 ECHR led to the conclusion that exposure to death row — as a result of the unlawful conviction — also automatically entailed a violation of the prohibition of ill-treatment of Article 3 ECHR. As the Grand Chamber of the Court phrased it:

> [T]o impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention.[52]

The Human Rights Committee came to the very same conclusion in a case it decided a year after the *Öcalan* judgment: *Larrañaga v. Philippines*.[53] Imposition of the death penalty after an unfair trial entailed, in the Committee's view, that the state exposes a person to the fear of death without justification. In coming to this conclusion, the Committee referred to its own earlier decision in the *Errol Johnson* case, which did not centre so much on unfair trials but rather on the downsides of the death penalty as such. The Committee inferred from the *Johnson* case that whenever the imposition of the death penalty violated the provisions of Article 6 ICCPR (right to life), a violation of Article 7 (prohibition of ill-treatment) automatically ensued — a conclusion that cannot clearly be inferred from that case, one may add. Subsequently, the Committee concluded, apparently by analogy, that when the death penalty is the verdict of a judge in an unfair trial, this amounts to a violation of Article 7. At this point, the Committee explicitly referred to the *Öcalan* case of the European Court. Since this line of reasoning clearly follows from *Öcalan*, but is not so much from *Errol Johnson*, it seems that the Committee both wanted to follow the European precedent and at the same time wanted to emphasize that its own interpretation, arising from its own earlier jurisprudence,

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[51] *Öcalan v. Turkey*, Judgment of the Grand Chamber of the ECtHR of 12 May 2005, Application No. 46221/99.

[52] *Ibid.*, para. 169.

[53] *Francisco Juan Larrañaga v. Philippines*, Decision of the HRC of 24 July 2006, No. 1421/2005.

took central stage. This double justification of its own reasoning — both on the basis of ECHR case-law and on the basis of the Committee's own views, also occurred in the comparable case of *Munguwambuto Kabwe Peter Mwamba v. Zambia* of 2010, in which the Committee made explicit references to *Errol Johnson, Larrañaga* and *Öcalan*.[54]

V. Expulsion and Extradition

The other aspect which made the European Court's *Soering* judgment so famous is the interpretation of the ECHR as to include a prohibition of *refoulement*. Whenever a real risk exists of treatment contrary to Article 3 ECHR, state parties to the European Convention are barred from expelling or extraditing individuals to the country concerned. To what extent did this aspect of Strasbourg case-law reverberate in the work of the Human Rights Committee? It may be surprising that in its first General Comment on the prohibition of ill-treatment, in 1982, the Committee did not even mention a possible non-refoulement aspect of Article 7 ICCPR.[55] But ten years later, in a new, revised General Comment the Committee affirmed that "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."[56] Since this change of position cannot be inferred from the Committee's views in individual cases in the preceding decade, this new interpretation seems to be a direct consequence of the *Soering* judgment of the European Court. The first application of the principle in the assessment of an individual complaint occurred in 1993, in the *Kindler* case mentioned above:

> If a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.[57]

This phrasing is clearly based on *Soering*, but the Committee did not make the reference explicitly. A few months after *Kindler*, when dealing with another extradition complaint — *Ng v. Canada* — the Committee added by way of explanation that the general obligation for states "to respect and to ensure" human rights within

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[54] *Munguwambuto Kabwe Peter Mwamba v. Zambia*, Decision of the HRC of 10 March 2010, No. 1520/2006, para. 6.8.

[55] General Comment No. 7, *supra* note 23.

[56] HRC, General Comment No. 20, 3 October 1992, para. 9.

[57] *Kindler*, *supra* note 41, para. 13.2.

their jurisdiction (Article 2 ICCPR) would be rendered nugatory if states were allowed to extradite people to states where torture or ill-treatment were foreseeable.[58] Again, this reflects the case-law of the European Court, but once again only implicitly. One may note that the Committee used variable wording. Whereas it called the decisive factor "real risk" in *Kindler*, in *Ng* the Committee used the wording "necessary and foreseeable consequences" which seems to refer to also to situations where ill-treatment is certain or may even be the very goal of the extradition.[59] Later cases more closely followed Strasbourg by applying the "real risk" criterion.[60] The variety is reflected in the case of *A.R.J. v. Australia*, relating to an expulsion to Iran: the criterion is mentioned but is then elaborated upon as "necessary and foreseeable consequences."[61] Once again a double-edged sword: connections to external case-law, but also an emphasis on the Committee's own particular interpretation and wording.

At times, principles developed by the Human Rights Committee in this context build upon other sources of international law without explicitly referring to them in the views as such. The reference then may become visible in separate or concurring opinions. Such was the case in *B.L. v. Australia*, about the imminent removal of a Senegalese man from Australia to his country of origin. In the case, the majority of the Committee held that the applicant could have safely relocated within his country rather than asking asylum abroad. According to a joint opinion by Committee members Neuman and Iwasawa, this in effect reflected an existing principle of international refugee law, the "internal flight alternative." The support the existence of this rule, they not only referred to an earlier view of the Committee itself but also to several Strasbourg cases.[62]

There have also been instances in which the parties in a case before the Human Rights Committee invoked the practice or case-law of the European Court to prove a factual point. In *Pillai v. Canada*, the safety of returning to Sri Lanka was heavily contested.[63] On the one side of the argument, the applicant pointed to interim measures of the Strasbourg Court granted to Tamils who faced removal to Sri Lanka. The UNHCR had welcomed this European judicial action. According to

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[58] *Ng v. Canada*, Decision of the HRC of 5 November 1993, No. 469/1991.

[59] *Ibid.*, para. 6.2.

[60] *A.R.J. v. Australia*, Decision of the HRC of 28 July 1997, No. 692/1996; *Mohammed Alzery v. Sweden*, Decision of the HRC of 25 October 2006, No. 1416/2005.

[61] *A.R.J.*, *supra* note 60, para. 6.14.

[62] Joint opinion of Committee members Gerald L. Neuman and Yuji Iwasawa (concurring) in *B.L. v. Australia*, Decision of the HRC of 7 January 2015, No. 2053/2011.

[63] *Pillai v. Canada*, Decision of the HRC of 9 May 2011, No. 1763/2008. Only in the joint individual opinion of five mostly European Committee members was the reference to Strasbourg's case-law made more explicitly.

the applicants, this presented clear proof that it was dangerous for Tamils to be sent back. The state, on its part, referred to a Strasbourg judgment in *N.A. v. United Kingdom*, in which no general risk for Tamils was held to exist.[64] The Committee held that the authorities should have given more weight to the applicant's allegations and in doing so referred amongst others to the paragraphs in which the applicant referred, amongst others, to the Strasbourg practice. Once again, the echo of Strasbourg in Geneva is not very loud.[65]

Finally, a key aspect of expulsions and extraditions is the diplomatic guarantee of the receiving state that the person concerned will suffer no ill-treatment. The Human Rights Committee critically assesses claims by the expelling or extraditing state that sufficient guarantees of such kind have been obtained. The application of *Mohammed Alzery v. Sweden* is a clear example. In that case, the Committee held that a number of considerations were pertinent: the existence of diplomatic guarantees, their content, and the existence and application of safeguard mechanisms.[66] In the particular case at hand, Sweden had not taken sufficient steps to assess the real risk of torture for Alzery. Swedish embassy personnel had, for example, visited Alzery in prison for the first time as late as five weeks after the extradition, thereby "neglecting altogether a period of maximum exposure to risk of harm," according to the Committee.[67] Here the Committee adopted a critical stance very similar to the one of the European Court in judgments such as *Chahal* — a case to which the applicant in *Alzery* made reference.[68]

Conclusion

Over two decades ago, in 1990, a commentator of the Human Rights Committee's work remarked that the Committee was reticent in referring to the jurisprudence of other human right bodies, including the European Court. A source whose potential is not fully tapped, he concluded.[69] Since that time some things have changed, as this article has tried to show. But still, one cannot argue that the Committee's work extensively uses Strasbourg case-law. Both applicants and states

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[64] *N.A. v. United Kingdom*, Judgment of the ECtHR of 17 July 2008, Application No. 25904/07, para. 125.

[65] There are also cases in which an applicant's invocation of European case-law falls on deaf ears, simply because the arguments related to it are not seen as central to the Committee's reasoning. See *e.g.*, *Khakdar v. Russian Federation*, Decision of the HRC of 26 November 2014, No. 2126/2011.

[66] *Alzery*, *supra* note 60, para. 11.3.

[67] *Ibid.*, para. 11.5.

[68] *Chahal*, *supra* note 32, para. 105.

[69] Ghandhi, *supra* note 16, p. 761.

regularly include European Court judgments in their submissions, but it is not always clear to what extent these play a role in the discussion among Committee members.

Is fragmentation then a problem within the sub-field of human rights? The very small sample analysed above seems to reflect that on the issue of ill-treatment and torture no large disconnects exist, but that the Committee does put the emphasis differently at times. On one particular aspect Geneva takes a clearly different stance than Strasbourg: for applicants on death row it is much more difficult to argue that a state violates Article 7 ICCPR whenever the applicants have availed themselves of appeals procedures — which take time and thus prolong the period of death row. Nevertheless, the Committee cannot ignore the high legal authority of the European Court's *Soering* judgment and its interpretation. This has entailed that discussion on this point has time and again resurfaced within the Committee, as the numerous dissenting voices testify. Apart from this specific point, the findings here confirm the outcomes of Miller's analysis: the Committee by and large respectfully deals with external jurisprudence — in this case of the Strasbourg Court. External citations are, in line with what Slaughter has argued, used to increase the persuasiveness and quality of the case-law. Openly acknowledging existing external jurisprudence contributes to more nuanced and refined discussions and allows for new points of view, even if these are not automatically incorporated. Finally, it is interesting to note how the Committee deals with Voeten's assumption that those who do cite external sources expose themselves to the criticism of overstepping their mandate. Time and again, the Committee weaves such external references into the fabric of its own case-law. In doing so, it seeks to connect to the broader human rights field, while simultaneously emphasizing its own independent position as key interpreter of the ICCPR. Strasbourg's echoes do resound in Geneva, but the Human Rights Committee plays its own tune.