REMEDYING THE NORMATIVE IMPACTS OF FORUM SHOPPING IN INTERNATIONAL HUMAN RIGHTS TRIBUNALS

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ABSTRACT: As part of an ongoing debate on the proliferation and fragmentation of international law, this research presents a discussion on the consequences of jurisdictional overlap in international human rights treaties and its consequential forum shopping for the normative coherence and consistency of international human rights law. The paper endeavours to demonstrate that forum shopping may not affect the normative coherence of international human rights law as long as decisions by (quasi-) judicial bodies on the same matter or on the same human rights rules are consistent with each other. Transjudicial communication is presented as an option to increase such coherency. The central focus is on the United Nations Human Rights Committee (HRC) and the European Court of Human Rights (ECHR).

INTRODUCTION

In recent years there has been a sharp increase in the number of international tribunals1 and a greater willingness on the part of states and other international players to subject themselves to the jurisdiction of international adjudicative mechanisms.2 International law is a legal system that lacks the classical executive and legislative institutions to make law; it also lacks a judiciary with compulsory jurisdiction to interpret and apply the law.3 Nevertheless, the international legal system carries out these functions through decentralised processes, although the acquisition of a Court’s jurisdiction always rests on the consent of the State Party.4

Although states remain the centre of gravity in ‘making’ international law, it is also subject to international (quasi-) judicial bodies, producing highly influential and authoritative judgements on the interpretation and application of particular provisions. As a result, multiple independent fora may find and apply international law differently,5 which leads many experts to question whether the coherence of

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2 Inter alia ICJ, WTO, NAFTA, ITLOS, ICC, IACHR, ECHR, HRC.


international law is threatened by this proliferation of international tribunals.\textsuperscript{6}

Unlike the International Court of Justice (ICJ), other international (quasi-) judicial bodies are created to decide disputes under specific substantive treaties in a specialised area of international law. One result of the proliferation of international adjudicatory mechanisms\textsuperscript{7} – both on a regional and a universal level – is the potential fragmentation of international law which is “encouraged particularly by the development of specific legal regimes with dedicated mechanisms for dispute resolution.”\textsuperscript{8} The uncoordinated nature of this particularly rapid proliferation resulted in an overlap between the jurisdictionalambits of different judicial bodies.\textsuperscript{9} This judicial overlap in both content and function – also referred to as ‘treaty congestion’\textsuperscript{10} – is prominent in the international human rights arena.

As part of an ongoing debate on the proliferation and fragmentation of international law, this research presents a discussion on jurisdictional overlap in international human rights treaties and the consequent forum shopping for the normative coherence and consistency of international human rights law. This paper will focus on the United Nations Human Rights Committee (HRC) and the European Court of Human Rights (ECHR).

Owing to jurisdictional overlap, the same international dispute (between the same parties and concerning the same issues) may be subject to the jurisdiction of more than one forum – allowing individuals to bring a case before one or more different tribunals – also referred to as ‘forum shopping’\textsuperscript{11} (either parallel or successive). Judicial overlap also grants litigants the option of finding the best jurisdiction or court for trying their case most favourably.\textsuperscript{12} Commentators have examined the theoretical and policy justifications for and against forum shopping. Although there is evidence for some desirable impacts on the interests and incentives of petitioners, the effects seem more contentious with regard to institutional and normative complications for the co-existence of international petition procedures. Generally, revision of an individual’s claim before more than one tribunal is undesirable and should be prevented. Accordingly, provisions are incorporated into the admissibility requirements of human rights treaties in order to regulate the exercise of jurisdiction, thus impeding forum shopping.

This research will endeavour to answer these questions of normative coherency by

\textsuperscript{6} Ibid 115.
\textsuperscript{7} Jennings supra n 2, p.5.
\textsuperscript{8} M. Craven “Legal Differentiation and the Concept of Human Rights Treaty in International Law” (2000) 11 EJIL 489.
\textsuperscript{11} Shany supra n 9, p. 79.
\textsuperscript{12} Legal Definitions.com <www.legal-definitions.com/forumshopping> (02/09/04)
addressing the HRC and the ECHR, both of which have proven to actively protect individuals’ rights through individual complaint procedures.\(^{13}\) Although the overlap of jurisdiction is a universal concept,\(^ {14}\) the challenges of forum shopping have particular relevance to jurisdiction in the field of human rights because the development of individual complaint procedures significantly increased the amount of case law.\(^{15}\) Apart from that, proliferation in the international human right field resulted in both regional and functional specialisation.

The HRC has been created by, and monitors one of the world’s two principle universal\(^ {16}\) human rights treaties created under the auspices of the UN, namely the International Convention on Civil and Political Rights (ICCPR).\(^ {17}\) The 1994 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the “European Convention”) is of particular importance within the context of international human rights for several reasons: it functions on the basis of the first comprehensive treaty in the world in this field, it established the first international complaints procedure, and it established the first international court for the determination of human rights matters. It remains the most judicially developed of all human rights systems and it has generated a more extensive jurisprudence than any other part of the international system.\(^ {18}\) This dissimilarity in background, and yet similarity in overlapping treaty provisions and rules,\(^ {19}\) supported with extensive bodies of case law – in relation to other human rights mechanisms – justifies the emphasis on these tribunals.

Following a overview of proliferation in international (human rights) law and a general outline of the functions and backgrounds of the HRC and the ECHR in Chapter I, Chapter II will delineate the provisions regulating jurisdictional exercise


\(^{14}\) Shany supra n 9, p.2


\(^{16}\) The ‘universal character’ of the HRC in this context means ‘United Nations sponsored’.


\(^{19}\) Although initial moves to create a European Convention pre-dated the UDHR, the text of the latter was available when the European Convention was drafted. A number of rights are in terms similar to the early version of the draft Convention of the ICCPR, inter alia article 2-12 and 14 have counterparts in the European Convention (as amended by Protocol 11). The Covenant went to numerous changes before adoption and hence some articles are different in phrasing or scope. Another significant difference is the European emphasis on democratic values such as expressed in Article 8-11, to which the provision ‘necessary in a democratic society’ has been added in: Alston and Steiner supra n 18, p. 788.
of the First Optional Protocol (OP) to the International Covenant of Civil and Political Rights (ICCPR) and the European Convention. It is essential to understand the circumstances that give rise to such jurisdictional overlap in order to gain an insight into how forum shopping creates potential complications in the coherency of international human rights law. Two case studies are presented in Chapter III in an attempt to identify inconsistency in case law with rights protected by more than one international agreement. Chapter IV will shed light on the importance of coherence between the decisions taken by different international human rights tribunals, mainly from a normative point of view. Chapter V will scrutinise the workings of transjudicial communication as a method to improve consistency between case law of the HRC and the ECHR.

It seems that forum shopping only poses a problem from a normative point of view if it leads to inconsistent judgements on ‘same matter’ cases or on decisions on the same human rights rules. Transjudicial communication and reference to grounds for divergence in judgements can improve the coherence of international human rights law without leading toward completely similar decisions.

I THE UN HUMAN RIGHTS COMMITTEE AND THE EUROPEAN COURT OF HUMAN RIGHTS

A The Proliferation and Fragmentation of International Law

The 20th century witnessed a rapid increase in international law-making through treaties, state practice and soft law legislation. With the intensification of international independence in recent decades, international law dispute settlement facilities accelerated significantly during the 1990s. The traditional reluctance on the part of states to commit themselves – ante hoc – to (quasi-) judicial dispute settlement mechanisms has gradually eroded, and a growing number of (quasi-) judicial bodies have been invested with compulsory jurisdiction. That proliferation has also led to fragmentation in international law is not a new phenomenon, and its challenges are even addressed in General Assembly Sessions and the International Law Commission. Although fragmentation may be a natural

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21 Note that dispute settlement can take place in various forms such as negotiation, mediation and good offices, inquiry, conciliation and arbitration. Arbitration is defined by the International Law Commission as “a procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted” (emphasis added), in Dixon above n 4, 262-268.

2222 Note that the ICJ also recognises acquisition of jurisdiction ad hoc (consent ad hoc) and post hoc (forum prorogatum), in Dixon supra n 4, p. 277-278. See also Sands, Mackenzie and Shany, supra n 2.

consequence of the expansion of international law, it may challenge unity and coherence largely because of the horizontal character of international law as a system based on consensus, which will be discussed in further detail in Chapter IV. This decentralised character of the creation of law within the international system, and the diffusion of decision making powers among a variety of judicial – or quasi-judicial – bodies all dealing with largely discrete legal regimes, suggests that “international law may be losing its centre of gravity”.

In the international setting the adjudicatory machinery lacks a power which “holds them together in a coherent system”. Although states play the predominant role in creating and modifying norms, third party dispute settlements also contribute to the substance of international law and its development. If that influence “can amount to law-making..., the absence of hierarchical authority to impose order is a prescription for conflicting precepts.”

One particular area in which the potential for fragmentation is frequently identified is the field of human rights, especially with the present trend towards individualised adjudication. Article 34(1) of the Statute of the ICJ reads that only states may be parties before the court, one of the reasons for states to set up alternative and more specialised tribunals. Traditionally, individuals derived neither rights nor duties from international law, as they were not regarded as ‘subjects of international law’. Individuals were merely recipients of benefits granted of duties imposed by states. Coupled to the lack of substantive rights accorded to individuals was the absence of any procedural mechanism with which to enforce any benefits which might be granted by states, a position which improved significantly after the Second World War. The human rights field has witnessed both regional -and sub-regional- arrangements. Moreover, it saw the creation of new bodies that were given functional specifications over more general normative formulations that had already been assigned to universal or (sub)regional bodies.

Charney notes that this major divergence is hardly cause for alarm because it mainly “reflects the differences in purpose and subject matter between general tribunals and special regimes, especially those dealing with human rights”. However, fragmentation in the international legal order does not take away the notion that

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24 Craven supra n 8, p. 490; G. Hafner supra n 23, par 497.
25 Craven supra n 8, p. 490.
27 Charney supra n 3, p. 117.
28 Judge Shahabuddeen supra n 26.
29 Craven supra n 8, p. 490.
30 Reisman supra n 10, 10. Examples of regional arrangements are the African Court of Human Rights and the Inter-American Court of Human Rights. Functional specifications can be found in bodies created especially to deal with torture (CAT Committee), rights of children (CRC Committee), or women’s rights (CEDAW Committee).
human rights bodies belong to the same legal ‘subsystem’ as part of a general legal system and thus creates strong pressure in favour of maintaining normative coherence. The HCR and the ECHR purport to have the same goal, function and purpose, especially with regard to the individual complaint procedure, albeit on a universal and regional level respectively. This similarity in function and provisions requires normative coherence.

The level of detail addressed can have a significant impact on the conclusions reached regarding the consequences of judicial overlap. Dissimilar interpretations of comparable treaty provisions may be attributable to regional differences. Therefore, a detailed observance of case studies should also be placed on a more general level, asking whether, despite minor differences, the cases and tribunals are engaged in the same dialectic, and whether they render decisions that are relatively compatible. The presence of such coherency would take away a substantial number of the challenges forum shopping poses on international law.

B The UN Human Rights Committee and the International Covenant of Civil and Political Rights (ICCPR)

The UN Human Rights Committee was established pursuant to the provisions of Part IV article 28 of the ICCPR. The travaux préparatoires of the ICCPR reveal considerable differences between various groups of states. A quasi-judicial HRC had been envisaged quite different from the powers and functions which actually came into existence. There are 18 committee members who serve in their “private capacities and make a declaration of impartiality upon taking office”. Effectively this means that the members are experts and do not ‘represent’ their respective governments.

The OP gives the Committee the competence to consider a complaint brought by individuals, either directly or through a representative – referred to in the OP as ‘communication’ – in circumstances where they are the alleged victims of violations of the Covenant, and to forward its views to the individual and state concerned as

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32 Shany supra n 8, p. 109.
33 See also Chapter IV below.
34 Jennings supra n 2, p. 6. “It might be acceptable to rely on regional differences for a question of jurisdiction, but there is also the possibility that the technique might be extended to matters of substance. This could lead to human rights law increasingly different from the universal system, which is part of general international law”.
35 Note that the UN HRC is a ‘treaty body’ rather than a ‘Charter body’ like, for instance, the UN Human Rights Commission.
36 The result of the lack of consensus is a compromise between those states who favored strong international measures and those who emphasised the primacy of national sovereignty and responsibility, P. Alston The United Nations and Human Rights: A critical appraisal (Clarendon Press, Oxford, 1992) 371.
37 O’Flaherty supra n 13, p. 31.
laid out in Article 1.\textsuperscript{39}

Under international law the individual has no \textit{locus standi},\textsuperscript{40} which means that an individual only has rights under international law as \textit{derived} from his or her own state. Therefore, a state has to sign and ratify the (Optional) Protocol of a treaty or convention before an individual from a member state can enjoy the treaty affording a remedy against the government of his national state.\textsuperscript{41} The human rights field benefited enormously from these Optional Protocols, which allow individuals direct access to court.

The ICCPR and its First Optional Protocol (OP) contain three supervisory mechanisms for ensuring that a State Party’s behaviour conforms to its international obligations. The only mandatory mechanism, as articulated in Article 40(1), is the periodic report procedure of the member states to the Committee.\textsuperscript{42} The optional mechanisms are the inter-state complaint procedure, as laid out in Article 41 of the Covenant and the individual complaint procedure, which is the focus of this research.\textsuperscript{43}

One of the admissibility criteria of the OP, which deserves attention in the context of forum shopping, is the requirement – comparable to practically all human rights instruments\textsuperscript{44} – that a litigant must have exhausted all available domestic remedies before international proceedings may be properly engaged.\textsuperscript{45} As the Inter American Court of Human Rights explained in \textit{Viviana Gallardo v Costa Rica},\textsuperscript{46} the rational for the rule is that a state is excused from “having to respond to charges before an international body for acts which have been imputed before it has had the opportunity to remedy them by internal means”.\textsuperscript{47} The OP to the ICCPR is not an

\begin{itemize}
\item Alston supra n 36, p. 16.
\item Alston and Crawford supra n 38, p. 20-23.
\item New Zealand became party to the ICCPR in December 1978 and ratified the OP on May 26 in 1989.
\item International Covenant on Civil Political Rights, opened for signature 16 December 1966, 999 UNTS 171, (entered into force March 1976) (“ICCPR”) article 2
\item Decision of the Inter-American Court of Human Rights, November 13, 1981 par 26.
\end{itemize}
exception to this requirement.\textsuperscript{48}

\textbf{C European Court and Commission of Human Rights}

The Council of Europe is an inter-governmental body created in 1949 to promote cultural, social and political co-operation in (originally) Western Europe.\textsuperscript{49} It has been very active in the human rights field, and in 1950 it adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force in 1953. By the 1980s, the acceptance of basic human rights norms, and the legitimacy of the European Convention machinery was so widely spread that ratification of the Convention had become a \textit{de facto} political condition for the membership of the Council of Europe itself.\textsuperscript{50} All parties to the Convention have accepted both the right of individual petition and the jurisdiction of the European Court.\textsuperscript{51} Hence, the theoretically ‘optional jurisdiction’ over individual cases has now been unanimously accepted by the parties. The principal enforcement bodies of the Convention are the European Commission of Human Rights and the European Court of Human Rights, together with the Committee of Ministers of the Council of Europe.

\textbf{II ADMISSIBILITY CRITERIA REGULATING THE EXCERSISE OF JURISDICTION}

\textbf{A Regulation of Jurisdictional Exercise in Theory}

Jurisdictional\textsuperscript{52} overlap means that "a certain dispute can be addressed by more than one individual forum."\textsuperscript{53} However, the question of what are 'the same proceedings' should not be offered \textit{in abstracto}, but should rather take into consideration the prevailing attitudes of the legal community toward this question. These attitudes are reflected, most prominently, in the manner of the application of traditional rules regulating the exercise of jurisdiction, such as \textit{lis alibi pendens}, \textit{res judicata} and

\textsuperscript{48} Although Article 5 articulates the admissibility procedures of a communication to the HRC, it does not expressly mention that the author of a communication must exhaust domestic remedies 'in accordance with the accepted rules of international law', but it is clear that this has been implied by the Committee's jurisprudence, Davidson supra n 46, p. 349.

\textsuperscript{49} The General Assembly became especially supportive of regional initiatives to protect human rights in the late 1970s when it formally endorsed a new approach by appealing "to States in areas where regional arrangements in the field of human rights do not yet exist to consider agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights" GA Res 32/172 (1977) cited in: Alston and Steiner supra n 17, p. 782.

\textsuperscript{50} Lillich and Hannum supra n 18, p. 684.

\textsuperscript{51} Lillich and Hannum supra n 18, pp. 684-685.

\textsuperscript{52} Jurisdiction can be defined as “to denote the initial power of a tribunals [or (quasi-)judicial body] to determine whether it may determine (or has the authority to determine) that is has appropriate authority to continue judicial examination of a case” cited in: C.F. Amerasinghe \textit{Jurisdiction of International Tribunals} (London, Kluwer, 2003)

\textsuperscript{53} Shany supra n 9, p. 19.
The ICCPR and the European Convention significantly overlap in their protection of certain rights. Problems regarding the relationship between subsequent conventions in this context cannot be resolved by the application of provisions such as Articles 30, 41, 58 and 59 of the Vienna Convention on the Law of Treaties (VCLT). The development of human rights norms through the medium of specific regimes, has at times led to tension between subject neutral lex generalis on the one hand and the particular demands of human rights understood as a subordinate subject area on the other hand. This understanding is clearly perceived in the relationship between general principles of treaty law as encapsulated by the VCLT and the developing practice and doctrine relating specifically to human rights treaties. It has often been suggested that these general principles governing the application and effect of treaties need to be modified or even discarded when dealing with human rights treaties. This tendency is also found in General Comment 24 of the HRC, where it has been suggested that general principles embodied in the VCLT were ‘inappropriate’ and ‘inadequate’ when dealing with reservations to the ICCPR, and the task of determining their compatibility should rest with the HRC itself.

Consequently, both the OP and the European Convention have included admissibility requirements regulating the exercise of their jurisdiction in order to prevent subsequent and parallel proceedings from taking place. These admissibility requirements for individual complaint procedures dealing with the exercise of jurisdiction are stipulated in article 5(2)(a) of the OP and article 35(2)(b) of the European Convention.

It should be noted here that there are no definitions of the criteria stipulated for admissibility contained in the OP and it has been left to the Committee to develop its own jurisprudence in this area. As the OP established conditions of

54 See supra n 20, p 3.
55 Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 8 ILM 679 (entered into force 27 January 1980) (‘Vienna Convention’). Article 30 concerns the application of successive treaties relating to the same subject matter, article 41 concerns agreements to modify multi-lateral treaties between certain of the parties only, article 58 concerns suspension of the operation of a multi-lateral treaty by agreement between certain parties only, and article 59 concerns termination or suspension of the operation of a treaty implied by conclusion or a later treaty.
56 Although at first sight Article 30 seems applicable in this context, dealing with ‘same matter’ treaty provisions, it should be noted here this Article deals with the treaty provisions themselves, not the jurisdictional overlap between judgements of the courts set up by certain treaties, Th Meron ‘Norm Making and Supervision in International Human Rights: reflections on institutional order’ (1982) 76 AJIL 758. Note that with regard to treaty interpretation the ECHR adheres to the rules of the VCLT. See Golder v UK (1975) 1 Eur Crt H.R. in: Charney supra n 3, p. 156.
57 Craven supra n 8, p. 491.
58 Craven above n 8, 491. See also infra Chapter IV, section A 4.
59 Hum Rts Comm General Comment no 24, UN Doc CCPR/C/21 par 17.
admissibility, but not the procedures for the determination of admissibility, rules of procedure have been established premised on *inter alia* maintaining the basic principle of equality of arms of both parties. This equality of arms premise is of particular importance in the discussion on forum shopping, which is claimed to be advantageous for the individual who can choose the most favourable place for litigation.

Because of the lack of well defined admissibility criteria, case law is a central theme in this section. Before turning to the specific interpretation and application of these provisions in the jurisdiction of the HRC and the ECHR, a theoretical outline of rules regulating the exercise of jurisdiction will add to the understanding of how jurisdictional overlap is regulated at present.

It should be noted here that, as has *inter alia* been articulated in Article 14(1) of the ICCPR, "[e]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." This necessarily limits the sphere of application of rules regulating jurisdictional exercise. If two proceedings do not deal with the same disputes, the excessive restriction of the right of adjudication, based on previous but different disputes, might conflict with the right to access a court system. This is especially the case with regard to two disputes brought before fora embracing different rules. Although this limitation should be recognised, there are substantive reasons supporting the introduction of rules regulating jurisdictional exercise that strive for elementary co-ordination without being too intrusive. Restriction may be justified in order to prevent differing judgements by different bodies on the 'same matter' cases and strive for coherence.

First, the *'lis alibi pendens'* rule governs the relationship between parallel proceedings. This doctrine of 'litispendens' entails that during [the consideration] of one set of proceedings before a judicial body, it is prohibited to commence

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62 McGoldrick supra n 60, p. 135.  
63 Also, states may take advantage of multiple litigations when they have the option of implementing the most favorable decision.  
64 See also infra Chapter II section B1-3  
66 Meron supra n 56, p. 24.  
67 Shany supra n 9, p. 115.  
68 Shany supra n 9, p. 116; Davidson supra n 46, p. 348.
another set of competing proceedings concerning the same dispute before another judicial body”.

Second, the res judicata rule, also known as the 'doctrine of finality', provides that "the final judgement of a competent judicial forum is binding upon the parties (it carries obligatory effect) and cannot be relitigated (carries a preclusive effect)." Thus a final decision rendered in one set of proceedings bars any subsequent court or tribunal from exercising jurisdiction over the same dispute. This rules hence regulates successive proceedings.

Third is the electa una via rule, which provides that once a party has selected a certain procedure for dispute resolution, the party is precluded from selecting another dispute settlement body. "The choice of a specific forum can be perceived as indicative of the intent to resolve the dispute in the selected forum to the exclusion of all other alternative fora." So the electa una via rule encompasses both the lis alibi pendens and the res judicata rule together.

The electa una via rule is based upon the rationale of 'estoppel'. 'Collateral estoppel' "prevents a party to a lawsuit from raising a fact or issue which was already decided against him in another lawsuit" (emphasis added). The 'rationale of estoppel' is based upon 'issue preclusion' whereas res judicata is based upon 'claim preclusion'. Under res judicata, a final judgement on the merits of an action precludes the parties ... from "relitigating issues that were or could have been raised in that action." In other words, the res judicata rule regulates that a final judgement of a competent court is conclusive upon the parties in any subsequent litigation involving 'the same cause of action.' The rationale of estoppel on which electa una via is based, is designed to bar claims initiated by the same applicant and not by claims brought by different persons.

The electa una via rule, by preventing parties from choosing any other form of litigation apart from the first chosen, limits cases being brought for other tribunals.

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69 Shany supra n 9, p. 22 (emphasis added).
70 The full Latin title of the rule is electa una via no datur recursus ad ateram; 'when one way has been chosen, no recourse is given to another', Bryan A Garner and H.C Black (eds) Black's Law Dictionary (seventh edition, West Group, New York, 1999) 1633.
71 Shany supra n 9, p. 22.
72 See also infra p 15.
73 'Equitable estoppel' prevents one party from taking a different position at trial than he or she did at an earlier time if the other party would be harmed by the change. This last principle deals with the regulation of claims within one lawsuit and thus is less relevant for the discussion on forum shopping, The Lectric Law Library's Lexicon on 'Res Judicata and Collateral Estoppel', <http://www.lectlaw.com/def2/q036.htm> (03/09/04)
74 The Lectric Law Library's Lexicon on 'Collateral Estoppel' <http://www.lectlaw.com/def2/q036.htm> (03/09/04)
75 Ibid.
76 Shany supra n 9, p. 212. Therefore electa una via goes even beyond a conjunction of res judicata and lis alibi pendens, see also infra Chapter II, section B 3.
dealing with the 'same issue' rather than the 'same claim'. What this means in practice will be discussed in the following subsection.

Lastly, the doctrine of forum non conveniens should be mentioned in this context. This doctrine gives a court the option to refuse to exercise its jurisdiction to hear a case when it believes that it would be more convenient – in either private interest or public interest (judicial comity) – to have the case decided elsewhere.\textsuperscript{77} Hence the doctrine regulates the exercise of jurisdiction, but not necessarily in order to prevent subsequent proceedings (a same matter case brought before two or more bodies successive in time) or parallel proceedings (two same matter cases brought before two or more bodies at the same time). The doctrine thus does not regulate multiple proceedings, but gives a (quasi-) judicial body the authority to direct a litigant on a pragmatic basis to a different body. Accordingly it will not be the focus of the present discussion.

To what extent the international human rights tribunals must apply these rules, depends, to a large extent, on the application and interpretation of the various treaty provisions, as is discussed in the next subsection.

\textbf{B \hspace{0.5cm} Interpretation and Application of Article 5(2)(a) of the First Optional Protocol of the ICCPR}

\textit{1. Lis Alibi Pendens}

Having discussed the definitions and theoretical underpinnings of these general provisions regulating the exercise of jurisdiction, it is essential to take a closer look at how these rules are incorporated into the HRC’s jurisprudence. The question to be dealt with subsequently is what do ‘same matter’ proceedings incorporate in practice?

Article 5 (2)(a) of the OP articulates the \textit{lis alibi pendens} rule as adopted by the HRC. It reads:\textsuperscript{78}

\begin{quote}
\texttt{\textit{the Committee shall not consider any communication from an individual unless it has ascertained that: (a) (t)he same matter is not being examined under another procedure of international investigation or settlement (emphasis added)}}
\end{quote}

Article 5(2)(a) articulates that a communication may not be considered by the Committee if it contains the 'same matter' as that which \textit{is being examined} under

\textsuperscript{77} “A typical example is a lawsuit arising from an accident involving an out-of-state resident who files the complaint in his/her home state (or in the defendant driver's home state), when the witnesses and doctors who treated the plaintiff are in the state where the accident occurred, which makes the latter state the most convenient location for trial” cited in: Law.com Dictionary on ‘Forum non Conveniens’ \texttt{<http://dictionary.law.com>} (01/10/04); J.L Goldsmith International Dispute Resolution: the regulation of forum selection (Transnational Publishers, New York, 1997) 295.

\textsuperscript{78} First Optional Protocol to the International Convention on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)
another procedure of international investigation, thereby providing a rule of *lis alibi pendens* rather than the rule of *electa una via*.

Under general international law, competing proceedings are defined as "procedures that involve the 'same parties' and the 'same issues'". In a similar vein, the relevant HRC jurisdiction indicates that what constitutes ‘the same matter’ proceedings is defined, within the scope of Article 5(2) (a) of the OP, as "including the same claim and the same individual." The jurisprudence on Article 5(a) indicates the *lis alibi pendens* character of the provision, although the reservation made by some EU countries to Article 5(a) transforms the provision for those states that made the reservation into an *electa una via* provision, as discussed in the next subsection.

(a) Same matter = same parties (ratione personae) and same issues (ratione materiae)

The HRC has held in several cases that the *lis alibi pendens* rule does not bar litigants from the use of the Committee’s observations if the same issues were raised in proceedings pending before another international human rights procedure by complainants *unrelated to the victim*. The ‘same party’ is interpreted in the HRC jurisdiction as “the same victim or someone authorized to act on the victim's behalf as well as the same party respondent state.”

In *Estrella vs Uruguay* the view was taken that the same legal claim before different international human rights legal systems cannot be deemed to involve the ‘same matter’ as long as they do not involve the ‘the same party’. The HRC observed that Article 5(2)(a) of the OP could not be so:

...interpreted as to imply that an unrelated third party, acting without the knowledge and consent of the alleged victim, can preclude the latter from having access to the HRC. It therefore concluded that it was not prevented from considering the communication submitted to it by the alleged victim himself, by reason of a submission by an unrelated third party.

Thus, within the meaning of Article 5(2)(a), the submission of the ‘same issue’ by a third party for another international body, did not constitute the ‘same matter’.

Similarly, in *V.O. v Norway* the HRC stated “that the same matter refers to identical parties, to the complaints advanced and the facts adduced in support of them”. In *Celiberti de Casariego v Uruguay*, *Fanali v Italy*, and *Blom v Sweden*.

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79 McGoldrick supra n 60, p. 82.
80 Shany supra n 9, p. 24.
81 McGoldrick supra n 60, pp. 182-183.
82 Shany supra n 9, pp. 24-25.
83 Meron supra n 56, p.776.
85 *Celiberti de Casariego v Uruguay* U.N. GAOR Hum Rts Comm UN Dec A/36/40 185.
the Committee confirmed this stance.

(b) International Investigation

Subsequently, the practical definition of what constitutes a ‘procedure of international investigation or settlement’ within the meaning of article 5(2)(a) can be derived. This provision effectively refers to those instruments which provide the right of individual application. To date these are the European Convention on Human Rights, The Organization of American States Charter, The American Convention on Human Rights, The African Charter of Human and Peoples Rights and the UN Convention on the Elimination of Racial Discrimination.

Of particular importance was the position the HRC took with regard to the 1503 procedure of the Economic and Social Council Resolution, under which a particular human rights situation of a country can be examined. As this procedure examines situations, which appear to reveal a ‘consistent pattern of gross violations of human rights’, the HRC took the stance that ‘a situation’ is not the same matter as an ‘individual complaint’. Additionally, the HRC decided that a procedure of a non-governmental organisation does not constitute a procedure of international investigation or settlement in the meaning of article 5(2)(a).

As a final note to this section, it can be added that, with regard to the reservations to article 5(2)(a), the interpretation of ‘other international investigation or settlement’ only incorporates binding decisions of fully judicial bodies. For instance, recommendations of quasi-judicial bodies, such as the African Human Rights Commission, cannot automatically prevent the HRC from considering a case, as this might give non-binding decisions a binding effect, against the wishes of the parties to the relevant treaties.

(c) Same issues = similar object and similar grounds

Proceedings are only labelled by the HRC as competing or involving ‘the same matter’ when a case involves both the same party and the same issue as another proceeding brought before international investigation or settlement at the same time. Subsequently, this section will discuss what ‘the same issue’ incorporates in practice. "The same issue' condition has been described as comprising 'similar object' conditions and similar grounds."

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86 Fanali v Italy, U.N. GAOR, Hum Rts Comm, UN Dec (A/38/40) 160.
87 Blom v Sweden, UN GAOR, Hum Rts Comm, UN Dec (A/43/40) 211.
88 Alston and Steiner supra n 17, pp. 612-613.
89 Ibid.
90 McGoldrick supra n 60, p.183; Meron supra n 56, p. 767.
91 Meron supra n 56, pp. 767-768. This was based on the HRC’s determination that Article 5(2)(a) "can only relate to procedures implemented by Inter-State or intergovernmental organisations on the basis of inter-state agreements or arrangements" cited in: McGoldrick supra n 60, p.184.
92 Shany supra n 9, p. 255.
93 Ibid.
and 'similar grounds'. In other words the 'same issue test' finds a claim competing if a 'same fact pattern' and the 'same legal claim' can be found.\(^{94}\) Therefore, it seems that multiple proceedings relating to the same facts, but involving different legal claims, do not necessarily meet the 'same issues' standard. Both Casanovas vs France\(^{95}\) and Keller vs Germany\(^{96}\) suggest that, if a right is more broadly defined under the ICCPR than under the ECHR, the HRC would permit multiple proceedings. Hence, even if two complaints are identically phrased when submitted to the Committee and to a competing human rights procedure, it would not be considered as 'the same matter' ''if there are material differences in the substantive scope of protections offered by the constitutive instruments of the two mechanisms''.\(^{97}\) It therefore seems that there is no 'competition' between the ECHR and the HRC if there are significant differences between the relevant scopes of protection offered by their respective treaties.\(^{98}\)

Hence, the HRC applies a restrictive (narrow) interpretation to the expression of 'the same matter'. In order for a procedure to constitute 'the same matter', the claim must be based on 'the same party', 'the same object' and 'similar grounds'. Only if a case is comparable on all of these grounds and brought before another international procedure for examination at the same time will the proceeding be labelled as 'same matter' and be held inadmissible for the HRC.

2 Res Judicata

One of the conditions of the res judicata rule is that it is only applied if "a judicial decision has been rendered".\(^{99}\) By definition, a res judicata approach focuses on the issues actually addressed by the decision rather than the issues raised in the original claim.\(^{100}\)

The HRC’s jurisprudence suggested that the Committee is only precluded from considering a communication if the same matter is simultaneously being examined under another procedure of international investigation or settlement.\(^{101}\) The fact that the HRC interprets Article 5(2)(a) as lis alibi rather than res judicata, is different from Article 35(2)(b) of the European Convention, which has been interpreted as a res judicata regulation, precluding consideration of all matters that have already been dealt with by other international procedures. The traveaux preparatoires of the ICCPR demonstrate that proposals to introduce stricter jurisdictional regulating standards were explicitly rejected.\(^{102}\)

\(^{94}\) Shany supra n 9, p. 25.
\(^{97}\) Shany supra n 9, pp. 25-26.
\(^{98}\) See also infra p 17.
\(^{99}\) Shany supra n 9, p. 27 (emphasis added).
\(^{100}\) Shany supra n 9, p. 27.
\(^{101}\) McGoldrick supra n 60, p. 182.
\(^{102}\) Shany supra n 9, p. 254.
That the HRC applies a *lis alibi* regulation rather than *res judicata* is also evident in the fact that article 5(2)(a) is a ‘temporary restriction’ for the time that case is also pending before another international investigation, rather than an absolute prohibition.\(^{103}\) *Antonaccio v Uruguay* and *Altesor v Uruguay*\(^{104}\) suggest that it is not precluded from considering a communication if a ‘same matter’ claim has been withdrawn or is no longer under active consideration by another international procedure.\(^{105}\) In cases of dual application it is open to the applicants to withdraw their case from another procedure to render the communication admissible for the HRC.\(^{106}\) This exhibits the ‘temporary’ character of the provision.\(^{107}\)

The question as to what the HRC interprets as the appropriate time for declaring that ‘the same matter’ is not ‘being investigated’ under other international procedures has been clarified in *Torres Ramírez v Uruguay*.\(^{108}\) It was decided that it refers to the moment when the Committee makes its ‘decision on admissibility’.\(^{109}\) Therefore, once another international tribunal has concluded its examination of a case, the Committee is free to pursue its own consideration provided that the state party has made no reservation to Article 5(2)(a), as discussed in the subsequent section.

3 **Electa una via**

An *electa una via* provision precludes investigation of ‘same matter’ claims, which ‘are being investigated’ or already ‘have been investigated’ by another international procedure. It therefore generally combines *lis alibi* and *res judicata* rules. In fact, the *electa una via rule* is even wider than the combined effect of *lis alibi pendens* and *res judicata*, as it also encompasses situations where a procedure did not lead to a final judgement.\(^{110}\)

Previous subsections in this paper have pointed out that the Committee applies a *lis alibi* rather than *res judicata* interpretation of Article 5(2)(a). However, the admissibility criteria of the OP are further narrowed in some cases by reservations to Article 5(2)(a) by some State parties, most of them also party to the ECHR.\(^{111}\)

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103 Meron supra n 56, p. 767.
104 McGoldrick supra n 60, p. 182.
105 Meron supra n 56, p. 767.
106 If the author has withdrawn his submission to the international body, the Committee may proceed to make a declaration of admissibility, Ghandhi supra n 60, p. 223.
107 Davidson supra n 46, p. 348.
109 Ghandhi supra n 60, p.226. See also infra pp 16-17.
110 Shany supra n 9, p. 212.
111 Some state parties have refrained from entering such a reservation, such as The Netherlands, Portugal, Cyprus, Finland, Czech Republic, Slovakia and Hungary, OP “Declarations and Reservations as of March 2002”. For example, according to the Dutch Government, the practical objections to possible double procedures constitute an insufficient argument for preventing individuals from applying to the HRC after having done so to the ECHR. It added that the making
For the parties holding this reservation, Article 5(2)(a) forms an *electa una vía* provision,\(^{112}\) precluding the HRC from considering any case which ‘has already been’ examined by another international forum.\(^{113}\) The Committee of Ministers concluded "that an applicant should not be able to bring the same case under both procedures either at the same time or successively."\(^{114}\) It was decided that in order to prevent successive applications from the European Commission or ECHR to the HRC, a reservation should be made by the member states to the European Convention:\(^{115}\)

...whose effect would be that the competence of the U.N. Human Rights Committee would not extend to receiving and considering individual complaints relating to cases which are being or *already have been examined* under the procedure provided for by the European Convention. (emphasis added)

Such a reservation is only covering rights which, in substance, are covered by the two instruments, and thus not of complaints of violation of rights, which are not guaranteed in the European Convention. The Committee of Ministers also noted that it did not give its opinion on the interpretation of the words "the same question" of Article 5 (2)(a) of the OP.\(^{116}\) Note that this is in line with article 35(2)(b)\(^{117}\) of the ECHR which also bars the Commission from handling a ‘same matter case’ which ‘has already been submitted to another procedure of international investigation’ unless it contains relevant new information.\(^{118}\)

One of the intentions of the reservation is to prevent any form of appeal by the HRC of decisions taken by the ECHR.\(^{119}\) Additionally, it should be taken into account that the ECHR is a regional court and performs a dual role of not only settling specific disputes arising out of the Convention but also ‘serves as an engine of regional integration’.\(^{122}\) A differing decision of ‘the same matter’ case by external

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\(^{112}\) A.M. v Denmark, UN GAOR, Humm Rts Comm, UN Dec A/37/40 (1982) 212.

\(^{113}\) Ghandhi supra n 60, p. 228.


\(^{115}\) Ibid.


\(^{117}\) Shany supra n 9, p. 212.

\(^{118}\) Note that this is in line with the exclusive jurisdiction provision Article 55 of the ECHR and the non-exclusive jurisdiction provision article 44 of the ICCPR. Article 55 articulates that only by way of agreement can states decide to waive the jurisdiction of the ECHR and opt for dispute settlement before another forum. Article 44 of the OP is lenient and allows settlement before another court. Although these provisions apply to complaints brought by states rather than individuals, it aligns with the absence of a *res judicata* interpretation of Article 5(2)(a) of the OP and the presence of such a provision in the ECHR. See also Meron supra n 56, pp. 770-771, 786; Shany supra n 9, pp. 188, 197.

\(^{119}\) Ghandhi supra n 60, pp. 228-229.

\(^{122}\) Shany supra n 9, p. 182.
judicial bodies might have a disruptive effect on the functioning of the regional legal entity\textsuperscript{121} and might weaken the ECHR authority.\textsuperscript{122} Moreover, it appears that the intention of the drafters of the European Convention was to make the ECHR’s verdicts absolute. Any form of appeal of a closed ECHR case by any another international human rights body may therefore be contrary to the drafter’s intention to have the ECHR render final decisions.\textsuperscript{123}

As the cases Casanovas vs France, Keller vs Germany and Estrella vs Uruguay indicate, the ‘same issue’ test will only find ‘the same matter’ if there is both the ‘same fact pattern’ and ‘the same legal claim’. Similar interpretations of the ‘same matter’ have been used with regard to the reservations made to article 5(2)(a).\textsuperscript{124} Glaziou v France clarified, in relation to the reservation to article 5(2)(a), that ‘same matter’ constitutes ‘same events’, ‘same facts’ and ‘substantially the same issues’.\textsuperscript{125}

Moreover, as suggested in the General Comment of the Human Rights Committee "the electa una via reservations should apply only where both the legal rights and the subject matter under the two competing instruments are identical",\textsuperscript{126}

Reservations have been entered which effectively add an additional ground of inadmissibility under article 5, paragraph 2, by precluding examination of a communication when the same matter has already been examined by another comparable procedure. \ldots [and] where the legal right and the subject matter are identical under the Covenant and under another international instrument (paragraph 14 of the General Comment, emphasis added).

In O.F v Norway\textsuperscript{127} it was suggested by the Committee that it interprets the reservation as such that it also precludes the consideration of cases which have been denied by the ECHR. The notion that a case has been registered by the ECHR – even though is has been declared inadmissible at a later stage –\textsuperscript{128} ‘has been considered’ and seems to constitutes a case ‘submitted’ to the ECHR, thus precluding the HRC from considering the case. Note that this differs from its decision in Torres Ramírez v Uruguay\textsuperscript{129} where it was decided that the moment when a communication ‘is being examined’ is when the claim ‘has been admitted’.\textsuperscript{130}

\textsuperscript{121}Ibid. \\
\textsuperscript{122}Ghandhi supra n 60, p.229. \\
\textsuperscript{123}This intention may be inferred from former Articles 26, 27, 32 and 52, European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). Van Dijk and van Hoof, supra n 110, p. 58. Note that article numeration changed after adoption of protocols. \\
\textsuperscript{124}Shany supra n 9, p. 27. \\
\textsuperscript{125}Cited in: Ghandhi supra n 60, p. 233. \\
\textsuperscript{126}Shany above n 9, p. 27. See inter alia Casanova v France, UN GAOR, Humm Rts Comm, UN Dec A/49/40, (1994) 131. \\
\textsuperscript{127}Ghandhi supra n 60, p. 228. \\
\textsuperscript{128}Ghandhi above n 61, p. 232, V.E.M v Spain, UN GAOR, Humm Rts Comm, UN Dec A/48/40 (1993) 214. \\
\textsuperscript{129}Torrez Ramírez v Uruguay, UN GAOR, Humm Rts Comm, UN Dec A/35/40 (1977). Note that this case gave an interpretation not in relation to the reservation clause to Article 5(2)(a) of the OP. \\
\textsuperscript{130}See also supra n 119, p. 14.
A dissenting view\textsuperscript{131} clarifies that the effect of the HRC’s interpretation cannot be so that a case that has been declared inadmissible \textit{ratio materiæ} under the ECHR is ‘automatically’ also declared incompatible with the ICCPR\textsuperscript{132} and thus inadmissible \textit{ratio materiæ} under the OP. The conditions for the admissibility of communications might be different for other international instruments and vary from those under the OP\textsuperscript{133}.

Initially the HRC adopted an expansive interpretation of the \textit{electa una via} reservations and did not consider differences between the scope of protection by the ICCPR and the ECHR. Both \textit{A.M. v Denmark}\textsuperscript{134} and \textit{V.O v Norway}\textsuperscript{135} were declared inadmissible being manifestly ill-founded\textsuperscript{136} under Article 35(3) of the European Convention.\textsuperscript{137} In both cases the HRC decided that, although the cases had been declared inadmissible, the matter ‘had been examined’ by the ECHR, precluding the HRC from considering the cases.

However, recent case law has developed along the lines with dissenting views. At present when the ECHR rejects a complaint as inadmissible \textit{ratio materiæ}, the HRC may still decide to address the case because of differences in the scope of rights under the Covenant and the Convention. In \textit{Casanovas v France}\textsuperscript{138} the Committee found the communication, which had been declared inadmissible by the ECHR, ‘incompatible \textit{ratio materiæ} ICCPR with the ECHR’.\textsuperscript{139} Since:\textsuperscript{140}

\begin{quote}
...the rights of the Convention differ in substance and with regard to their implementation procedures from the rights set forth in the Covenant. A matter that had been declared inadmissible \textit{ratio materiæ} had not, in the meaning of the reservation, ‘been considered’ in such a way that the Committee was precluded from examining it.
\end{quote}

So at present a case that has been declared inadmissible \textit{ratio materiæ} under the ECHR is not necessarily ‘incompatible with Covenant’ -article 3 OP- and thus inadmissible \textit{ratio materiæ} under the OP.\textsuperscript{141}

\begin{footnotes}
\item[131] Adopted by Mr Graefrath, member of the HRC.
\item[133] McGoldrick supra n 60, p. 185; Ghandhi supra n 60, p. 229.
\item[134] \textit{A.M. v Denmark}, UN GAOR, Humm Rts Comm, UN Dec A/37/40 (1982).
\item[136] Meaning ‘being incompatible with the provisions of the Convention’.
\item[137] The author V.O. claimed that “the provisions of the ICCPR differed in several aspects from those of the ECHR.” Cited in: McGoldrick supra n 60, p. 185.
\item[138] Ghandhi supra n 60, p. 234.
\item[139] \textit{Ibid}.
\item[141] McGoldrick supra n 60, p.185; Ghandhi supra n 61, p. 230.
\end{footnotes}
III OVERLAPPING JURISDICTION: CASE STUDIES

The previous Chapter illustrated how parallel and successive proceedings (and hence also the parallel and successive types of forum shopping) are to a large extent impeded by the admissibility criteria of the ICCPR and the European Convention regulating the exercise of jurisdiction of the HRC and the ECHR respectively. The following case studies illustrate a third form of forum shopping. Since similarly or identically phrased rights are included in both the ICCPR and the European Convention, the individual has the option to choose between different forms of international settlement or investigation. As a result of this judicial overlap, dissimilar decisions for differing parties on the basis of the same rules may be reached by the two human rights bodies. The death row phenomenon and the protection of the liberty and security of a person are two examples of such divergence in interpretation of a similar human rights rule.

A Death Row Phenomenon

Over the last decade, (quasi-) judicial bodies have considered whether prolonged detention on death row – and its associated physical and psychological consequences – amounts to inhuman or degrading treatment. The death row phenomenon is defined as “prolonged delay under the harsh conditions of the death row”,142 thus taking into consideration both the element of delay and the effect of prison conditions. The article prohibiting such treatment in the European Convention and the ICCPR are virtually identical in wording. Article 7 of the ICCPR stipulates that: “…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.”

Similarly, Article 3 of the ECHR states that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Case law exhibits both diverging interpretations of the relevant articles of the ICCPR and the ECHR and indications of co-ordination between the two human rights bodies.144

1 Soering v UK (ECHR)145

The ECHR first addressed the so-called "death row phenomenon" in 1989 in Soering v. United Kingdom. Soering146 was found in the United Kingdom and the

143 International Covenant on Civil Political Rights, opened for signature 16 December 1966, 999 UNTS 171, (entered into force March 1976), article 7
146 Soering was a West German national, who grew up in Virginia, and was accused of committing murder in the United States.
United States government requested his extradition. If sentenced, Soering faced the prospect of the death penalty. The author argued that by extraditing him he would face the death penalty and the United Kingdom would be in violation of Article 3, 6 and 13 of the Convention.\(^{147}\)

Article 5(1)(f) of the European Convention recognises the legality of extradition proceedings and Article 2(1) permits capital punishment in certain circumstances.\(^{148}\) Further, the United Kingdom was not a party to the Sixth Protocol to the Convention which abolishes the death penalty as a criminal sanction. Soering’s claim was novel because he did not seek to establish that the death penalty itself was ‘inhuman or degrading treatment or punishment’, but rather sought to demonstrate that Article 3 would be violated because of the unique circumstances of his case, especially based on the long delays in Virginia between the death sentence and execution.\(^{149}\)

The Court decided that, in contrast with the earlier European Commission’s decision,\(^{150}\) Soering’s extradition to the US to await execution on death row would be in violation of article 3 of the European Convention. In considering the length of the detention prior to execution, it was decided that delay might be attributable to the prisoner who made the choice to appeal, but a prisoner cannot be blamed for delay. “It is part of human nature that the person will cling to life by exploiting … safeguards to the full”,\(^{151}\) hence blaming the system for delay in execution. Imperative here is that the Court was “unanimously of the view that delay caused by the prisoner could constitute cruel and inhuman punishment”.\(^{152}\)

Apart from that, the ECHR’s decision was highly fact-specific\(^{153}\) meaning that all circumstances of the imprisonment were taken into account. An important consideration was how his age and mental state would affect him if he were subjected to the death row phenomenon.\(^{154}\) This is notwithstanding the fact that the court recognised the ‘democratic character of Virginia’s legal system’ and that the applicant would be subject to a legal system in the US which is ‘in itself neither arbitrary nor unreasonable.’\(^{155}\) But the Court considered that the long period of time spent on death row, in such extreme conditions in relation to his personal condition,

\(^{147}\) Hudson supra n 142, p. 838.
\(^{148}\) “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law” European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol 11, opened for signature 11 May 1994, 15 HRLJ 86 (entered into force 1 November 1998) Article 2(1) (emphasis added).
\(^{149}\) Hudson supra n 142, p. 839.
\(^{150}\) Ibid 841.
\(^{152}\) Hudson supra n 142, p. 842 (emphasis added).
\(^{154}\) Hudson supra n 142, p. 842.
\(^{155}\) Van Dijk and van Hoof, supra n 111, pp. 239-240.
would expose him to a real risk of treatment going beyond the threshold set by Article 3.

It should be taken into account that the Court’s jurisdiction covers countries which have abandoned the use of capital punishment and that it might have been driven by a “strong antipathy to the death penalty.” The legacy of the Soering case became apparent in subsequent cases, such as Cinar v Turkey, where the European Commission was willing to find a breach based on long delay in execution and with a constant anxiety of death.

2 Pratt & Morgan v Jamaica

All death row phenomenon claims are brought under Article 7 and 10 of the ICCPR, on which the Committee takes an intermediate position. It will not accept delay alone as a violation of the ICCPR, but it will examine the facts of a particular case to determine if the conditions as a whole constitute ‘cruel, inhuman or degrading treatment or punishment’. Therefore, the HRC has not followed the ECHR decision taken in Soering v UK. It decided in Pratt & Morgan v Jamaica that:

...prolonged proceedings do not per se constitute cruel, inhuman and degrading treatment, if the accused is merely prevailing himself of appeal possibilities, even if such delay may be a source of mental strain and tension for detained prisoners.

The authors claimed that the duration of their detention on death row of nearly 10 years constituted a violation of article 7 of the ICCPR. The Committee adopted a more conservative and ‘restrained’ position in Pratt & Morgan v Jamaica than the ECHR in Soering v UK. "An assessment of the circumstances of each case would be necessary." The Committee concluded that the authors failed to demonstrate that “delay in judicial proceedings constituted for them cruel, inhuman and degrading treatment under article 7”. In subsequent cases, such as Kelly v Jamaica, the HRC continued its divergent stance rejecting the argument that prolonged confinement on death row alone could violate the ICCPR.

156 Hudson supra n 142, p. 843.
157 Ibid.
159 Hudson above n 142, p. 844.
160 Ibid.
161 Pratt and Morgan v Jamaica supra n 157, p. 222.
162 Lillich supra n 144, p. 704.
163 Pratt and Morgan v Jamaica supra n 158, p. 222.
164 It should be noted here that the cases were pending at the same time, which was possible as the cases involved different parties, and that apparently neither body at the time knew that its counterpart was simultaneously dealing with the ‘same issue.’ Lillich supra n 144, p. 704.
165 Helfer supra n 153, p 303; Lillich supra n 144, p. 704.
166 Hudson supra n 142, p. 844 (emphasis added).
167 Hudson supra n 142, p. 845.
3 Kindler v Canada

In one case the HRC seemed to endeavour to harmonise with the ECHR’s view by adopting a fact-specific analysis. In *Kindler v. Canada*, while referring to its earlier decision that “death row detention does not *per se* violate the ICCPR” the Committee gave “careful regard to” the ECHR’s position when it distinguished the unique facts of the Soering case from Kindler, because the cases were comparable. The HRC noted that …

...important facts leading to the judgement of the European Court are distinguishable on material points from the facts in the present case. In particular, the facts differ as to the age and mental state of the offender, and the conditions on death row in the respective prison systems. ... The Committee has also noted in the Soering case that ... there was a simultaneous request for extradition by a State where the death penalty would not be imposed.

Although the Committee referred to the ECHR, it reaffirmed its earlier views on the death row phenomenon and expressly endorsed the Canadian Court’s narrow reading of *Soering v UK*. According to the Committee, prolonged judicial proceedings, even if a source of mental strain for convicted persons on death row, are not by themselves cruel, inhuman and degrading treatment, “if the convicted person was merely availing himself of appellate remedies.”

4 Francis v Jamaica

The HRC practice of conducting a fact-specific review of each case in line with the ECHR has not been realised in all subsequent cases. In *Francis v Jamaica*, the Committee had to determine whether the author’s treatment during his nearly 12 years detention on death row entailed violations of articles 7 and 10 of the ICCPR. The Committee reaffirmed its established jurisprudence that the period per se did not constitute a violation, but found nonetheless “that twelve years on death row together with numerous aggravating factors, including beatings by prison wardens,

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169 Helfer supra n 153, p. 154.
170 Hudson supra n 142, p. 845.
172 The case was, in effect, an ‘appeal’ from the Supreme Court of Canada. See also Lillich supra n 144, p. 708.
173 Lillich supra n 144, p. 54.
violated the ICCPR.” It thereby clarified that it would examine the extent to which any delay was imputable to the state, the conditions of imprisonment, and the impact of detention of the person involved.

However, in other decisions involving equally lengthy periods of detention the Committee has consistently rejected petitioners’ claims. By taking this position, judging from the high standard the HRC has set, it is harder to prove a case on the death row phenomenon before the HRC than before the ECHR.

5 Johnson v Jamaica

This inconsistency of the HRC’s own jurisprudence, possibly arising out of the differing stance of the ECHR, also became apparent in Johnson v Jamaica where the majority of the Committee acknowledged that “its [own death row] jurisprudence [had] given rise to controversy.” The majority contended that only if a claimant could demonstrate "compelling circumstances of the detention" other than its length the Committee would find a violation of article 7 of the ICCPR. The influence of the ECHR is evident here in the sense that the majority of the Committee members wished to explain its reasoning and decision in greater detail, as several petitioners repeatedly asked it to follow national and international case law adopting a more pro-petitioner approach. In Johnson v Jamaica the HRC gave a number of reasons why it required more than simple delay to constitute a violation, but it did not give explicit reference to the reasoning of the ECHR.

B Right to Liberty and Security of Person

In line with the previous examples on death penalty cases, jurisprudence on Article 5(1)(a) of the European Covenant and Article 9(1) of the ICCPR provides a second example of how articles dealing with similar substance- albeit differently phrased-

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178 Helfer supra n 153, p.303
179 Hudson supra n 142, p. 846. “Whereas psychological tension created by prolonged detention on death row may affect persons in different degrees the evidence before the Committee in this case ... indicates that his mental health seriously deteriorated during incarceration on death row. Taking into consideration the author’s description of prison conditions ... the Committee concludes that these circumstances reveal a violation ... under articles 7 and 10 (1) of the Covenant” cited in: Francis v Jamaica in Alfredson supra n 178, p. 98.
180 Helfer supra n 153, p. 303.
181 Lillich supra n 144, p. 712.
183 Lins and De Lille supra n 175, p. 15.
184 The Committee made clear that “[i]mposing a bright line cut-off date beyond which death row detention would be impermissible would create an incentive for States to carry out death sentences expeditiously.” Because “[l]ife on death row, harsh as it may be, is preferable to death,” even “prolonged detention on death row cannot, per se, be regarded as cruel or inhuman treatment”, Johnson v Jamaica supra n 182, par. 8.4.
185 Johnson v Jamaica supra n 182, par 8.5.
186 Helfer supra n 153, p. 302.
187 Johnson v Jamaica supra n 182, par 8.3-8.5.
have received dissimilar interpretations. Like the case studies on the death row phenomenon, this section illustrates how judicial overlap leads to the third form of forum shopping, as a result of differing judgements on virtually the same rule. Both articles in the ICCPR and the European Convention deal with the right to 'liberty and security'.

The HRC, in William Delgado Paez v Columbia,\(^{188}\) indicated that the first sentence of Article 9 does not stand as a separate paragraph. The location of the sentence could lead to the view that 'the right to security' arises only in the context of arrest and detention. Based on the *travaux preparatoires* it took the view that there is "no evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty".\(^{189}\) The HRC found that it would be improper to claim that States can "ignore threats to the life of persons under their jurisdiction" for the reason that the person is not arrested or otherwise detained, which would consequently "render totally ineffective the guarantees of the Covenant".\(^{190}\)

By taking this position, the HRC diverges from and goes beyond, the ECHR's jurisprudence, which has taken a rather restrictive view of the concept of 'security of person'. The ECHR interpreted Article 5(1) not as an autonomous right, standing as a separate paragraph, but in connection with the 'concept of liberty', for instance, freedom of movement and protection from arbitrary arrest or detention.\(^{191}\)

In Adler and Bivas v Federal Republic of Germany and Dyer v United Kingdom the European Commission held that:\(^{192}\)

\[
\text{[t]he term liberty and security must be read as a whole and, in view of its context, as referring to only physical liberty and security, "Liberty of a person" in Article 5(1) thus means freedom from arrest and detention and "security of person" to the protection against interference with this liberty.}
\]

In the Bozano case\(^{193}\) the Court held a similar position determining that liberty and security are two sides of the same coin; if personal liberty means actual freedom of movement of the person, security is the condition of being protected by law in that freedom.\(^{194}\)

\(^{188}\) *William Delgado Paez v Colombia*, UN Doc Humm Rts Comm, UN Doc CCPR/C/39/D (1990) par 5.5.

\(^{189}\) Alfredson supra n 176, p. 100.

\(^{190}\) *Ibid.* In *Tshishimbi v Zaire* (Comm 542/1993), the HRC shed further light on this provision with regard to the disappearance of a person. Again it explained that Article 9(1) 'may be invoked outside the context of arrest and detention', adding that another interpretation would 'render ineffective the guarantees of the Covenants'.

\(^{191}\) Alfredson supra n 176, p. 101.

\(^{192}\) Cited in: Van Dijk and van Hoof, supra n 111, p. 252

\(^{193}\) *Ibid.*

\(^{194}\) Van Dijk and van Hoof, supra n 111, p. 253.
C Harmonization of Case Law

The previously discussed case studies indicate that coherence of case law between the HRC and the ECHR has not yet been achieved. The observation that the two bodies hold a different approach to what constitutes ‘inhuman and degrading treatment’ without reference to grounds for divergence decreases the predictability and coherence of international human rights law, with possible negative consequences for both individuals and state parties.\textsuperscript{195}

Although the HRC has not explained the shift away from European jurisprudence on the death row phenomenon, possible reasons for doing so can be discussed. The interpretation and application of the articles have demonstrated to be essential as the selected words are not material. The difference in background of the HRC and the ECHR\textsuperscript{196} explain the more sensitive interpretation of the ECHR, not the selected words which prohibit cruelty.\textsuperscript{197} The members of the ICCPR stand for a global system and embrace more diverse political and economic systems. Therefore, \textit{Soering v UK} might be found too stringent a position for the HRC and possibly unacceptable to many non-European parties to the ICCPR. The divergence also seems to be reflected in answering the question of who should be considered at fault for delay when the prisoner is pursuing reasonable appeals. The reference in \textit{Kindler v Canada}\textsuperscript{198} to the ECHR’s decision is a start of consideration of earlier decisions, but does not provide reasons for its divergence yet. \textit{Colin v Johnson} includes an explanation by the HRC for its stance, but without explicit reference to earlier decisions of the ECHR.

Despite the fact that the HRC and the ECHR have the ability to act independently, they do form part of the same legal ‘sub system’, performing similar functions. Although the HRC has made attempts to harmonize its decisions with the ECHR, a more important aspect is the \textit{explanation} it should give when it diverges from ECHR decisions. These explanatory grounds would lead to more coherence in the jurisprudence of the two bodies, and increase predictability for individuals faced with the choice of different judicial fora. The importance of such coherence in international (human rights) law and the concept of transjudicial communication are addressed in the following chapters.

\textsuperscript{195} See also infra Chapter IV.
\textsuperscript{196} See also infra Chapter V.
\textsuperscript{197} Van Dijk and van Hoof, supra n 111, p. 239. In \textit{Soering vs UK}, the ECHR, for instance, took written comments of Amnesty International into account, in which it was argued that that the evolving standards in Western Europe regarding the existence of the death penalty required that the death penalty should now be considered as inhuman and degrading punishment within the meaning of article 3 of the European Convention. See also Hudson supra n 142, p. 387 and infra Chapter IV.
\textsuperscript{198} \textit{Kindler v Canada}, supra n 168. See also infra Chapter III A 3.
IV COHERENCE IN INTERNATIONAL LAW

The previous Chapters have outlined how the exercise of jurisdiction of the HRC and the ECHR is regulated in some of the admissibility criteria of the OP and the European Convention. Although these criteria limit parallel and subsequent proceedings to a large extent, the presented case law also indicated that owing to the narrow interpretation of the relevant provisions, some forum shopping is still possible. Forum shopping (both parallel and successive) may lead to inconsistent judgements on the same matter cases and differing interpretations of the same human rights rules in the ICCPR and the European Convention, which may affect the consistency of international human rights law.

The phenomenon of forum shopping is a result of the steady increase in the number of (quasi-) judicial bodies. It often raises the question whether this proliferation will lead to further fragmentation of legal norms and thereby threaten the coherence and consistency of international (human rights) law.199 The important question to deal with subsequently is why is coherence and consistency so important in general international law? And how can this question be answered for international human rights in particular?

A Diversity of Tribunals and Unity of the Legal System

The 20th century witnessed a sharp increase in international law making through treaties, state practice and soft law regulation.200 Also, more areas of international law are now regulated. This development in international law—reflected in greater density, complexity and diversity of its normative content201—has also led to the multiplication of specialised mechanisms of implementation, including (quasi-) judicial bodies and tribunals.

Most of these judicial bodies have been set up by specialised treaties. Although States remain the central subjects of the ‘making’ of international law, these (quasi-) judicial bodies play an additional role in the interpretation and application of the law. What these judicial bodies have in common, despite their diversity, is that they belong to the same legal system and also derive their legitimacy from it.202 This unity of the international legal order requires consistency in the interpretation of similar rules in different treaties. Increased specialization requires the preservation of unity of the international legal system which makes specialization possible and meaningful.203

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199 P.M. Dupuy, The Danger of Fragmentation or Unification of the international legal system and the International Court of Justice” (1999) 31 NYU J Int.L &Pol 792.
200 M. Craven, supra n 8, p. 489.
202 Abi-Saab supra n. 201, p. 921.
203 Abi-Saab supra n. 201, p. 925.
1 The specificity of international law and the importance of coherence

Specialised tribunals also exist in municipal law, but the ambit of their specialised jurisdiction is delimited in relation to the courts of plenary or general jurisdiction. Frequently, although not systematically, the specialised tribunals are subject to the control of higher instances of the judicial system. On the international level, characterised by its horizontal structure, there is not such clear distribution of function. In the beginning of this century this situation was tolerable in practice as long as the use of the ICJ and arbitration remained sparse. But with the proliferation of specialised tribunals which necessarily tread on part of the grounds covered by judicial bodies exercising more general jurisdiction, the danger of coherence becomes imminent. More than one treaty may contain either a similarly phrased rule or deal with a similar norm. This resulted in the challenge to consistent interpretation of the same rules by various (quasi-) judicial bodies partly because international law lacks systematic codification of the law by a central legislative or adjudicative branch. In addition to that, international law lacks a possibility of appeal which also makes for the unity of interpretation of law.

So this proliferation of judicial bodies raises the issue of inconsistent interpretation of international norms and rules. But what does unity, in legal terms, mean for international law, as it is an assumption that could be challenged somewhat, considering that sovereign states retain the inherent power to determine, or at least interpret, the content of the law binding upon them.

The unity of the international legal order can be characterised on two levels, ‘formal unity’ and ‘substantive unity’. Formal unity is created by the general use of secondary rules which deal with “the rule creation and change, responsibility and dispute settlement”. Substantive unity is created by primary rules, which lay down particular rights and obligations. These international secondary rules are fundamentally the same whatever the object of the international primary rules. The classical view is that international law only finds its unity in the formal techniques it uses. However, since the introduction of the UN Charter- which was ‘constitutional’ in character- and the further development of customary law (some with even of peremptory nature) and generally applied norms (which also include

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204 Ibid.
205 Meron, supra n 56, p. 771.
206 Abi-Saab, supra n 201, p. 922.
207 Shany, supra 9, p. 97.
208 Shany supra n 9, p. 82; Abi-Saab supra n 201, p. 924.
209 Dupuy supra n 199, p. 792.
210 Dupuy above n 1, 793.
212 Ibid; Dupuy supra n 199, p. 794.
213 Dupuy supra n 199, p. 794.
basic human rights norms), the primary rules have provided international law with substantive unity as well.\textsuperscript{214}

It is important that all international tribunals recognize that they are all part of the same legal system and that this also imposes certain obligations. Of these, the most basic one is to accept the doctrinal unity of the international legal system.\textsuperscript{215} This means \textit{inter alia} that each judicial body has an obligation to respect the judicial competence of other (quasi-) judicial institutions which comprise the system when rendering judgements and take account of their case law on the same subject matter or the same rules. This concept of transjudicial communication will be dealt in the subsequent section.

The substantive unity of the international legal order demands a common understanding and interpretation of the overarching principles by this widening spectrum of (quasi-) judicial bodies. Inconsistent interpretations (in any system of law) diminish first of all legal security. Legal subjects are no longer able to predict the reaction of official institutions to their behaviour and to plan their activity accordingly.\textsuperscript{216} Secondly, inconsistent interpretations of the same rules put legal subjects in an unequal position vis-à-vis each other.\textsuperscript{217}

The previously discussed lack of an appeal system requires the avoidance of divergent jurisdiction on the same matter disputes. One of the central roles of a legal institution is to maintain and promote the coherence and effectiveness of law. As a result of the lack of systematic codification of the law by a central legislative or adjudicative branch, inconsistent judgements on ‘same matter’ cases before different bodies challenge the coherence of international law.

Increased adjudication can, in principle, promote cohesion of the system “since courts may serve as agents of unity.”\textsuperscript{218} However, the decentralised character of international law, the lack of binding precedence, the poor level of jurisdictional co-ordination and harmonizing devices and the higher level of specialization requires co-ordination between the diverse (quasi-) judicial bodies in order to maintain the necessary coherence of international law.

2. \textit{International human rights law and coherence}

The previous section outlined that although international law is characterised by its decentralised nature, it still comprises “one system on a normative level”\textsuperscript{219}.

\textsuperscript{214} \textit{Ibid.}
\textsuperscript{216} Buergenthal supra n 215, p. 274.
\textsuperscript{217} Koskenniemi supra n 211, p. 2.
\textsuperscript{218} Shany supra n 9, p. 109.
\textsuperscript{219} Shany supra n 9, p. 230.
Unfortunately, it still enjoys only “a limited degree of institutional coherence.”\textsuperscript{220} Although specialised (quasi-) judicial bodies have a mandate that prescribes their jurisdiction confined to a particular area, they still do not operate as entirely autonomous bodies, but are part of this larger system of international law.

Accordingly, also the HRC and the ECHR are part of the same international legal order, unified both formally and substantially. Apart from that, both the HRC and the ECHR form part of the same ‘legal sub-system’, as they perform similar functions, pursue similar goals and decide on similar rules. Consequently, this requires co-ordination between the two bodies and coherence in case law. Indeed international (quasi-) judicial bodies seem to lean toward the view that “that the decisive test for determining whether two claims involve the same legal issue is legal (whether the same legal assertions can be made) rather than factual (whether the facts of the case underlying each claim are the same).”\textsuperscript{221} This supports the notion that human rights bodies are part of the same legal system.

The human rights field faced not only functional specialization but also regional specialization.\textsuperscript{222} Although these (quasi-) judicial bodies have been set up by different treaties, the jurisdiction of the bodies overlap not only in general norms of human rights law,\textsuperscript{223} but also contain similarly phrased rules. As the previous chapters have pointed out, the admissibility criteria of the OP and the European Convention regulate the exercise of jurisdiction to a large extent, but not strictly. This creates the possibility of inconsistent decisions on the same rules and in same matter disputes\textsuperscript{224}, which may jeopardize even the modest degree of harmonization so far achieved and introduce disharmonizing tensions into the legal system.\textsuperscript{225} Accordingly, the regulation of the exercise of jurisdiction aimed at preventing multiple proceedings might not be sufficient if the normative harmony is not being improved as well.\textsuperscript{226}

As pointed out in the previous section, inconsistent judgements in international human rights law undermine legal security and it poses legal subjects in an unequal position vis-à-vis each other. These dangers are also present in international human rights law, but coherence in this field is also important because many human rights norms are still not clearly defined as yet. Inconsistent judgements may undermine the credibility of the application of the human rights rules. With an eye on the further development and strengthening of human rights law, inconsistency in case law may undermine the setting of standards of basic human rights norms. Accordingly, the application of international human rights law by national courts is

\textsuperscript{220} Shany supra n 9, p. 94.
\textsuperscript{221} Shany supra n 9, p. 86. See also Casanova v France, supra n. 94.
\textsuperscript{222} See supra n 30.
\textsuperscript{223} M. Pinto “Fragmentation or Unification among international institutions: human right tribunals (1999) 31 NYU J Int.L &Pol 833.
\textsuperscript{224} Shany supra n 7, p. 109.
\textsuperscript{225} Shany supra n 9, p. 94.
\textsuperscript{226} Shany supra n 9, p. 120.
a process that may strengthen the development of human rights law, but national courts will not be likely to do so if international standards are unclear. Moreover, the introduction of the individual complaint procedure the human rights field has resulted in the development of an extensive body of case law, which may increase the chance of inconsistent judgements.

Although regional development resulted in (quasi-) judicial human rights bodies with different backgrounds—which may create a basis of divergence in interpretation of the same rules—it may be accurate to note here that, although the European Convention is indeed a regional body, the observation that many rules are substantially similar or identical to the ones incorporated in the universal Covenant, indicates that the rights of the Convention are based on, and reflect, universal norms and values. The Preamble of the Convention also illustrates the universal character of the rights incorporated, referring to the Universal Declaration of Human Rights on which it has been based and that the “[d]eclaration aims at securing the universal and effective recognition and observance of the Rights therein declared.”

In the context of the individual complaint procedures, an additional comment can be made with regard to competing or divergent jurisprudence in international human rights law. “Multiplicity of norms may be advantageous [from an individual’s point of view], because it allows the individual to seek out the most favourable position.” This also encapsulates the argument that forum shopping favours the individual litigant especially in the form of subsequent forum shopping. However, competing jurisdictions also grant states the option to adhere to the most lenient decision of the courts, thus undermining stricter judgements. So, states guilty of human rights violations could also take advantage of conflicting opinions by hiding behind the milder or more lenient opinion of a court.

3. Forum shopping and consistency of international human rights law

The consequences of forum shopping are traditionally portrayed at two ends of a spectrum. Some authors highlight, from an individual’s point of view, the importance of the “legitimate procedural interests of the victims of human rights violations”, also referred to as procedural laissez-faire. Allowing individual

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228 See also infra Chapter V, section B.
230 McGoldrick, supra n 60, p. 135.
231 Meron, supra n 56, p. 776.
232 Helfer, supra n 153, 110.
litigants multiple proceedings is suggested in order to maximize the protection of their rights. Additionally, as a result of the introduction of rules regulating the exercise of jurisdiction as part of admissibility criteria, complaints will often be rejected on non-substantial grounds.\footnote{Ibid.}

Opposite the ‘laissez faire- doctrine’, the unification doctrine intends the avoidance of multiple examinations by more than one court. This theory stresses “the States parties’ interest in the good administration of justice and...the need to prevent abusive and repetitive complaints.”\footnote{Ibid.}

This paper offers a more comprehensive appraisal by delineating a different starting point from which to assess the question of forum shopping. It is submitted here that forum shopping does not challenge the normative coherence of international human rights law as long as decisions of (quasi-) judicial bodies on the ‘same matter’ cases or similarly or identically phrased rules are not consistent with each other. As discussed in the next section, decisions cannot be entirely similar owing to the differing backgrounds and mandates of international human rights (quasi-) judicial bodies and these differences may even be desirable. By giving reference to grounds for a diverging opinion, judgements can differ from each other but still constitute normative coherence for international human rights law as a whole.

As explained in the foregoing sections, coherence in international (human rights) law is important and the often cited disadvantage of forum shopping –whether as parallel or subsequent proceedings- is that it challenges this coherence\footnote{Ibid.}. Too strict limitations on the choice of forum should be avoided\footnote{Shany supra n 9, p. 85.}, but owing to the decentralised character of the international legal order coherence is specifically dependent on consistency and coherence in case law and jurisprudence.

4. Forum shopping and ‘res judicata’

Successive proceedings may result in concerns about the authority of the first judgement. This is the most frequently cited justification for refusing to permit the filing of successive petitions.\footnote{Eissen supra n 114, p. 198.} “It is...possible to question whether it is wise policy to reconsider communications which have already been disposed of by other means of international settlement.”\footnote{Davidson, supra n 46, p. 355.} This may lead to the potential risk that divergent opinions might spring from different institutions within the field of human rights. "Such divergence could...lead to a weakening of respect for the Committee if it is seen to review decisions of well respected and firmly established institutions.”\footnote{Davidson, supra n 46, p. 348.}

\begin{thebibliography}{99}
\footnotesize
\item[234] Ibid.
\item[235] Ibid.
\item[236] Meron, supra n 56, p. 222; Davidson, supra n 46, p. 348.
\item[237] Shany supra n 9, p. 85.
\item[238]Eissen supra n 114, p. 198.
\item[239] Davidson, supra n 46, p. 355.
\item[240] Davidson, supra n 46, p. 348.
\end{thebibliography}
While there is general consensus over the need to apply the principle of finality in international law,\(^{241}\) it has been suggested that human rights proceedings brought by individual petitioners should be exempted from the application of the *res judicata* rule, given the unique characteristics of the parties to disputes in the human rights field of international law.\(^{242}\)

Helfer describes the differing characteristics of individual litigants contrasted with state parties’ litigation. States have greater resources at their disposal and more experience accumulated by repeated participation in litigation. Owing to this inequality between parties, Helfer submits that individuals should be granted maximum procedural opportunities, including permission to relitigate cases already decided elsewhere. The differences in the scope of the protection offered by the various human rights bodies, and the differences between the authoritative characters of their decisions, should allow the human rights field to be exempted from a finality provision.\(^{243}\)

In addition to that, Helfer contends that jurisprudential interaction between human rights (quasi-) judicial bodies could increase the coherence of international human rights law.\(^{244}\) In a similar vein, based on the divergence of procedures applied by (quasi-) judicial bodies and their differing backgrounds, multiple proceedings might promote a beneficial process of judicial dialogue, which all (quasi) judicial bodies could use as a basis to improve on their own decisions. Throughout this dialogue different ideas can be exchanged and existing rules can be re-examined, possibly culminating in the emergence of the best possible norm. Such a dialogue might even be desirable with regard to a single dispute.\(^{245}\) Moreover, a *res judicata* provision in the decentralised system of international (human rights) law, although intended to lead to judicial consistency, might conflict with the requirements of justice, such as the need to reverse previous and unjust ruling.\(^{246}\)

While there is some merit to this position, it seems that the conclusion that the rule of finality should be excluded from the human rights field can be questioned.\(^{247}\) Helfer’s argument that excluding human rights courts from the use of a *res judicata* provision will be effective for the coherence of the system as whole\(^{248}\) may have to be placed in a different light. It is submitted here that improving the coherence of international human rights law is better obtained by giving effect to decisions of (quasi-) judicial bodies in other cases, rather than a continuing to contest settled judgements.

\(^{241}\) Shany, supra n 9, p. 171.
\(^{242}\) Helfer, supra n 153, pp. 346-9.
\(^{243}\) Helfer, supra n 153, p. 313.
\(^{244}\) Helfer, supra n 153, pp. 349-52.
\(^{245}\) Meron, supra n 56, pp. 754, 776.
\(^{246}\) Shany supra n 9, p. 121.
\(^{247}\) Shany, supra n 9, p. 172.
\(^{248}\) Helfer, supra n 153, p. 351.
As some human rights rules are included in more than one treaty, albeit dissimilarly phrased, Helfer might be right in his submission that the first seized decision should not preclude subsequent ruling for other courts as they might result in different decisions, with respect to differing backgrounds and mandates of (quasi-) judicial bodies. Nevertheless, multiple proceedings based on the same factual basis, but raising different legal questions from those that the first selected (quasi-) judicial body could not have addressed, are not in direct competition (in overlap) with each other. This is supported by the jurisprudence of the HRC. Additionally, jurisprudence indicates that the HRC does not bar relitigation of cases with different factual bases. This is especially true in cases where the first seized tribunal did not permit the admissibility of the same facts.

Finally, with regard to the differences in the binding nature of the decisions of various human rights judicial bodies, "it should be recognized that various quasi judicial procedures cannot create an automatic res judicata effect...because they do not produce binding decisions", although admittedly a rule with equivalent effect to the res judicata rule can be implemented. In reality, decisions of quasi-judicial bodies, like decisions of the HRC, are treated very much like highly authoritative international judgements. Several tribunals and courts, applying both judicial and quasi-judicial procedures, confer upon the decisions of the quasi-judicial procedures as having a preclusive effect. Article 35(2)(b) of the European Convention articulates the admissibility criteria and states that the court:

will not deal with any application submitted under Article 34 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.

This provision also provides a precluding effect to quasi-judicial procedures, such as earlier examination by the HRC.

It is useful to note here that the stare decisis doctrine, defined as "the principal that the precedent decisions are to be followed by [other] courts", is generally not applicable in international law. Thus, cases involving similar issues but different

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249 Helfer, supra n 153, pp. 370-375.
250 See also supra Chapter I and infra Chapter V.
251 Casanova v France, supra n 95. See also supra p 16.
252 Ibid.
253 Helfer, supra n 153, pp. 377-378.
254 Shany supra n 9, p. 173.
255 Davidson, supra n 46, p. 119.
258 Exceptions to this are “hierarchically related courts, such as the Appeal Chambers of the ICTY", Shany supra n 9, p. 25; Charney supra n 3, p.129.
sets of parties do not have a preclusive effect on each other, although they may carry a considerable persuasive influence. When similar questions arise before different bodies, it is expected that each (quasi-) judicial body will at least take a previous decision of another (quasi-) judicial body into account. Case law should have considerable authority and jurisprudential divergence ought to be tolerated only when justified for good reasons.\textsuperscript{259}

As a \textit{stare decisis} doctrine is often not applied, reference to prior judgements or awards are traditionally limited.\textsuperscript{260} However, international judicial bodies increasingly rely on reasoning in prior decisions and there is certainly a level of precedent in international law – even though it is not of a binding character, it is highly persuasive.\textsuperscript{261} Perhaps the field of human rights is one of the few areas where (quasi-) judicial bodies have taken account of decisions of other such bodies.\textsuperscript{262}

Some allowance of forum shopping should not necessarily be deemed to constitute a problem and can, in some ways, even be viewed as beneficial where contested questions and sensitive issues might come into the daylight. Full co-ordination will be hard to achieve in a decentralised system on the international level, but challenges to the incoherence should be avoided as much as possible. Forum shopping may be tolerated as long as it does not lead to inconsistent judgements on the same matter cases or similar human rights rules.\textsuperscript{263}

5. \textit{Practical assessment of forum shopping}

Forum shopping can also be assessed on a more practical level rather than the ‘normative’ level discussed in the foregoing sections. Both parallel and subsequent proceedings may constitute a problem of both a financial and a doctrinal nature because most substantive norms in the ICCPR and the European Convention are congruent and many of the procedures are similar.\textsuperscript{264} The effective utilisation of international judicial resources also comes into question.\textsuperscript{265} Overburdening human rights monitoring bodies with cases which have already been addressed by alternative jurisdictions will affect efficiency in a practical way.\textsuperscript{266}

\textsuperscript{259}Helfer and Slaughter, supra n 41, p. 377. See also infra Chapter V, section B2.
\textsuperscript{260}Charney supra n 3, p. 129.
\textsuperscript{261}Albeit, not strictly in the context of individual complaint procedures, the ICJ takes prior decisions into account. Article 59 of the Statute reads that it must build a coherent jurisprudence that heavily relies on the persuasive force of its prior decisions. The appropriateness of prior decisions is sanctioned by article 38(1)(d) of the ICJ Statute, which provides that the “Court … shall apply … subject to the provisions of article 59, judicial decisions … as subsidiary means for the determination of rules of law” cited in: Charney supra n 3, pp. 129-130.
\textsuperscript{262}Slaughter, supra n 226, p. 99.
\textsuperscript{263}Shany, supra n 9, p. 127.
\textsuperscript{264}Reisman, supra n 10, p. 41.
\textsuperscript{265}Shany, supra n 9, p. 80.
\textsuperscript{266}Shany, supra n 9, p. 172.
Some additional disadvantages of forum shopping can be mentioned in the context of subsequent proceedings, either after the court has given its judgement or after the dispute was rejected admittance. Compelling a state to defend essentially the same case more than once might increase cynicism of the international human rights system as a whole and create the image of institutional chaos. The interest of the individual should be balanced here against the interests of the state not to be unduly exposed to multiple litigations.

The foregoing sections have endeavoured to outline that forum shopping may not threaten the coherence of international human rights law as long as judgements on the same rules and ‘same matter’ case are not inconsistent with each other. A possible way to achieve consistent judgements without necessarily requiring similar decisions is through transjudicial communication which will be addressed in the next chapter. However, even with an increased level of such horizontal communication between judicial bodies, the practical disadvantages of forum shopping may remain in place. It should also be kept in mind that, while aiming at a legislative co-ordination, it should not impede the raising standards of different provisions. Uniformity in this context should not undermine the goal of the system.

V TRANSJUDICIAL COMMUNICATION

This following Chapter scrutinises the workings of transjudicial communication. Although there are several forms, this section focuses on ‘horizontal communication’ between (quasi-) judicial international human rights bodies, in particular the HRC and the ECHR. Special reference is made here to the contributions of Helfer and Slaughter and those contributions will be used as a basis for further analysis. In line with their research, it is submitted here that improved communication between (quasi-) judicial international human rights bodies should be encouraged in endeavouring to increase coherence in international human rights law.

For a long time regional developments in the human rights field were not popular at the UN; there was often a tendency to regard it as the expression of a breakaway movement, calling the universality of human rights into question. After the adoption of the ICCPR in 1966, the UN started to rehabilitate and became less suspicious of regionalism. This initial disinclination of the UN to the accept regional human rights institutions and the absence of strict applicability of stare decisis in international law might be reasons for the HRC’s initial reluctance to refer to the ECHR in its decisions.
A Types of Transjudicial Communication

Various types of communication can be distinguished. First, in some cases the parties before the HRC implicitly referred to the decision of the ECHR in support of its claim, such as *Celepi v Sweden*, *Howard v Norway* and *E.W. v Netherlands*. It is unclear whether the references influenced the HRC. In none of the decisions did the Committee expressly refer in its examination of the merits to the decisions of the ECHR. This is a form of ‘reciprocal engagement’ also referred to as ‘the listening court’. However even such implicit communication is a recognition of being part of a larger legal order and having a common endeavour.

A second form of communication occurs when a case is brought before the HRC which has previously been rejected by the ECHR. One would expect a substantial analysis by the HRC when diverging from a decision (rejection) of the ECHR in the context of virtually identical rights. However, in *Coeriel v Netherlands*, *Brinkhof v Netherlands*, and *Casanovas v France* the individuals received favourable decisions from the HRC after their claim was rejected by the ECHR, without justification of its departure. In *Casanovas v France* for instance the court only referred to the ECHR rejection of the case peripherally:

> [A]rticle 14 of the Covenant encompasses dismissal of civil servants from employment, notwithstanding a contrary conclusion by the European Commission of Human Rights based on identical language in Article 6 of the Convention (emphasis added)

By doing so the Committee created a divergent interpretation of parallel treaty text. However, it is imperative to mention here that some of the admissibility criteria of the OP and the European Convention differ, which may explain divergent decisions with regard to admittance. Divergence other than related to admissibility requirements- especially when they cannot be justified on the bases of differences in texts between the Covenant and the Convention- may challenge the coherence of

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273 Helfer and Slaughter supra n 41, p. 372; Lins and De Lille supra n 175, p. 6.
275 *Engel v Netherlands* (1976) 22 Eur Ct H.R.; *Vuolanne v Finland*, U.N.GAOR Humm Rts Comm., UN Dec A/44/40 (1987) are example cases of where one believed the HRC to be influenced by the ECHR earlier judgement, but where no specific reference has been given. Cited in: Lins and De Lille, supra n 175, p. 9.
276 ‘Listening court’ seeks only ideas or inspiration from a foreign court but it has no incentive to credit the source of those ideas in its opinion, Slaughter supra n 226, p. 110.
277 Helfer and Slaughter, supra n 41, p. 372.
278 Note that several countries such have not adopted a reservation to Article 5(2)(a) of the OP, see supra n 122, p 15.
280 *Casanova v France*, supra n 95, pp. 133-134.
international human rights law.

A third form of communication is ‘direct interaction’. This refers to the HRC actively considering the reasoning of other (quasi-) judicial bodies of prior cases and trying to harmonize them or indicating why it distinguishes from those decisions. This is also referred to as a ‘monologue’ type of ‘reciprocal engagement’. Without a defined judicial hierarchy, monologue transjudicial communication can indicate several things. First of all, that the court adheres to a highly formalist view of the law -a view that the law is discovered rather than made- is “evidence that courts around the world have reached similar conclusions to a similar legal problem and would constitute per se evidence that the decision in question was a correct statement of ‘the law’.”

In this process courts are likely to take up a particular idea only if they are persuaded or “if they conclude that either the content of the idea or its source will enable them better to persuade their own audience”.

As previously discussed, in Kindler v Canada, the HRC said it gave ‘careful regard’ to the ECHR’s earlier approach. Thereafter, in Collin v Johnson, the HRC felt compelled to extend on its reasons for its interpretation of the rules on torture and inhuman and degrading treatment but without explicit reference to the ECHR’s stance. This may be an indication of a first step toward the explicit type of reciprocal engagement such as the ‘monologue’. Also in cases where the HRC’s reasoning was “virtually identical” to that of the ECHR, it made no express reference to the ECHR’s judgement.

B Transjudicial Communication and Coherence in International Human Rights Law

The concept of transjudicial communication in the context of coherence in international human rights law is of particular importance in the light of the high degree of both regional and functional specialization. It is submitted here that differences in case law owing to differing backgrounds of courts cannot and should no be avoided, as long as explicit reference to grounds of divergence is provided in ‘same matter’ cases or in cases dealing with the same rules.

It is imperative that in the pursuit of coherence norms will not be ‘boiled down’ to the lowest common denominator. Pinto’s submission that unification of international human rights tribunals by the creation of one international human

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281 This monologue refers to the type of transjudicial ‘communication’ leading the listening court not only to borrow the idea, but to also publicize its source. ‘Monologue’ rather than ‘dialogue’ communication is most common in ‘horizontal’ communication in: Slaughter, supra n 226, p. 110.

282 “Courts engaged such in transjudicial communication, however, still conceive of themselves as autonomous actors forging an autonomous relationship with their foreign or supranational counterparts.” Cited in: Slaughter supra n 226, pp. 111-113.

283 Slaughter, supra n 226, pp. 113-114.

284 Slaughter, supra n 226, p. 290.
rights court will promote higher standards\textsuperscript{285} can be questioned. Regional courts such as the ECHR have developed a high rate of development which was impossible to achieve in other regions of the world.\textsuperscript{286} Such developments should be encouraged rather than limited.

Another concept is the reliance of municipal courts on international human rights judgements which may strengthen the development of human rights law. This type of ‘vertical’ transjudicial communication creates an image of judicial collaboration in pursuit of the same substantive goals.\textsuperscript{287} Transjudicial communication where judicial human rights bodies give grounds of divergence can clarify international human rights standards. Such clarified standards will encourage national courts to rely on international judgements\textsuperscript{288}, a desirable process as supranational (quasi-) judicial bodies can bolster their effectiveness if national courts follow their lead.\textsuperscript{289}

Transjudicial communication is also essential because of the increasing number of litigations in international human rights law mainly because of the introduction of the individual complaint procedures.\textsuperscript{290} For years the issue of differing case law of the HRC and the ECHR was only theoretical, as the few petitions gave little reason for conflict.\textsuperscript{291}

In this context it is worthwhile to point out that, perhaps in line with the decentralised nature of international law, experience shows that the international community needs time to get used to the introduction of a new system.\textsuperscript{292} This may also support the notion that newly established judicial bodies need time to receive cases to come before them that require them to implement an approach demonstrating their commitment to coherence. Transjudicial communication, especially where direct reference is made to the decisions of other (quasi-) judicial bodies, requires acceptance of that body. Some courts even feel they lose part of their autonomy by doing so.\textsuperscript{293} Such communication with newly established courts might need time to develop. Although it may be true that supranational (quasi-) judicial bodies must move cautiously in their early years "striking a balance between independence...and deference, and permitting states to adjust and respond to the mechanisms of supranational adjudication,"\textsuperscript{294} it is still important that inconsistent judgements should be avoided as much as possible.

\textsuperscript{285} Pinto, supra n 223, p. 841.
\textsuperscript{286} Alston and Steiner, supra n 17, p. 780.
\textsuperscript{287} Slaughter, supra n 226, p. 117.
\textsuperscript{288} Lillich supra n 144, p. 701.
\textsuperscript{289} Slaughter, supra n 226, p. 108.
\textsuperscript{290} Slaughter supra n 226, p. 103; Lins and De Lille supra n 175, p. 6.
\textsuperscript{291} Helfer and Slaughter supra n 41, p. 374.
\textsuperscript{292} Helfer and Slaughter, supra n 41, p. 367.
\textsuperscript{293} Slaughter, supra n 226, p. 109.
\textsuperscript{294} Helfer and Slaughter, supra n 41, p. 367.
1. Challenges in the pursuit of coherence within international human rights law

Transjudicial communication between the HRC and the ECHR, although desirable, also faces a number of challenges. Non-parties to the European Convention might argue that by ratifying the ICCPR and the OP, non-European states did not intend to be bound by the decisions of the ECHR or the European Commission. Therefore, heavy reliance on European jurisprudence may be claimed to be illegitimate. Additionally, practice that compels the HRC to consult regional sources might be in itself a violation of the Convention in that it "confers powers on the Committee not expressly specified in the text of the treaty." Helfer and Slaughter present various rebuttals in order to undermine the force of these statements.

They submitted that "although it is general practice of international monitoring bodies to rely solely on their own constituent treaties and decisional law, that practice has not been universally followed in the human rights context." This same argument has also been given by Meron. However, the examples of jurisprudence presented by Helfer and Slaughter refer to European bodies like the ECHR relying on jurisprudence of the European Court of Justice. Hence, this does not support the basics of the argument that a universal body, like the HRC, would be justified to rely on regional ECHR case law. In principle however, one can concur with their rejection of the notion that reliance on European jurisprudence by the HRC would be illegitimate.

Acknowledging that also the ECHR deals with universal human rights norms, that both procedures take place not only under the same legal order of international law, but also perform similar function in the 'sub legal system of human rights', reference to case law of the ECHR by the HRC can be justified. Although it is not expressly specified in the ICCPR that the Committee is allowed to rely on European case law, it also does not limit the HRC from doing so.

2. Reference to grounds for divergence of interpretation

There are a limited number of reasons why the HRC may decide to diverge from the established European interpretation. It may be justifiable for the HRC to diverge in case law from the ECHR when the 'object and purpose of a treaty differ'. It has been an established practice under international law to resolve interpretational

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295 Helfer and Slaughter, supra n 41, p. 376.
296 Helfer and Slaughter, supra n 41, pp. 377-378.
297 Helfer and Slaughter, supra n 41, p. 377.
298 Meron, supra n 56, pp. 160-62.
300 See also supra Chapter IV, section A 2.
301 Helfer and Slaughter, supra n 41, pp. 377-386.
questions of treaties by reference to the object and purpose of a treaty.  

In this context there are two important differences between the ICCPR and the European Convention. Firstly, the European system emphasises the principles that prevail in democratic societies, primarily based on the requirement that all state parties must accept the "rule of law and democratic values." The reference to democratic societies in the ICCPR is less prevalent although by no means entirely absent. The treaty does not require state parties to adopt any particular political philosophy as a prerequisite of ratification apart from several articles where there is specific reference to a "democratic society." Note, however, that civil and political rights have their roots in democratic tradition. Since an essential goal of the universal ICCPR is to encourage all states regardless of their political composition to ratify and comply with the treaty, the HRC's reference to democratic principles is likely to be more limited than the ECHR.  

However, some authors, such as Rosalyn Higgins, do not see the universal character of the HRC which is thus also open for undemocratic countries as grounds for divergence from the jurisprudence of the ECHR. In Higgins’ view the HRC has always stressed that civil and political rights are a matter of ‘good faith’ rather than economic or political evolution.

Secondly, one of the ECHR’s most significant and well documented interpretative tools is the determination that the Covenant is a 'living instrument' and is to be construed in the “light of present day conditions,” also referred to as the 'teleological method of interpretation'. “There has been no parallel in the [Committee’s] jurisprudence to the 'dynamic' approach to the interpretation under the Covenant”. This 'dynamic approach' to the interpretation of the ECHR is also reflected in the previously mentioned 'margin of appreciation'.

Based on, inter alia, these arguments it may be improper for the HRC to impose European human rights experience on the entire international community. Differences between the two human rights bodies cannot and should not be avoided. However, acknowledging that both the HRC and the ECHR function in the same legal (sub) system and deal with similar international human rights rules
and norms, it is imperative for the consistency and coherence of international human rights law that, in case of a divergent opinion, reference is given to earlier decisions of another (quasi-) judicial body.

**CONCLUSION**

One result of the proliferation of international (quasi-) judicial bodies is the potential fragmentation of international law, encouraged particularly by the development of specific legal regimes with dedicated mechanisms for dispute resolution. As standards proliferate and new treaty bodies are created, the risk of inconsistency will grow where the various fora find and apply international law differently. Specifically, the process of proliferation in the international human rights field has resulted in both regional and functional specialization. The former form of specialization, especially, led to different approaches by (quasi) judicial bodies pursuing highly similar goals operating in the same legal ‘sub system’. Although differences between international human rights tribunals are present, they operate as a common enterprise.

The international legal order is “one on a normative level” and finds both formal and substantive unity. Apart from that, in the specialised area of international human rights the (quasi-) judicial bodies comprise an institutional subsystem of their own, conceived through their pursuit of similar goals and the exercise of parallel functions. Recognition of this commonality does not ‘obviate’ cultural differences, but it assumes the possibility that generic legal problems may transcend those differences.

Negative consequences of jurisdictional overlap such as the inconsistency in case law have partly been mitigated by the introduction of rules regulating the exercise of jurisdiction as part of admissibility criteria. Forum shopping (and multiple proceedings) -although limited by these admissibility requirements- are still possible owing to the narrow interpretation giving to what constitutes a ‘same matter’ case in practice. This paper endeavoured to demonstrate that forum shopping may not affect the normative coherence of international human rights law as long as decisions by (quasi-) judicial bodies on the same matter cases or on the same human rights rules are consistent with each other. Such consistency does not necessarily call for similar decisions- and should not do so because of the different backgrounds of the relative (quasi-) judicial bodies- but requires reference to grounds for divergence with explicit reference to earlier judgements of other (quasi-) judicial human rights bodies.

The disaggregated nature of the petition system with the potential of forum shopping, together with treaties overlapping in the protection of interrelated rights and freedoms, creates a compelling case for communication among tribunals to promote the evolution of coherent jurisprudence. Significant variations in case law in specialised areas, such as human rights law, could undermine the perceived uniformity and universality of international law. Coherent distinctions should
therefore be generated between the outcome in the case at hand and divergent outcomes of other ‘same matter cases’ through (explicit) transjudicial communication.

Such collective (quasi-) judicial deliberation, through awareness, acknowledgment and use of decisions rendered by fellow (quasi-) judicial bodies, frames a universal process of judicial deliberation and decisions. Such collective deliberation between supranational (quasi-) judicial bodies over the protection of human rights would be an answer to the perceived dangers of forum shopping for the normative coherence of international law. At the same time, individuals will not be unduly limited in the protection of their rights, offered by the various international treaties. The more the various international human rights bodies resemble a coherent judicial system, the better the chances that the overarching legal system will function effectively.