

# University of Pennsylvania Law Review

FOUNDED 1852

---

Formerly  
American Law Register

---

---

---

VOL. 148

DECEMBER 1999

NO. 2

---

---

## ARTICLES

### FORUM SHOPPING FOR HUMAN RIGHTS

LAURENCE R. HELFER<sup>†</sup>

INTRODUCTION.....	288
I. TWO TYPOLOGIES OF THE HUMAN RIGHTS PETITION SYSTEM ....	296
A. <i>An Overview of Human Rights Monitoring</i> .....	296

---

<sup>†</sup> Associate Professor of Law, Loyola Law School, Los Angeles. J.D. New York University School of Law, 1992; M.P.A. Woodrow Wilson School of Public and International Affairs, Princeton University, 1992; B.A. Yale University, 1987. Thanks to David Boyd, Catherine Fisk, Gregory Fox, Lawrence Solum, Georgene Vairo, and Jessica Vapnek for their many comments and suggestions on earlier drafts, and to Dina Chodoroff for her excellent research assistance. Work on this Article was supported by a summer research fellowship from Loyola Law School.

B. <i>Typology of Similarities and Differences Among Human Rights Treaties</i> .....	301
C. <i>A Typology of Forum Shopping</i> .....	304
1. Choice of Tribunal Forum Shopping .....	304
2. Simultaneous Petition Forum Shopping .....	305
3. Successive Petition Forum Shopping .....	306
II. FORUM SHOPPING PRACTICE .....	308
A. <i>Using Differences Among Human Rights Treaties as a Basis for Avoiding a Forum Shopping Bar</i> .....	309
1. The UNHRC's Interpretation of "The Same Matter" ..	310
a. <i>The Early Restrictive Approach to Successive Petition Forum Shopping</i> .....	310
b. <i>Recent Confusion Over Successive Petition Forum Shopping</i> .....	313
2. The European Commission's Interpretation of "Substantially the Same Matter" .....	319
3. The Inter-American Commission's Interpretation of "Substantially the Same Matter" .....	322
4. The African Commission's Interpretation of "Cases Which Have Been Settled" .....	324
B. <i>Diverging and Conflicting Approaches to Human Rights Norms</i> ..	325
1. Higher Regional Standards: The Death Row Phenomenon.....	326
2. Higher Global Standards: Discrimination Between Conscientious Objectors .....	331
3. Avoiding Conflicting Standards: Racist Speech.....	335
III. FORUM SHOPPING THEORY .....	341
A. <i>The Parties' Interests and Incentives</i> .....	341
B. <i>Institutional and Normative Concerns</i> .....	342
1. Threatening the Authority of Tribunals .....	343
2. Preserving the Primacy of Regional Human Rights Regimes .....	344
3. Avoiding Diverging and Conflicting Decisions.....	345
C. <i>Critiquing the Conventional Wisdom: Identifying the Interests of Individual Petitioners Favoring Forum Shopping</i> .....	346
D. <i>Critiquing the Conventional Wisdom: Identifying Normative and Institutional Factors Favoring Forum Shopping</i> .....	349

1. From Vertical Hierarchy to Horizontal Dialogue Conceptions of Human Rights Litigation .....	349
2. From Regional Protectionism to Robust Regionalism ..	353
a. <i>The European Convention</i> .....	353
b. <i>The Inter-American Convention</i> .....	354
c. <i>The African Charter</i> .....	355
3. From Resisting to Embracing Differing Human Rights Standards.....	355
a. <i>Diverging Standards</i> .....	355
b. <i>Conflicting Standards</i> .....	358
E. <i>Refocusing on Institutional Interests: Burdens of Expanding Responsibilities, Crowded Dockets, Delays, and Inadequate Resources</i> .....	360
IV. FORUM SHOPPING REFORM .....	363
A. <i>A Proposal for Forum Shopping Reform</i> .....	364
1. Simultaneous Petition Forum Shopping .....	365
a. <i>Identical Factual Allegations and Legal Claims</i> .....	365
b. <i>Distinct Legal Claims and Factual Allegations</i> .....	366
i. Distinct Legal Claims Arising Out of Related Factual Allegations.....	366
ii. Distinct Factual Allegations .....	367
iii. Claims Reviewable in Only One Forum .....	368
c. <i>Applying an Events and Facts Approach to                 Simultaneous Petitions</i> .....	369
2. Successive Petition Forum Shopping .....	371
a. <i>Legal Claims and Factual Allegations That Could                 Not Have Been Raised in the First Proceeding</i> .....	373
i. Legal Claims .....	373
a. Exclusive Treaty Rights .....	374
b. Differently Defined or Interpreted Treaty Rights .....	375
ii. Factual Allegations .....	377
iii. Prudential Concerns .....	378
b. <i>Claims That Could Have Been Raised in the First                 Proceeding, But Were Not</i> .....	380
c. <i>Claims That Were Raised and Rejected in the                 First Proceeding</i> .....	382
B. <i>Implementing Forum Shopping Reform</i> .....	385

1. Amending the Treaties to Increase Jurists' Discretion ..	385
2. Justifying Forum Shopping Discretion: Death Row Petitions and Treaty Denunciations in the Caribbean ..	389
3. The Prospects for Amending the Treaties.....	391
4. Implementing Forum Shopping Reform in the Absence of Amendment .....	392
C. <i>Reforming the U.N. Human Rights System: A Cautionary Note</i> ....	395
CONCLUSION.....	399

## INTRODUCTION

Individuals have now acquired the power to shape international human rights law. No longer found merely in aspirational or ambiguous treaties with limited practical impact on the lives of the people it was meant to protect, the law of human rights is being refined not only by diplomats or governments but by jurists—neutral arbiters of decidedly legal disputes initiated by individuals. Human rights courts, quasi-judicial tribunals, and treaty bodies (the “tribunals”)<sup>1</sup>—including the European and Inter-American Courts of Human Rights; the European, Inter-American and African Commissions of Human Rights; and United Nations treaty bodies such as the Human Rights Committee, Committee Against Torture, and Committee on the Elimination of Racial Discrimination—now regularly adjudicate petitions filed by victims of human rights abuses against national governments that have agreed to subject themselves to scrutiny by the tribunals.

This trend toward individualized adjudication of human rights law

---

<sup>1</sup> The language needed to describe these juridical entities collectively is cumbersome. Two of these entities, the European and Inter-American Courts of Human Rights, are officially referred to as “courts” with the power to issue binding decisions under international law. Other entities, such as the European and Inter-American Human Rights Commissions, while not courts in the formal sense, are quasi-judicial tribunals that adjudicate disputes between individuals and their governments. Finally, the panels of human rights experts established to monitor States’ compliance with various U.N. human rights agreements are known as “treaty bodies,” a deliberately ambiguous title that reflects the judicial and non-judicial functions they exercise. Although the treaty bodies are not courts in the formal sense and do not issue legally binding decisions, in practice they increasingly exercise quasi-judicial functions in reviewing petitions filed by individuals and issuing non-binding recommendations to governments encouraging them to modify national practices. For a review of the literature, see Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997). For the sake of simplicity, I will generally refer to these human rights courts, quasi-judicial tribunals, and treaty bodies as “tribunals,” and to their members as “jurists.”

started over forty years ago in Europe, and has spread more recently to the Americas and to Africa, as well as to human rights treaties within the United Nations ("U.N."). With the end of the Cold War's geopolitical divisions, the possibility of achieving widespread, if not universal, ratification of these treaties and their individual complaint procedures is within sight.<sup>2</sup> Proposals are now being considered to create new tribunals or complaint procedures for other human rights treaties and to link new treaties to existing procedures.<sup>3</sup> In short, at the end of the twentieth century, many national governments have created a vast and multi-faceted "international human rights petition system" that grants to individuals a widening range of opportunities to vindicate their rights internationally.<sup>4</sup>

Individuals have seized upon these opportunities by filing an increasing number of claims for relief before a panoply of global and regional human rights tribunals. In response, the jurists on these tribunals have developed a rich and nuanced case law that translates abstract legal principles into concrete, fact-specific rulings. Through the repeated adjudication of these individual complaints, a clearer picture of the human rights practices of particular countries has emerged.<sup>5</sup> A

---

<sup>2</sup> See Philip Alston, *Effective Function of Bodies Established Pursuant to United Nations Human Rights Instruments: Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System*, U.N. ESCOR, 53d Sess., Agenda Item 15, ¶¶ 14-36, U.N. Doc. E/CN.4/1997/74 (1996) [hereinafter *1996 Alston Report*] (discussing the recent increase in ratification of U.N. human rights treaties and efforts made to achieve "universal ratification").

<sup>3</sup> United Nations treaty bodies that are authorized to hear claims against governments by individuals and groups include the Human Rights Committee, the Committee on the Elimination of Race Discrimination, and the Committee Against Torture. See DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 50-51 (1991); MICHAEL O'FLAHERTY, *HUMAN RIGHTS AND THE UN: PRACTICE BEFORE THE TREATY BODIES* 104-09, 158-64 (1996). The Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of All Forms of Discrimination Against Women cannot receive petitions from individuals, although this possibility is under active consideration within the United Nations. See *infra* notes 63, 65 (discussing proposals to create optional petition procedures to allow these two committees to receive communications from individuals).

<sup>4</sup> This is a striking change from the state-dominated dispute settlement system that existed prior to World War II. See 1 M.E. TARDU, *Historical Development of the International Petition System*, in *HUMAN RIGHTS: THE INTERNATIONAL PETITION SYSTEM* pt. II, §§ 4-5 (1985) (describing the international petition systems that existed from the close of the 18th century until World War II).

<sup>5</sup> See Rein A. Myllerson, *Monitoring Compliance with International Human Rights Standards: Experience of the UN Human Rights Committee, 1991-1992* CANADIAN HUM. RTS. Y.B. 105, 107 ("[I]t is only through the consideration of individual communications that complete conformity of national legislation and practice with the requirements of

growing body of scholarship also suggests that granting individuals the right to challenge States' actions internationally is a critical component of a broader strategy for pressuring the different branches of national governments to adhere to human rights standards.<sup>6</sup>

The important role individuals play in shaping human rights law has been examined before. What has not been studied, however, is how the very same forces that are pushing States to expand the number of tribunals before which individuals can file complaints are also those that have the potential to thwart both the further expansion of the petition system and the development of a coherent human rights jurisprudence. Specifically, individuals in a growing number of recent and heretofore unexamined cases are capitalizing upon the existence of multiple human rights tribunals by "forum shopping" for a favorable decision.

The definition of forum shopping that I use in this Article will be somewhat novel to readers familiar with United States procedural law. What I define as forum shopping is not limited to an individual petitioner's strategic choice to litigate her claims in one of several available adjudicatory fora. It also encompasses other consequential choices engendered by the concurrent, overlapping jurisdiction of human rights treaties and tribunals, including attempts by petitioners to litigate identical or related claims in multiple fora *at the same time*, and attempts to engage in *sequential* litigation of claims. As explained more fully below, I refer to these three distinct activities as "choice of tribunal forum shopping," "simultaneous petition forum shopping," and "successive petition forum shopping."

These three types of forum shopping also occur in domestic legal systems.<sup>7</sup> For example, the modern judicial system in the United States seeks to maximize litigants' choices among fora, and even tolerates simultaneous litigation in multiple fora prior to final judgment.

---

international law can be assessed.").

<sup>6</sup> See Helfer & Slaughter, *supra* note 1, at 338-45 (providing an overview of the U.N. Human Rights Committee and its use of the petition procedure to supervise parties' compliance with the International Covenant on Civil and Political Rights); see also MATTHEW C.R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 32 (1995) ("Petition systems . . . are generally considered the most effective means for the protection of human rights.").

<sup>7</sup> Professor Robert Cover has identified these three activities as facets of the American judicial system's "complex concurrency" structure. He labels each activity, respectively, as "strategic choice, synchronic redundancy, and diachronic or sequential redundancy." Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 646 (1981).

Unlike many civil law jurisdictions,<sup>8</sup> however, it strongly discourages claim splitting and relitigation of claims through the use of broad joinder rules and expansive doctrines of *res judicata*.<sup>9</sup> Once a litigant has been given a full and fair opportunity to raise claims relating to a single transaction or occurrence, she is forever barred from relitigating those claims in another forum.<sup>10</sup> In this way, the American judicial system encourages efficient use of resources, promotes finality of litigation, and limits the possibilities for inconsistent outcomes or relief in the same case.<sup>11</sup>

Litigation in the international human rights petition system is fundamentally different and thus requires a radically different approach to forum shopping. Unlike the United States, where permissive pleading and joinder rules encourage litigants to consolidate their claims in a single forum, petitioners asserting human rights claims are far more procedurally constrained. Nearly all human rights tribunals are empowered only to adjudicate claims arising under the treaty that created them. Claims arising under other treaties—whether those claims relate to identical, similar, or different substantive norms—must be litigated before other tribunals.<sup>12</sup> In this situation, the incentives for petitioners to forum shop for a favorable ruling and the arguments for permitting redundant litigation are considerable.

Notwithstanding the basic differences between domestic and international adjudication, most commentators addressing the forum

---

<sup>8</sup> See Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1604, 1673 (1968) (asserting that U.S. law "accords broader conclusive effects to domestic judgments than does any other legal system," whereas many civil law countries "are prepared to allow the parties . . . to fragment a controversy that could be handled as a single matter").

<sup>9</sup> See Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 961-62 (1998) (discussing the means by which a jurisdiction can encourage joinder of claims and parties).

<sup>10</sup> The only major exception to finality in the United States occurs in habeas corpus cases. For a foundational discussion of the merits of redundant litigation in the habeas context, see Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

<sup>11</sup> See, e.g., *Montana v. United States*, 440 U.S. 147, 153-54 (1979) ("To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."); see also Cover, *supra* note 7, at 646-48.

<sup>12</sup> The procedural rules governing human rights petitions are thus similar to the writ system that operated during the early centuries of English common law and required a complaining party to use a different writ to vindicate each legal wrong he or she had suffered. See J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 49-59 (2d ed. 1979) (explaining the history and function of the writ system).

shopping issue in international human rights literature have viewed simultaneous or successive petition forum shopping as a danger to be suppressed. Specifically, they have argued that allowing more than one tribunal to examine the same individual's petition wastes scarce resources, creates a risk of divergent or conflicting rulings, and threatens to undermine the authority of international tribunals and the jurists who serve on them.<sup>13</sup> This Article questions that conventional wisdom and offers in its place a re-envisioning of the human rights petition system. It argues that forum shopping, if properly regulated, can materially benefit international human rights law.

As I explain more fully below when discussing forum shopping theory, both the interests of individual petitioners and the institutional and normative perspective favor some relitigation of human rights claims. In many instances, for example, successive review by two or more tribunals is the only way that aggrieved individuals can re-

---

<sup>13</sup> The few articles addressing this issue were published before the tribunals had issued many decisions concerning forum shopping. See Thomas Buergenthal, *International and Regional Human Rights Law and Institutions: Some Examples of Their Interaction*, 12 TEX. INT'L L.J. 321 (1977) (providing an overview of the interaction between international and regional human rights organizations and law); Marc-Andre Eissen, *The European Convention on Human Rights and the United Nations Covenant on Civil and Political Rights: Problems of Coexistence*, 22 BUFF. L. REV. 181 (1972) (examining the difficulties with the coexistence of the Council of Europe and the United Nations and the interaction between the concepts of universalism and European regionalism in the human rights context); Theodor Meron, *Norm Making and Supervision in International Human Rights: Reflections on Institutional Order*, 76 AM. J. INT'L L. 754 (1982) [hereinafter *Norm Making*] (presenting an overview of the problems and policies that are due to the coexistence of various human rights instruments and systems of supervision); A.H. Robertson, *The United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights*, 43 BRIT. Y.B. INT'L L. 21 (1968-69) (comparing the rights and obligations that exist under the United Nations Covenant on Civil and Political Rights with those that exist under the European Convention on Human Rights, and discussing the problems with their coexistence); M.E. Tardu, *The Protocol to the United Nations Covenant on Civil and Political Rights and the Inter-American System: A Study of Co-Existing Petition Procedures*, 70 AM. J. INT'L L. 778 (1976) (examining the main legal questions that arise from the coexistence of the system of international procedures for handling individual petitions established by the Optional Protocol to the U.N. Covenant on Civil and Political Rights and two regional procedures established within the framework of the Organization of American States).

More comprehensive discussions of the subject are found in THEODOR MERON, *HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS* (1986) [hereinafter *HUMAN RIGHTS LAW-MAKING*], and A.A. CANÇADO TRINDADE, *CO-EXISTENCE AND CO-ORDINATION OF MECHANISMS OF INTERNATIONAL PROTECTION OF HUMAN RIGHTS*, 1987-II Recueil des Cours, 202 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (1988), but these sources also predate the explosion of human rights litigation in the last decade. For a critical assessment of forum shopping scholarship, see *infra* Parts III.A, III.B.



ceive a complete review of their claims under all applicable human rights treaties. In addition, forum shopping encourages jurists to engage in a dialogue to elucidate and harmonize the legal norms shared by those treaties—a dialogue that, unlike the U.S. common law, has not adequately developed through litigation of similar factual and legal claims by different petitioners.<sup>14</sup> Finally, by permitting redundant review by multiple tribunals, forum shopping reduces the number of instances in which human rights claims are erroneously denied by jurists.<sup>15</sup>

Relitigation of claims by multiple human rights tribunals is not costless, however. To the contrary, it creates serious finality and efficiency concerns that weigh against permitting relitigation.<sup>16</sup> For these reasons, I develop at the conclusion of this Article a detailed set of control rules that balances the competing theoretical rationales for and against forum shopping and applies those rationales to the heterogeneous range of petitions that individuals are likely to present to the tribunals in the future.<sup>17</sup>

Although the potential for human rights forum shopping has existed for years, four recent developments suggest that it has now become a far more pressing concern.

First, since the end of the Cold War in the early 1990s, human rights tribunals have become increasingly active. The dockets of regional tribunals have been overflowing with new cases and the U.N. human rights tribunals have been receiving an increasing number of petitions from a wider array of nations.<sup>18</sup> With this activity has come a

---

<sup>14</sup> In the United States, commentators have stressed that duplicative review of criminal defendants' constitutional rights claims promotes a dialogue between federal and state courts that reduces judicial error and leads to a more precise articulation of the rights involved. See Cover & Aleinikoff, *supra* note 10, at 1045-49 (describing how the Warren Court's expansion of the writ of habeas corpus fostered a dialogue between state and federal courts). For a general discussion of how dialogue among supranational tribunals in different disputes promotes effective adjudication of international legal norms, see Helfer & Slaughter, *supra* note 1, at 323-26.

<sup>15</sup> See *infra* Part IV.A.2.c (describing situations where a petitioner seeks to relitigate claims that were rejected by the first tribunal); see also Cover & Aleinikoff, *supra* note 10, at 1045 ("[R]edundancy fosters greater certainty that constitutional rights will not be erroneously denied.").

<sup>16</sup> See *infra* Part III.E; cf. von Mehren & Trautman, *supra* note 8, at 1603 (noting that courts grant recognition to foreign judgments in part out of "a desire to avoid the duplication of effort and consequent waste involved in reconsidering a matter that has already been litigated").

<sup>17</sup> See *infra* Part IV.A (proposing a model for forum shopping reform).

<sup>18</sup> For a discussion of the European tribunals and the United Nations Human Rights Commission, see Helfer & Slaughter, *supra* note 1, at 296, 302, 347. See also

rising number of cases in which individuals have attempted to forum shop by filing petitions with more than one tribunal. In response, the tribunals have issued several recent and conflicting decisions analyzing the conditions under which forum shopping is permitted or prohibited by a particular treaty.<sup>19</sup> These conflicts have created skewed litigation incentives for litigants and States, and make it impossible to predict with any degree of certainty the preclusive effect of one tribunal's decision in subsequent litigation before another tribunal.<sup>20</sup>

Second, together with the increase in forum shopping has come an increasing divergence among the tribunals' case law analyzing the substantive human rights norms. Although differing interpretations might be expected where the texts of two treaties differ, the divergent rulings have in fact occurred in cases involving rights that are defined identically, or nearly so, in two or more treaties. These decisions have generated fresh incentives for forum shopping by individuals seeking out the tribunal with the most rights-protective case law in which to litigate their claims. They have also created uncertainty for individuals and governments seeking to incorporate the tribunals' decisions into national law.

Third, since the 1993 World Conference on Human Rights, the United Nations has advanced several proposals to create new individual petition procedures for several existing and new human rights treaties. In their present form, these proposals would increase the number of venues in which individuals may litigate their claims. The

---

Manfred Nowak, *UN-Human Rights Committee: Survey of Decisions Given Up Till July 1989*, 11 HUM. RTS. L.J. 139, 152 (1990) ("The comparably high number of communications against Western industrialized countries shows that lawyers are increasingly aware of this individual communication procedure being available in addition or as an alternative to the one under the European Convention on Human Rights.").

<sup>19</sup> See cases discussed *infra* Part II.A (addressing cases showing recent confusion in the United Nations Human Rights Committee regarding forum shopping, as well as conflicting interpretations of forum shopping standards by the European Commission, Inter-American Commission, and African Commission).

<sup>20</sup> In U.S. domestic law, some commentators have shown that "preclusion law can affect many of the most significant strategic decisions in litigation." Erichson, *supra* note 9, at 947. To facilitate strategic decision making by the parties and to further the policy determinations and value choices of the forum, these commentators have argued that the preclusive effect of a rendering court's judgment should be determined by the law of the rendering jurisdiction, rather than the law of the recognizing jurisdiction. See *id.* at 983-1008. The human rights tribunal decisions discussed in Part II.A all apply the law of the recognizing jurisdiction to determine the preclusive effect of an earlier tribunal decision, creating significant uncertainty for States and individuals. Another way to enhance predictability and facilitate strategic decision making, of course, would be to adopt a uniform preclusion rule for all tribunals. For the details of such a proposal, see *infra* Part IV.A.

proposals themselves also contain different approaches to forum shopping that threaten to add further complexity and confusion to an already convoluted jurisprudence.<sup>21</sup>

Finally, the U.N. Secretary General has recently commissioned several studies of the U.N. human rights monitoring system and its relationship to regional human rights systems. The studies advocate reforms to address the woefully inadequate resources allocated to human rights bodies to carry out their functions, including the review of individual petitions. The proposed changes range from minor revisions of procedural rules to a merger of all U.N. treaty bodies into one or two tribunals that would moot many opportunities for forum shopping. These reform proposals thus raise concerns that will affect any revision of the current approach to forum shopping that States may choose to implement.

Taken together, these four developments highlight the need for a comprehensive reexamination of the phenomenon of human rights forum shopping and its place in the human rights petition systems. Part I of this Article begins with a brief overview of the petition systems. It then defines two different typologies. The first categorizes the similarities and differences among global and regional human rights treaties, and explains how these similarities and differences create incentives for forum shopping by individual litigants. The second typology categorizes three distinct types of forum shopping and the divergent approaches that States have adopted in these treaties to regulate each of them.

Part II examines recent case law concerning both typologies identified in Part I. It first examines how global and regional human rights tribunals have responded to attempts by individual litigants to forum shop for a favorable decision. The case law these attempts have produced is conflicting and confusing, and contains limited guidance for individuals and States. Part II then discusses three recent examples of diverging and conflicting human rights decisions in order to illustrate that tribunals are beginning to treat each other's decisions as persuasive precedents to be considered when fashioning responses to common legal issues.

Part III turns from practice to theory, identifying the arguments and policy rationales for and against forum shopping. These arguments cluster into two distinct categories—arguments based on the parties' interests and incentives, and arguments based on institutional

---

<sup>21</sup> See *infra* Parts I.A, I.B.

and normative concerns. Part III also critiques, on various grounds, the received wisdom of commentators that human rights forum shopping is problematic and should be discouraged.

Part IV sets forth a detailed proposal for reforming the practice of forum shopping in both simultaneous and successive petition cases. The proposal is guided by two primary objectives. The first objective is to balance the interests of aggrieved individuals in maximizing their opportunities for review against the interests of States parties and jurists in finality and efficient use of resources. The second objective is to encourage jurists to use forum shopping cases as opportunities to engage in a dialogue with other tribunals to promote the development of a more coherent human rights jurisprudence. After setting forth this proposal, Part IV identifies two different ways in which it might be implemented into practice, and then concludes with a cautionary note about proposals to reform the U.N.'s human rights treaty system.

## I. TWO TYPOLOGIES OF THE HUMAN RIGHTS PETITION SYSTEM

The ability of individual litigants to forum shop for a favorable human rights ruling results from the conjunction of two distinct historical trends: (1) the creation of multiple treaty systems that protect similar or related rights and freedoms, and (2) the establishment within each system of an independent body of jurists or experts—a court, or quasi-judicial tribunal or review body—to monitor States parties' compliance with the treaty by considering petitions from aggrieved individuals. This section explains how each of these trends evolved.

### A. *An Overview of Human Rights Monitoring*

The corpus of international human rights law does not exist in a single, comprehensive treaty, code or statute. Rather, the rights and freedoms it enshrines are found in a complex web of overlapping global, regional, and specialized agreements, many of which contain identical, related, or even conflicting substantive standards. Each of these agreements has its inspirational source in the foundational 1948 Universal Declaration of Human Rights.<sup>22</sup> Over the years, however,

---

<sup>22</sup> For the text of the Universal Declaration of Human Rights, see HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS 1-17, U.N. Doc. ST/HR/1, U.N. Sales No. E.73.XIV.2 (1973).

that source has been refracted and refined into numerous treaties addressing a wide variety of subject matters.<sup>23</sup>

The two most comprehensive agreements are the U.N.-based International Covenant on Civil and Political Rights ("ICCPR")<sup>24</sup> and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),<sup>25</sup> each of which protects a broad catalogue of rights and freedoms. The ICCPR, and to a more limited extent, the ICESCR, have been mirrored in three regional treaties: the Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention"),<sup>26</sup> the American Convention on Human Rights (the "American Convention"),<sup>27</sup> and the African Charter on Human and Peoples' Rights (the "African Charter").<sup>28</sup> In addition, both within the U.N. and regionally, there are numerous subject-specific treaties addressing specialized human rights issues. United Nations treaties include the International Convention on the Elimination of All Forms of Racial Discrimination ("Race Convention"),<sup>29</sup> the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"),<sup>30</sup> the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"),<sup>31</sup> the Convention on the Rights of the Child,<sup>32</sup> and the In-

---

<sup>23</sup> See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 120 (1996) (explaining that the Universal Declaration has been widely used as a "springboard" to international treaties). International human rights law is also part of customary international law, as reflected in numerous U.N. and regional declarations relating to human rights issues and in the practice of States themselves. For a comprehensive list of these declarations, see *International Human Rights Instruments*, (visited Sept. 20, 1999) <<http://www1.umn.edu/humanrts/instrree/ainstls1.htm>>.

<sup>24</sup> *Adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>25</sup> *Adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

<sup>26</sup> *Done* Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

<sup>27</sup> Nov. 22, 1969, 1144 U.N.T.S. 123, 144-63 (entered into force July 18, 1978).

<sup>28</sup> Organization of African Unity: Banjul Charter on Human and Peoples' Rights, *opened for signature* June 20, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter African Charter]. Other regional treaties protecting economic and social rights include the European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89 (entered into force Feb. 26, 1965) and Organization of American States: Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, *done* Nov. 14, 1988, 28 I.L.M. 156 [hereinafter Protocol of San Salvador].

<sup>29</sup> *Opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, 212-38 (entered into force Jan. 4, 1969).

<sup>30</sup> *Adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

<sup>31</sup> *Adopted* Dec. 10, 1984, 1465 U.N.T.S. 85, 113-22 (entered into force June 26, 1987).

<sup>32</sup> G.A. Res. 44/25, U.N. GAOR, 44th Sess., Annex, Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990).

ternational Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("Migrant Workers' Convention").<sup>33</sup> At the regional level, specialized treaties are often added as protocols to the region's principal human rights agreement.<sup>34</sup> Finally, numerous treaties protecting labor rights and freedom of association are overseen by the International Labor Organization ("ILO").<sup>35</sup>

Each of these treaties is superintended by a court, tribunal, or treaty body that is authorized to monitor States parties' compliance with the rights and freedoms protected by that treaty.<sup>36</sup> This monitoring function is accomplished differently in each treaty system, but as a general rule treaties provide for up to three distinct mechanisms: a reporting procedure, a general comments procedure, and an individual petition procedure.<sup>37</sup>

---

<sup>33</sup> G.A. Res. 45/158, U.N. GAOR, 45th Sess., Annex, Supp. No. 49A, at 262, U.N. Doc. A/45/49 (1990) (not yet entered into force).

<sup>34</sup> See, e.g., Protocol of San Salvador, *supra* note 28, at 156; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, *done* Mar. 20, 1952, Europ. T.S. No. 9 (entered into force May 18, 1954). Not all specialized treaties are adopted in this way. See European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *done* Nov. 26, 1987, Europ. T.S. No. 126 (entered into force Feb. 1, 1989) (establishing a committee for the prevention of torture, and providing general procedural rules with regard to the committee).

<sup>35</sup> See generally HECTOR BARTOLOMEI DE LA CRUZ ET AL., THE INTERNATIONAL LABOR ORGANIZATION: THE INTERNATIONAL STANDARDS SYSTEM AND BASIC HUMAN RIGHTS (1996) (explaining the history of the adoption of international labor standards, and its relationship to fundamental human rights). For a comprehensive list of the ILO treaties, see *International Human Rights Instruments*, *supra* note 23.

<sup>36</sup> Until recently, the European Convention and the American Convention were each supervised by both a court and a commission of human rights. For a discussion of their respective functions in the two treaty systems, see SCOTT DAVIDSON, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM 99-154 (1997); P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 97-266 (3d ed. 1998). In 1998, the States parties to the European Convention merged the European Court and the European Commission into a single, permanent European Court of Human Rights. See Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, *done* May 11, 1994, Europ. T.S. No. 155 (entered into force Nov. 1, 1998) [hereinafter Protocol No. 11] (establishing a European Court of Human Rights and adopting general procedural rules for its operation). The African Charter's member States are considering a proposal to create a Court of Human and People's Rights to complement the protective mandate of the African Commission on Human and Peoples' Rights. *Draft Additional Protocol to the African Charter on Human and Peoples' Rights* (visited Sept. 22, 1999) <[http://www1.umn.edu/humanrts/africa/draft\\_additl\\_protocol.html](http://www1.umn.edu/humanrts/africa/draft_additl_protocol.html)> [hereinafter *Draft Additional Protocol*].

<sup>37</sup> For a more detailed discussion of these three functions, see Helfer & Slaughter, *supra* note 1, at 338-43. Other monitoring functions exercised by some tribunals include emergency procedures and investigations and review of inter-State petitions. See O'FLAHERTY, *supra* note 3, at 45, 103, 154 (describing procedures developed by various

The practice of three U.N. treaty bodies—the United Nations Human Rights Committee (“UNHRC”), the Committee Against Torture (“CAT”), and the Committee on the Elimination of Racial Discrimination (“CERD”)—illustrates these three functions. Under the reporting process, each treaty body receives written reports from States parties which explain the measures they have taken to protect the rights recognized in the treaties. The members of each Committee review the reports in public sessions, question governmental representatives about their contents, and then publish comments and recommendations to States on how to improve the protection of human rights. The jurisdiction of each Committee is limited to reviewing reports concerning the particular treaty under which it was created. No Committee has authority to review reports relating to other treaties, even if those treaties contain the same or similar rights and freedoms.<sup>38</sup>

In addition to reviewing States parties’ reports, each of the three Committees also drafts “general comments” addressed to the States parties. Some of these comments concern procedural questions about the reporting process, but most contain interpretations of the substantive rights and freedoms contained in the treaty each Committee oversees. The general comments develop with greater specificity the treaty bodies’ understanding of these rights and freedoms.<sup>39</sup>

Finally, each of the three treaty bodies receives written “communications” or “petitions” from individuals alleging that a State party has violated one or more rights protected by the particular treaty they monitor.<sup>40</sup> These petition procedures are optional, however,<sup>41</sup> and

---

Committees). The inter-State dispute procedure has rarely been utilized. See Scott Leckie, *The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?*, 10 HUM. RTS. Q. 249, 255 (1988) (indicating that the procedure, to date, has been used only 24 times).

<sup>38</sup> See Philip Alston, *Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights*, U.N. GAOR World Conf. on Hum. Rts. Preparatory Comm., 4th Sess., Annex, Agenda Item 5, ¶¶ 139-55, U.N. Doc. A/CONF.157/PC/62/Add.11/Rev.1 (1993) [hereinafter *1993 Alston Report*] (recommending to the General Assembly that treaty bodies eliminate overlapping competencies, while moving toward a more concerted cross-referencing system).

<sup>39</sup> See, e.g., DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE* 95 (1991) (“The general comments serve rapidly to develop the jurisprudence of the HRC under the Covenant.”).

<sup>40</sup> Several other U.N. human rights treaties do not provide any mechanism for review of individual petitions. These include the Convention on the Rights of the Child, CEDAW, and the ICESCR. See O’FLAHERTY, *supra* note 3, at 62-63, 122-23, 180-81. Proposals to add optional complaints procedures for CEDAW and the ICESCR are now being considered by the U.N. as noted in the discussion of draft admissibility clauses

many States that have ratified the treaties do not recognize the jurisdiction of the Committees to receive individual petitions.<sup>42</sup> For States that have made this optional election, the Committees exercise a quasi-judicial function when reviewing petitions. If the complainant satisfies the numerous admissibility hurdles set forth in the treaties,<sup>43</sup> the relevant Committee considers the merits of the complaint. The jurists seek to resolve the dispute between the parties "in a judicial spirit," and to develop a "specific problem-centered jurisprudence."<sup>44</sup> Unlike the decisions of some regional tribunals, the decisions of the three Committees are not legally binding. However, many States view them as highly persuasive and have implemented the recommenda-

---

discussed *infra* notes 63, 65.

<sup>41</sup> This is not the case in regional human rights systems, whose treaties require States parties to authorize regional courts and quasi-judicial tribunals to receive petitions from individuals. In Europe, 40 States have recognized the competence of the ECHR to receive petitions from individuals alleging violation of the European Convention. See *Council of Europe* (visited Oct. 31, 1999) <<http://www1.umn.edu/humanrts/euro/eurocon.html>> (listing ratification information relating to the Protocols to the European Convention, including Protocol No. 11). In the Americas, the Inter-American Commission can receive petitions from individuals concerning 25 Central and South American nations. See *Inter-American Human Rights Instruments* (visited Oct. 31, 1999) <<http://www1.umn.edu/humanrts/oasinstr/oaslist.htm>> (listing ratification information relating to Inter-American Human Rights instruments). In Africa, 49 nations have authorized the African Commission to hear individual petitions. See *African [Banjul] Charter on Human and Peoples' Rights* (visited Sept. 21, 1999) <<http://www1.umn.edu/humanrts/instree/z1afchar.htm>> (listing 49 States parties that have ratified the African Charter).

<sup>42</sup> As of October 1999, 95 of the 144 States parties to the ICCPR had ratified the First Optional Protocol authorizing the UNHRC to receive petitions from individuals. See *Human Rights Committee* (visited Oct. 31, 1999) <<http://www1.umn.edu/humanrts/hrcommittee/hrc-page.html>> [hereinafter *Optional Protocol*] (listing ratification information for the ICCPR and the First Optional Protocol). As of the same date, 28 of the 155 States parties to the Race Convention and 41 of the 118 States parties to the Convention Against Torture had filed declarations recognizing the competence of CERD and CAT, respectively, to receive individual communications. See *Convention of Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment* (visited Nov. 10, 1999) <[http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_booviv\\_booviv\\_9.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_booviv_booviv_9.html)> (CAT); *International Convention on the Elimination of All Forms of Racial Discrimination* (visited Nov. 10, 1999) <[http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_booviv\\_booviv\\_2.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_booviv_booviv_2.html)> (CERD).

<sup>43</sup> For a discussion of these admissibility hurdles, see TOM ZWART, *THE ADMISSIBILITY OF HUMAN RIGHTS PETITIONS* 8-9 (1994), and O'FLAHERTY, *supra* note 3, at 49-50.

<sup>44</sup> Matthew Craven, *Towards an Unofficial Petition Procedure: A Review on the Role of the UN Committee on Economic, Social and Cultural Rights*, in *SOCIAL RIGHTS AS HUMAN RIGHTS: A EUROPEAN CHALLENGE* 91, 94 (Krzysztof Drzewicki et al. eds., 1994). For a detailed discussion of the UNHRC's jurisprudence, see MANFRED NOWAK, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* (1993) (setting out the UNHRC's case law interpreting the ICCPR and the First Optional Protocol).



tions they contain.<sup>45</sup>

This brief overview illustrates what I will refer to as the disaggregated or decentralized nature of the human rights petition system. Unlike U.S. federal law, there is no supreme arbiter of international human rights law as a whole. Rather, each court or tribunal operates as the sole interpreter of the agreement that created it, with no formal mechanisms available to interact with its counterparts in other treaty systems.<sup>46</sup> It is this characteristic of the petition system, together with the overlapping treaty rights discussed below, that creates the opportunities and incentives for individuals to forum shop for a favorable human rights ruling.

### B. *A Typology of Similarities and Differences Among Human Rights Treaties*

The complex nodes of overlap among the world's human rights agreements can be illustrated by examining the similarities and differences between two specific treaties: the ICCPR and the European Convention. The two treaties protect many of the same civil and political rights, sometimes in language that is identical or nearly so.<sup>47</sup> These areas of concordance are far from absolute, however.<sup>48</sup> Four distinct types of differences exist: (1) rights protected exclusively by either the ICCPR or the European Convention;<sup>49</sup> (2) rights protected

---

<sup>45</sup> See Helfer & Slaughter, *supra* note 1, at 344-45 (discussing studies by the UNHRC documenting the extent of compliance with its non-binding decisions).

<sup>46</sup> See Klaus T. Samson, *Human Rights Co-ordination Within the UN System*, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 620, 658 (Philip Alston ed., 1992) ("Organic links between the different [petition] procedures are lacking and . . . the diffuse nature of the arrangements and the distinct composition, methods, and traditions of the organs concerned will make it difficult to secure a sufficient degree of consistency in evaluations and views." (footnote omitted)).

<sup>47</sup> For a comprehensive discussion of the overlapping rights and freedoms of the European Convention and the ICCPR, see *Report of the Committee of Experts on Human Rights to the Committee of Ministers: Problems Arising from the Co-Existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights*, Eur. Council, Doc. No. H (70) 7 (1970) [hereinafter Co-Existence Report]. See also Rosalyn Higgins, *The United Nations: Still a Force for Peace*, 52 MOD. L. REV. 1, 8 (1989) (recognizing that treaties granting the same rights may have different interpretations).

<sup>48</sup> See Eissen, *supra* note 13, at 207-08 ("[W]hile many . . . drafting differences are probably of little consequence, others seem rather significant." (footnote omitted)).

<sup>49</sup> The reference to the Convention here includes its substantive protocols, which contain additional human rights guarantees not found in the main text of the Convention. In the years since the ICCPR was drafted, the number of rights protected by the ICCPR alone has diminished, as the Council of Europe promulgated several additional protocols to the European Convention containing additional civil and political liberties.

by both treaties, but for which one treaty provides more extensive protection to individuals;<sup>50</sup> (3) rights protected by both agreements using the same language, but which are interpreted differently by the tribunals; and (4) rights that conflict, such that it would be impossible for a State party to protect both of them at the same time.<sup>51</sup>

This typology defines the relationship between any two human rights agreements. For example, a comparison of the American Convention and the ICCPR reveals many identical rights and freedoms. In contrast, a comparison of CEDAW with either the ICCPR or the ICESCR reveals many shared rights with different definitions or interpretations, and, on occasion, conflicting rights. Finally, some treaties, such as the Race Convention and the Convention Against Torture, have no common rights. In every instance, however, it is possible to classify the nature of two human rights treaties' intersections into these four distinct categories.<sup>52</sup>

The existence of overlapping substantive standards among human rights treaties, together with the multiple tribunals overseeing the treaties, create powerful incentives for individuals to forum shop. To see this concretely, consider the hypothetical example of a Norwegian national of South Asian descent who is convicted of murder in a Norwegian court. She alleges that police officials tortured her during an interrogation, that the selection of jurors at her trial was tainted by racial bias, and that her right to a fair trial was violated in other ways. The Norwegian national could file a petition against Norway raising all or part of these allegations before no fewer than four different tribunals: the European Court of Human Rights ("ECHR"), the

---

<sup>50</sup> The first two differences are discussed in the Co-Existence Report, *supra* note 47, at 4-6 (listing articles in the ICCPR that differ from those in the European Convention). See also Eissen, *supra* note 13, at 206-09 (comparing the normative clauses of the ICCPR with those of the European Convention and Protocols); Robertson, *supra* note 13, at 27-41 (discussing rights protected by one treaty or the other, or more extensively in one treaty than the other).

<sup>51</sup> For a discussion of the difference between diverging and conflicting approaches to human rights norms, see *infra* Part II.B. Such a conflict might arise, for example, if the ICCPR's right to life protected unborn fetuses while the European Convention's privacy right protected a woman's right to terminate her pregnancy. Cf. HUMAN RIGHTS LAW-MAKING, *supra* note 13, at 139 (discussing similar tensions within the Inter-American human rights system). In fact, no conflict has yet emerged because no tribunal has construed the treaties in this manner. See *id.* at 138 (stating that the Commission was able to interpret the American Declaration and the American Convention "so as to avoid conflicts between the two").

<sup>52</sup> For a different typology of "normative differences" among treaties, see HUMAN RIGHTS LAW-MAKING, *supra* note 13, at 150.

UNHRC, CAT, and CERD.<sup>53</sup>

Numerous strategic factors could affect this individual's decision about where and how to litigate her claims internationally. Consider first the substantive human rights violations this petitioner might allege. The broad scope of rights contained in the European Convention and the ICCPR would favor filing a petition with either the ECHR or the UNHRC. However, the more precisely defined obligations in the Race Convention and the Convention Against Torture, as well as the expertise of CAT and CERD jurists, might suggest proceeding before those committees if the torture or race discrimination facets of her claim were particularly strong.<sup>54</sup>

The petitioner would also need to consider remedial and procedural issues. Among the four tribunals, only the ECHR is empowered to issue rulings that are legally binding, as opposed to mere recommendations for remedial action.<sup>55</sup> It is also by far the most well-established tribunal, having gained the respect of governments and achieved a track record of compliance mirroring that of domestic courts.<sup>56</sup> But the ECHR also imposes stringent procedural hurdles that result in the dismissal of the overwhelming majority of cases prior

---

<sup>53</sup> An analogous choice confronts individuals in Uruguay, except that they may petition the Inter-American Commission on Human Rights rather than the European Commission. I have chosen Norway and Uruguay as examples because both States permit individuals to submit petitions to all of the tribunals listed in the text. See O'FLAHERTY, *supra* note 3, at 48, 105, 158. This is a rather unique situation. Most other nations within the Americas and Europe permit individuals to file petitions with a regional tribunal and only one U.N.-based treaty body, usually the UNHRC. See *id.* (identifying States that have accepted optional petition procedures to U.N. human rights treaties).

<sup>54</sup> For example, the definitions of "racial discrimination" in the Race Convention and "torture" in the Convention Against Torture are significantly more sweeping than those found in the European Convention. Compare Race Convention, *supra* note 29, art. 1(1), at 216 (defining "racial discrimination"), and Convention Against Torture, *supra* note 31, art. 1(1), at 113 (defining the scope of protection against torture), with European Convention, *supra* note 26, art. 3, at 3, art. 14, at 6 (defining the scope of protection against "torture" and "racial discrimination"). See generally Andrew Byrnes, *The Committee Against Torture*, in *THE UNITED NATIONS AND HUMAN RIGHTS* 509, 513 (Philip Alston ed., 1992) (stressing that "there is no one, standard definition of torture or other ill-treatment that applies in every context," and that as a result, "a State may have different obligations under" different treaties).

<sup>55</sup> See Helfer & Slaughter, *supra* note 1, at 304-05, 351 (noting that the ECHR issues rulings binding on States parties as a matter of international law and distinguishing non-binding recommendations of the UNHRC).

<sup>56</sup> John H. Barton & Barry E. Carter, *The Uneven, but Growing, Role of International Law*, in *RETHINKING AMERICA'S SECURITY: BEYOND COLD WAR TO NEW WORLD ORDER* 279, 287 (Graham Allison & Gregory F. Treverton eds., 1992) (noting that ECHR judgments are "as effective as those of any domestic court").

to a hearing on the merits. The other tribunals, by contrast, are more nascent adjudicatory institutions but are more likely to consider the petitioner's claim on its merits.<sup>57</sup>

Given these diverse strategic considerations, there are strong incentives for the aggrieved Norwegian national to file petitions with two or more tribunals either simultaneously, or in succession if the first tribunal rejects her allegations. Indeed, in the absence of such forum shopping, no single tribunal would have the authority to address the full scope of her legal claims.<sup>58</sup>

### C. *A Typology of Forum Shopping*

The foregoing hypothetical example is, admittedly, an extreme one. It illustrates, in the starkest way possible, the incentives to forum shop created by overlapping human rights treaties with multiple petition procedures. In fact, most aggrieved individuals can present their claims to at most two tribunals, either because of their petitions' limited subject matter or because the State against which they are complaining does not accept more than two such procedures.

Government officials and legal experts drafting human rights treaties have recognized that individuals may seek to forum shop even in this more limited way. Rather than implementing a uniform rule to regulate forum shopping, the treaty drafters adopted three different approaches to the practice, creating a confusing environment for both petitioners and defending States.

#### 1. Choice of Tribunal Forum Shopping

States parties might have simply prohibited all forum shopping entirely by requiring any dispute falling within the jurisdiction of two or more tribunals to be litigated in a particular forum.<sup>59</sup> No interna-

---

<sup>57</sup> See Helfer & Slaughter, *supra* note 1, at 313 n.162, 352 n.367 (citing relevant authorities).

<sup>58</sup> For example, neither CAT nor CERD could address the petitioners' fair trial claims. Conversely, the ECHR and the UNHRC might not be able to address the full scope of her race discrimination and torture allegations given the narrower definition of those rights in the European Convention and the ICCPR.

<sup>59</sup> The Council of Europe has adopted this approach for adjudication of human rights disputes *between States*. A 1970 resolution by the Council's Committee of Ministers provides that States parties to both the European Convention and the ICCPR normally will litigate claims relating to rights and freedoms protected by both treaties only before the ECHR and the European Commission on Human Rights (European Commission), rather than the UNHRC. See *Resolution of the Comm. of Ministers*, Res. (70)17 (May 15, 1970), reprinted in COUNCIL OF EUROPE, COLLECTION OF

tional human rights treaties impose such a rule, however, and no State has appended a reservation to a treaty to compel this result. To the contrary, individuals enjoy complete freedom to choose the tribunal before which they will litigate their claims, a freedom which both international and domestic law commentators have uniformly praised.<sup>60</sup>

## 2. Simultaneous Petition Forum Shopping

If individuals may choose the tribunal, may they also submit petitions to more than one tribunal at the same time and receive concurrent review of their claims? Human rights treaties are split over whether to permit such "simultaneous petition forum shopping." The majority of these treaties expressly prohibit this practice in their admissibility clauses. For example, article 5(2)(a) of the ICCPR's First Optional Protocol states that the UNHRC "shall not consider any communication from an individual unless it has ascertained that . . . [t]he same matter *is not being examined* under another procedure of international investigation or settlement."<sup>61</sup> However, the pe-

---

RECOMMENDATIONS, RESOLUTIONS AND DECLARATIONS OF THE COMMITTEE OF MINISTERS CONCERNING HUMAN RIGHTS: 1949-87, at 20, 21 (1989) (stating that disputes arising out of the European Convention should use the means of settlement provided for in the Convention); *see also* HUMAN RIGHTS LAW-MAKING, *supra* note 13, at 235 (noting that disputes arising out of the ECHR may only be brought before other bodies "by special agreement").

<sup>60</sup> *See* Robertson, *supra* note 13, at 46 ("Since the underlying object of both instruments is to secure the protection of the rights of the individual, . . . a person who believes that his rights have been violated should have a choice between [petition procedures] and should be allowed to use that which he considers most favourable to his case."); *see also* Eissen, *supra* note 13, at 201-02 (favoring the freedom of a petitioner to choose a tribunal). Maxime Tardu has referred to this type of forum shopping as the "una via electa" standard. Tardu, *supra* note 13, at 784. Commentators in the United States have proposed a similar rule, arguing that "individuals with constitutional claims generally should be able to choose whether to litigate in federal or state court." Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 300 (1988).

<sup>61</sup> Optional Protocol, *supra* note 42, art. 5(2)(a) (emphasis added). Similarly phrased prohibitions on simultaneous petition forum shopping appear in most other human rights treaties. *See* Migrant Workers' Convention, *supra* note 33, art. 77(3)(a) (requiring a finding that the "same matter has not been . . . examined under another procedure of international investigation"); Convention Against Torture, *supra* note 31, art. 22(5) (barring consideration of petition unless it is ascertained that "the same matter . . . is not being[] examined under another procedure of international investigation or settlement"); American Convention, *supra* note 27, art. 46(1)(c) (making admissibility subject to a determination that "the subject of the petition or communication is not pending in another international proceeding for settlement"). Article 27(1)(b) of the European Convention uses slightly different language, barring the consideration of a petition that is "substantially the same as a matter which . . . has already been submitted to another procedure of international investigation or settle-

tition procedures of the ILO treaties, the African Charter, and perhaps the Race Convention have been interpreted to permit the filing of simultaneous petitions.<sup>62</sup>

### 3. Successive Petition Forum Shopping

Human rights treaties are also divided over whether an individual may engage in "successive petition forum shopping" by submitting a petition to a second tribunal after proceedings concerning an earlier petition before a different tribunal have been concluded. The ICCPR's Optional Protocol permits the UNHRC to hear a petition previously submitted to another tribunal once that petition is no longer pending. The same permissive rule applies to the ILO treaties, to the Race Convention, and to the Optional Protocol to the ICESCR.<sup>63</sup>

---

ment" and that contains "no relevant new information." European Convention, *supra* note 26, art. 27(1)(b). This language bars consideration of a petition pending before another human rights tribunal. See Eissen, *supra* note 13, at 198 & n.59.

<sup>62</sup> The African Charter's admissibility clause implicitly allows simultaneous petition forum shopping by permitting the African Commission to declare petitions admissible only if they "[d]o not deal with cases which *have been settled* by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter." African Charter, *supra* note 28, art. 56(7) (emphasis added). See also *Amendments to the Rules of Procedure*, 18th Ord. Sess., at 104(1)(g), U.N. Doc. ACHPR/AMEND.RP(DANKWA)/XVIII (Oct. 1995) (requiring petitioner to provide information to the Commission on whether the petition "has been settled" by another international body). An earlier rule of procedure adopted by the Commission also barred consideration of simultaneous petitions, but that rule was superseded by a later rule following the text of the charter. See Rachel Murray, *Decisions by the African Commission on Individual Communications Under the African Charter on Human and Peoples' Rights*, 46 INT'L & COMP. L.Q. 412, 424-25 & 425 n.99 (1997) (concluding that the Charter bars only successive petitions).

The labor treaties administered by the ILO and the Race Convention contain no rules regulating simultaneous consideration of petitions. See HUMAN RIGHTS LAW-MAKING, *supra* note 13, at 218-19, 221-22 (suggesting that while not entirely clear, the treaties probably do not restrict the examination of a case pending before another international body); TRINDADE, *supra* note 13, at 332 & n.1074 (noting that the ILO procedures "contain no clauses . . . for co-ordination with other human rights procedures"). However, the Rules of Procedure drafted by CERD may implicitly preclude the filing of simultaneous petitions. See CERD R. of Proc., U.N.H.S.R., at Rule 84(1)(g), U.N. Doc. CERD/C/35/Rev.3 (1989), available in Treaty Bodies Database (visited Sept. 23, 1999) <<http://www.unhchr.ch/tbs/doc.nsf/>> (authorizing the Secretary General to inquire on CERD's behalf whether "the same matter is being examined under another procedure of international investigation or settlement"). But see HUMAN RIGHTS LAW-MAKING, *supra* note 13, at 222 (questioning the efficacy of this rule).

<sup>63</sup> See TRINDADE, *supra* note 13, at 332 ("The operation of other co-existing human rights complaint procedures therefore has been taken as not having effects on the receivability of complaints of alleged human rights violations under the ILO proce-

By contrast, other treaties categorically bar successive petition forum shopping. This restriction often is contained in the same clause that prohibits simultaneous petition forum shopping. For example, article 47(d) of the American Convention provides that the Inter-American Commission "shall consider inadmissible any petition or communication . . . if . . . [t]he petition or communication is substantially the same as one *previously studied* by the Commission or by *another international organization*."<sup>64</sup> Similarly phrased prohibitions appear in the admissibility clauses of the European Convention, the Convention Against Torture, the African Charter, Migrant Workers' Convention, and in a proposed Optional Protocol to CEDAW.<sup>65</sup>

Nor is the disharmony limited to the actual texts of the treaties. When ratifying the ICCPR's Optional Protocol and the Race Convention, two treaties that *permit* successive petition forum shopping, several nations (mostly in Europe) filed reservations to expand the treaties' ban on simultaneous petition forum shopping to include successive petition forum shopping. Such reservations preclude the jurists on the UNHRC and CERD from entertaining both successive and simultaneous petitions filed against those countries.<sup>66</sup>

---

dures."); U.N. GAOR, 54th Sess., Annex, Agenda Item 109, art. 4(2)(a), U.N. Doc. A/RES/54/4 (1999) (stating that a claim will be inadmissible where "[t]he same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement"); *supra* note 62 (citing the African Charter).

<sup>64</sup> American Convention, *supra* note 27, art. 47(d) (emphasis added).

<sup>65</sup> Migrant Workers' Convention, *supra* note 33, art. 77(3)(a) (allowing a petition to be considered only if "[t]he same matter has not been . . . examined under another procedure of international investigation or settlement"); Convention Against Torture, *supra* note 31, art. 22(5) (barring consideration of petition unless it is established that "[t]he same matter has not been . . . examined under another procedure of international investigation or settlement"); African Charter, *supra* note 28, art. 56(7) (barring consideration of "cases which have been settled"); European Convention, *supra* note 26, art. 27(1)(b) (barring consideration of a petition that is "substantially the same as a matter which has . . . already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information"); *Convention on the Elimination of All Forms of Discrimination Against Women, Including the Elaboration of a Draft Optional Protocol to the Convention*, U.N. ESCOR, 42d Sess., Agenda Item 5, art. 4(2)(I), U.N. Doc. E/CN.6/1998/WG/L.2 (1998) (containing a draft admissibility clause requiring dismissal of petition where "the same matter . . . has been or is being examined under another procedure of international investigation or settlement").

<sup>66</sup> European States were especially troubled by the prospect that individuals could file claims with the UNHRC after their petitions had been dismissed by the European Commission. To achieve parallelism with the European Convention, which bars successive petition forum shopping, these States filed reservations barring the UNHRC from considering "a communication from an individual if the same matter is being examined or has already been examined under another procedure of international investigation or settlement." *Optional Protocol to the International Covenant on Civil and Political*

## II. FORUM SHOPPING PRACTICE

The two typologies described in Part I reveal the close relationship between the practice of forum shopping and the areas of substantive overlap among the world's human rights agreements. These typologies, which are based principally on human rights treaty texts, merely frame the broad outlines of this complex issue, however. Human rights jurists elected to serve on global and regional tribunals also play a crucial role in regulating the practice of forum shopping and in defining the treaties' areas of overlap.

Jurists regulate forum shopping when they apply the admissibility clauses and reservations discussed above. They also shape the normative linkages among human rights agreements by issuing decisions interpreting substantive treaty rights that follow, diverge from, or conflict with the decisions of other tribunals. When these jurists adopt inconsistent applications of these forum shopping clauses and reservations, they create confusion for petitioners and defending States regarding the conditions under which forum shopping will be permitted. Further, when they issue divergent or conflicting decisions relating to the same human rights, they create additional incentives for petitioners to forum shop for the tribunal with the most rights-protective standard.

This Section explores both of these strands of jurisprudence. It demonstrates that recent tribunal decisions are divided over when an individual may cite differing levels of rights protection between two human rights treaties as a justification for avoiding a forum shopping bar and presenting a simultaneous or successive petition to a second tribunal. It then discusses three recent case studies involving diverging and conflicting human rights rulings. In each case study, a global or regional tribunal confronted a legal issue that previously had been

---

*Rights: Declarations and Reservations*, U.N. GAOR, 21st Sess., 999 U.N.T.S. 171 (1976) (updated at *Optional Protocol to the International Covenant on Civil and Political Rights* (visited Sept. 23, 1999) <[http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_booi/iv\\_boo/iv\\_5.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_booi/iv_boo/iv_5.html)>) (emphasis added). States that have filed reservations include Austria (limited to petitions previously submitted to the European Commission), Croatia, Denmark, El Salvador, France, Iceland, Ireland, Italy, Luxembourg, Malta, Norway, Poland, Romania, Slovenia, Spain, Sri Lanka, Sweden, and Uganda. Other nations, including Finland, the Netherlands, Chile and others, have not filed such reservations. See *id.* (showing acceptance of the Optional Protocol without reservation). Many European States that filed successive petition forum shopping reservations to the Optional Protocol, however, did *not* file similar reservations limiting the jurisdiction of CERD. See *International Convention on the Elimination of All Forms of Racial Discrimination*, *supra* note 42.



addressed by another tribunal and faced the question of whether to follow or deviate from that prior decision.

*A. Using Differences Among Human Rights Treaties as a Basis for Avoiding a Forum Shopping Bar*

A vexing question facing all human rights tribunals is how to define the scope of a petitioner's legal claims for purposes of applying a treaty's forum shopping bar.<sup>67</sup> Stated another way, may an individual avoid a treaty's ban on simultaneous or successive petition forum shopping by relying on differing definitions or interpretations of rights protected by two human rights treaties as identified in the first typology discussed above?

The texts of the treaties and State party reservations provide only limited guidance to answer this question. These texts compel jurists to dismiss a petition if it is "substantially the same" as one submitted to another tribunal, or if "the same matter" is being, or has already been,

---

<sup>67</sup> Although the jurisprudence of forum shopping has become increasingly discordant in recent years, there are a few points of clarity. First, with respect to the issue of parties' identity, the tribunals have adopted the sensible position that a simultaneous or successive petition is subject to a forum shopping bar only if it is submitted by the same individual or someone authorized to act on that individual's behalf. *See, e.g., Fannali v. Italy*, Comm. No. 18/75, at 160, ¶ 7.2, U.N. Doc. Supp. No. 40 (A/38/40) (1983) (noting that "the same matter" applies only to claims "concerning the same individual, submitted by him or someone else who has the standing to act on his behalf before the other international body"), *reprinted in* 4 HUM. RTS. L.J. 189, 190 (1983); *see also* ZWART, *supra* note 43, at 181-82 (discussing the European Commission's conclusion that cases brought by "virtually the same" complainants as earlier petitions, dealing with substantially the same facts, are inadmissible). Compare this practice with the practice under the American Convention, which permits non-governmental organizations and individuals to file complaints with the Inter-American Commission without the consent of the victim. *See Mejía v. Peru*, Case 10,970, Inter-Am. C.H.R., OEA/ser. L/V/II.91, doc. 7 at 157 (1996) (noting that the victim's consent to a petition is not a requirement for the petition to be deemed admissible), *reprinted in* 1996 INTER-AM. Y.B. ON HUM. RTS. 1120, 1146.

Second, the tribunals have concluded that only petitions to other human rights courts or quasi-judicial tribunals can trigger the forum shopping bar. Complaints to investigative bodies authorized to examine general human rights conditions in particular countries will not bar consideration of particular petitions. *See, e.g., Blanco v. Nicaragua*, U.N. GAOR, Hum. Rts. Comm., 51st Sess., ¶ 5.1, U.N. Doc. CCPR/C/51/D/328/1988 (1994) ("The general investigation, by regional and intergovernmental human rights organizations, of situations affecting a number of individuals, including the author of a communication under the Optional Protocol, does not constitute 'the same matter' within the meaning of article 5, paragraph 2(a)."); *see also* ZWART, *supra* note 43, at 174-75, 182-83 (discussing UNHRC and European Commission procedures of international investigation and settlement).

examined by another tribunal.<sup>68</sup> For American legal scholars, these phrases suggest something akin to the transactional test adopted by the United States Supreme Court to determine the contours of pendent jurisdiction.<sup>69</sup> In the international human rights context, however, these words have often been given very different interpretations, as the following analysis of the UNHRC and the European, Inter-American, and African Commissions demonstrates.<sup>70</sup>

### 1. The UNHRC's Interpretation of "The Same Matter"

The most extensive body of forum shopping case law has been decided by the UNHRC when interpreting States parties' reservations to the ICCPR's First Optional Protocol. These reservations prohibit the Committee from reviewing a petition if "the same matter" has already been "examined" or "considered" under "another procedure of international investigation or settlement."<sup>71</sup>

#### a. *The Early Restrictive Approach to Successive Petition Forum Shopping*

*A.M. v. Denmark*<sup>72</sup> presented the strongest case for invoking the fo-

---

<sup>68</sup> See *supra* text accompanying notes 61, 64 (noting, for example, that under the ICCPR's First Optional Protocol and the American Convention, respectively, the UNHRC and the Inter-American Commission must dismiss such petitions).

<sup>69</sup> See, e.g., *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (holding that pendent jurisdiction exists wherever there is a federal claim, and that "the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case'").

<sup>70</sup> As of the date of this writing, CERD has not decided any cases dealing with forum shopping. See *United Nations High Commissioner for Human Rights, Treaty Bodies Database* (visited Oct. 28, 1999) <<http://www.unhchr.ch/tbs/doc.nsf>> (reproducing CERD's published case law). The CAT has reviewed only two cases in which forum shopping was an issue. In *A.E.M. v. Spain*, Spain argued that the petition should be deemed inadmissible because the same petitioners had filed the same complaint with the European Commission and the European Committee for the Prevention of Torture. See *A.E.M. v. Spain*, U.N. GAOR, CAT, 13th Sess., Annex 5, at 43, U.N. Doc. A/50/44, ¶ 3.3 (1994). The CAT concluded, without further explanation, that it had "ascertained . . . that the same matter has not been and is not being examined under another procedure of international investigation or settlement," but it then dismissed the case for failure to exhaust domestic remedies. *Id.* ¶ 5.2.5.3. In *Mbulu v. Canada*, Comm. No. 26/1995, U.N. Doc. CAT/C/15/D/26/1995 (1995), CAT dismissed a petition seeking to delay an expulsion from Canada on the ground that petitioners' counsel had previously "submitted a motion relating to her expulsion to the Inter-American Commission on Human Rights." *Id.* ¶ 3.

<sup>71</sup> See *supra* note 66 (identifying countries that have filed such reservations under the Optional Protocol).

<sup>72</sup> Comm. No. 26/121, at 212, U.N. Doc. Supp. No. 40 (A/37/40) (1982), *reprinted* in 3 HUM. RTS. L.J. 188 (1982).

rum shopping bar—the successive presentation of identical factual and legal claims to two tribunals. A.M. was a Pakistani national convicted of a criminal offense in Denmark,<sup>73</sup> who alleged that the Danish judicial system had treated him unfairly because he was a foreigner, and had denied him a fair trial. He also asserted that his deportation from Denmark constituted degrading treatment or punishment under the Universal Declaration of Human Rights.<sup>74</sup> Prior to petitioning the UNHRC, A.M. had presented the same allegations to the European Commission.<sup>75</sup> The Commission had dismissed his claim as “manifestly ill-founded,”<sup>76</sup> indicating that the allegations failed to raise even an arguable violation of the European Convention.<sup>77</sup> Without expressly analyzing the European Commission’s prior ruling, the UNHRC concluded that the “author has submitted the same matter to the European Commission of Human Rights,” and that as a result the UNHRC was “not competent to consider the present communication.”<sup>78</sup>

Only one member of the UNHRC believed that the European Commission of Human Rights’ dismissal of A.M.’s petition did not compel the UNHRC to dismiss his petition. In a concurring opinion, Committee member Graefrath reasoned that Denmark’s reservation was inapplicable because the European Commission had declared the petition inadmissible and had not provided A.M. with a full hearing on the merits. Because of this summary dismissal, the claim had not been “considered” in a way that triggered Denmark’s forum shopping bar. Mr. Graefrath stressed that the Danish reservation did not seek to limit the Committee’s powers “merely on the ground that the rights of the Covenant allegedly violated may also be covered by the European Convention and its procedural requirements.”<sup>79</sup> Indeed, had Denmark sought to limit the UNHRC’s competence in this manner, he would have found its reservation incompatible with the Optional

---

<sup>73</sup> *Id.* ¶ 1.

<sup>74</sup> *See id.* ¶¶ 3.1-3.2 (discussing A.M.’s allegations that the Danish police were dishonest in his pre-trial investigation and that the authorities treated him unfairly, thereby allegedly violating the Universal Declaration of Human Rights).

<sup>75</sup> *Id.* ¶ 4.

<sup>76</sup> A.M. v. Denmark, App. No. 9490/81, *reprinted in* 3 HUM. RTS. L.J. 354, 357 (1982).

<sup>77</sup> *See id.* (“The Commission finds no issues under any of the . . . Articles invoked by the applicant.”). *See generally* ZWART, *supra* note 43, at 144-46 (discussing the European Commission’s use of the phrase “manifestly ill-founded” to summarily dismiss meritless petitions).

<sup>78</sup> A.M., *supra* note 72, at 189.

<sup>79</sup> *Id.* at 190 (Graefrath, concurring).

Protocol.<sup>80</sup>

In the *A.M.* case, the factual and legal claims contained in the petition to the UNHRC were apparently identical in all respects to those *A.M.* had previously brought before the European Commission. In any event, they did not raise serious issues concerning Denmark's compliance with either treaty.<sup>81</sup> Thus, the UNHRC was not required to determine whether a second petition alleging violations of treaty rights whose definitions differ from the rights at issue in a prior proceeding raises "the same matter" as the prior proceeding.

That issue arose two years later in *V.M.Ø. v. Norway*,<sup>82</sup> in which the petitioner challenged Norwegian divorce and custody proceedings by alleging that a domestic court failed to protect his relationship with his daughter and to enforce his visitation rights.<sup>83</sup> After exhausting domestic remedies, the petitioner filed a claim with the European Commission alleging, under the European Convention, violations of his right to a fair trial, parental visiting rights, and equality rights.<sup>84</sup> The Commission dismissed the case as manifestly ill-founded,<sup>85</sup> and *V.M.Ø.* filed a second petition with the UNHRC alleging violations of

<sup>80</sup> For his reasoning, see Mr. Graefrath's opinion, in which he concluded: An application that has been declared inadmissible under the system of the European Convention is not necessarily inadmissible under the system of the Covenant and the Optional Protocol, even if it refers to the same facts. . . . The[] rights [contained in the European Convention], however, differ in substance and in regard to their implementation procedures from the rights set forth in the Covenant. . . . A decision on non-admissibility of the European Commission, therefore, has no impact on a matter before the [UNHRC] and cannot hinder the [UNHRC] from reviewing the facts of a communication on its own legal basis and under its own procedure and from ascertaining whether they are compatible with the provisions of the Covenant. This might lead to a similar result as under the European Convention, but not necessarily so.

*Id.* at 191.

<sup>81</sup> Thus, Mr. Graefrath, while disapproving of the majority's construction of the "same matter" clause, agreed that the petition should be declared inadmissible because it did not "raise issues under any of the provisions of the Covenant." *Id.* at 190. This is essentially the same justification used by the European Commission to dismiss *A.M.*'s earlier petition. See *A.M. v. Denmark*, App. No. 9490181, reprinted in 3 HUM. RTS. L.J. 354, 357 (1982) ("The Commission finds no issues under any of the . . . Articles invoked by the Applicant.").

<sup>82</sup> Comm. No. 168/1984, reprinted in 7 HUM. RTS. L.J. 268 (1985).

<sup>83</sup> See *id.* ¶¶ 2.1-2.2 (discussing the author's allegations of how Norwegian courts did not adequately address his ex-wife's refusal to honor his visitation rights).

<sup>84</sup> See *id.* ¶ 2.3 (noting that the author submitted an application to the European Commission of Human Rights, claiming such violations).

<sup>85</sup> *Id.* ¶ 2.4.

those same rights, as protected by the ICCPR.<sup>86</sup>

Although the two petitions' factual allegations were identical, V.M.Ø. argued that Norway's reservation did not bar the UNHRC from considering the matter because "the provisions of the European Convention . . . differ in several areas from those of the [ICCPR]," and the latter treaty was "better suited to protect his rights in the matter complained of than [the rights] earlier invoked before the European Commission."<sup>87</sup> V.M.Ø. stressed that he was not attempting to appeal the Commission's decision to the UNHRC, but rather to raise legal issues that "the European Convention does not cover."<sup>88</sup> In response, Norway argued that the forum shopping bar applied because the second application contained no new facts or legal arguments, and the European Commission had already examined "the substance of the application."<sup>89</sup> As for whether the rights protected by the ICCPR were broader than their European analogues, Norway acknowledged that the rights were not "identical" but stated that several articles of the European Convention "offer in substance the same protection" as the ICCPR.<sup>90</sup>

The UNHRC essentially adopted Norway's approach to the issue. In a tersely worded paragraph, the Committee concluded that the phrase "the same matter" refers "to *the complaints advanced and the facts adduced in support of them*."<sup>91</sup> Applying this standard, the Committee held that V.M.Ø.'s petition was "in fact the same matter that was examined by the European Commission. While fully understanding the circumstances which have led the author to make a communication under the Covenant," the Committee found that the reservation "preclude[d] it from examining the communication."<sup>92</sup>

#### b. *Recent Confusion over Successive Petition Forum Shopping*

The Committee's adoption in V.M.Ø. of a "complaints and facts" standard appeared to reject the possibility that a petitioner could

---

<sup>86</sup> See *id.* ¶¶ 2.5-2.6 (noting that petitioner submitted such petition and discussing his contention that the Committee should hear it).

<sup>87</sup> *Id.* ¶ 2.5.

<sup>88</sup> *Id.* ¶ 2.6. In particular, the applicant argued in general terms that the ICCPR's fair trial guarantees, family rights, and equality provisions were broader than their European Convention analogues. See *id.* (quoting V.M.Ø.'s reasoning that the European Convention's provisions are too limited to deal with his allegations).

<sup>89</sup> *Id.* ¶ 4.2.

<sup>90</sup> *Id.* ¶ 4.3.

<sup>91</sup> *Id.* ¶ 4.4 (emphasis added).

<sup>92</sup> *Id.*

avoid the forum shopping bar by invoking rights that the ICCPR defines more expansively than does the European Convention. In several cases decided in the mid-1990s, however, the UNHRC's jurisprudence has become significantly more unsettled. While adhering to a similar "events and facts" test in several cases, the Committee has stated in other decisions that it is prevented from reviewing a successive petition only if the precise legal and factual issues were adjudicated before the first tribunal.<sup>93</sup>

*Trébutien v. France*<sup>94</sup> is emblematic of the UNHRC's continued restrictive approach to forum shopping. Trébutien, convicted of numerous offenses before French courts, raised various legal arguments to challenge the prosecutions against him in three separate petitions filed with the European Commission. The Commission declared all three petitions inadmissible on various grounds, including failure to exhaust domestic remedies, submission of manifestly ill-founded allegations, and filing of repetitive claims.<sup>95</sup>

Trébutien then submitted a petition to the UNHRC challenging the same prosecutions under the analogous provisions of the ICCPR, which are drafted in substantially similar language.<sup>96</sup> He also alleged that the State had failed to protect his family life, as required by an article of the ICCPR drafted somewhat more broadly than its European

---

<sup>93</sup> In this sense, the Committee's more restrictive interpretation of "the same matter" is similar to American collateral estoppel principles, which prevent re-litigation of issues of fact or law necessary to a final judgment. See, e.g., *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 467 n.6 (1982) ("Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties.").

<sup>94</sup> U.N. GAOR, Hum. Rts. Comm., 51st Sess., Annex, U.N. Doc. CCPR/C/51/D/421/1990 (1994).

<sup>95</sup> See *id.* ¶ 2.14 (noting that the Commission declared the case inadmissible *ratione personae* because, with regard to some pleadings, the domestic remedies had not been exhausted, and other pleadings were "manifestly ill founded" and "substantially the same" as those submitted in a previous petition). In these three petitions, Trébutien challenged irregularities in his extradition from Portugal, detention in a French prison, the conduct of his criminal trials, and the denial of visits from his family in prison. *Id.*

<sup>96</sup> Compare European Convention, *supra* note 26, arts. 5 and 6, with ICCPR, *supra* note 24, arts. 9 and 14. Article 14(1) does, however, specify that criminal defendants are to be tried before a "competent, independent and impartial tribunal," whereas article 6(1) refers only to an "independent and impartial tribunal." Trébutien's petition may have related to this difference, inasmuch as he alleged that the judge withheld court documents necessary for counsel to prepare his defense. See *Trébutien*, *supra* note 94, ¶ 2.12 ("The author also points out that . . . the President of the Court allegedly withheld the necessary court documents for consultation and preparation of the defense.").

counterpart.<sup>97</sup> Finally, Trébutien raised legal and factual claims which he alleged had not been presented to the European Commission.<sup>98</sup> When France interposed its forum shopping reservation, Trébutien argued that the forum shopping ban was inapplicable because the Commission had not addressed "all the complaints that [had] been placed before the Human Rights Committee."<sup>99</sup> The UNHRC rejected Trébutien's attempt to circumvent the French reservation, reasoning that "the author's complaint[s] before that body [were] based on *the same events and facts* as the communication that ha[d] been submitted under the Optional Protocol to the Covenant; accordingly, the Committee is seized of the 'same matter' as the European Commission."<sup>100</sup>

In striking contrast to *Trébutien* is the Committee's decision in *Casanovas v. France*, which was decided just one day later.<sup>101</sup> Casanovas was a municipal civil servant who was dismissed for alleged incompetence and sought reinstatement before French administrative courts. Casanovas later filed a complaint with the European Commission. He

---

<sup>97</sup> Compare ICCPR, *supra* note 24, art. 23(1) ("The family is the natural and fundamental group unit of society and entitled to protection by society and the State."), with European Convention, *supra* note 26, art. 8 (granting everyone a "right to respect for his private and family life," but permitting limitations that are "in accordance with the law and . . . necessary in a democratic society" to achieve a list of particular objectives).

<sup>98</sup> In particular, Trébutien argued that his complaints to the European Commission did not address certain "irregularities" that occurred during his conviction for escaping from prison. *Trébutien*, *supra* note 94, ¶¶ 5.3-5.4.

<sup>99</sup> *Id.* ¶ 6.3.

<sup>100</sup> *Id.* ¶ 6.4 (emphasis added). Consistent with *Trébutien*, the UNHRC has refused to entertain petitions raising "the same events and facts" and "substantially the same issues" as petitions previously rejected by the European Commission. See *Valentijn v. France*, U.N. GAOR, Hum. Rts. Comm., 57th Sess., Annex, ¶ 5.2, U.N. Doc. CCPR/C/57/D/584/1994 (1996) (noting that the petitioner's successive complaints submitted to the European Commission on Human Rights were predicated on the same events and facts as his complaint addressed to the UNHRC); *Glaziov v. France*, U.N. GAOR, Hum. Rts. Comm., 51st Sess., Annex, ¶ 7.2, U.N. Doc. CCPR/C/51/D/452/1991 (1994) (noting that the petitioner's application to the European Commission was based on the same events and facts as his complaint to the UNHRC). It has, however, permitted individuals to raise factual and legal allegations not previously submitted to the regional tribunal. See *Valentijn*, *supra*, ¶ 5.4 (considering Valentijn's claim, not submitted to the European Commission, that he should have been given a lighter sentence after the Criminal Code was amended); *Glaziov*, *supra*, ¶ 7.2 (noting that petitioner's claim that he was hit by prison warders had not been submitted to the European Commission and was not barred by France's forum shopping reservation, but was nevertheless unsubstantiated for purposes of admissibility). The Committee has not indicated, however, whether the petitioners could have raised these allegations before the European Commission but failed to do so.

<sup>101</sup> See U.N. GAOR, Hum. Rts. Comm., 51st Sess., Annex, U.N. Doc. CCPR/C/51/D/441/1990 (1994). *Trébutien* was decided on July 18, 1994; *Casanovas* on July 19, 1994.

alleged that the administrative tribunal had failed to hear his case in a timely manner in violation of article 6(1) of the European Convention, which requires a hearing within a reasonable time for any "determination of . . . civil rights and obligations."<sup>102</sup> The Commission declared his complaint inadmissible *ratione materiae*<sup>103</sup> because the Convention "does not cover procedures governing the dismissal of civil servants from employment."<sup>104</sup>

When Casanovas filed a petition with the UNHRC containing precisely the same allegations under ICCPR article 14(1),<sup>105</sup> France sought to dismiss his petition on two grounds. It first invoked the forum shopping reservation and the *V.M.Ø.* decision, urging that the petition be dismissed because "the case concerns the same individual, the same facts, and the same claim as the case submitted to the European Commission on Human Rights."<sup>106</sup> It also urged the UNHRC to follow the European Commission's lead and hold that civil service proceedings are not covered by article 14(1), arguing that the texts of article 6(1) and article 14(1) are "identical."<sup>107</sup>

The UNHRC rejected both arguments. It first held that, because Casanovas's initial petition alleged a violation of a right not protected by the European Convention, it had not "been 'considered' in such a way that the Committee was precluded from examining it."<sup>108</sup> As for

<sup>102</sup> European Convention, *supra* note 26, art. 6(1).

<sup>103</sup> A dismissal *ratione materiae* occurs when the petition alleges a violation of a right not protected by the treaty. See Erik Möse & Torkel Opsahl, *The Optional Protocol to the International Covenant on Civil and Political Rights*, 21 SANTA CLARA L. REV. 271, 296-97 (1981).

<sup>104</sup> *Casanovas*, *supra* note 101, ¶ 2.5. In effect, the Commission concluded that administrative challenges to the dismissal of civil servants do not qualify as "civil rights and obligations" under article 6(1).

<sup>105</sup> See ICCPR, *supra* note 24, art. 14(1) (requiring fair and public hearings for any "determination [of] rights and obligations in a suit at law").

<sup>106</sup> *Casanovas*, *supra* note 101, ¶ 4.2 (citing *V.M.Ø.*, *supra* note 82, ¶ 4.4).

<sup>107</sup> *Id.* ¶ 4.3. In fact, the texts are drafted somewhat differently. Article 14(1) refers to "rights and obligations in a suit at law" whereas article 6(1) uses the phrase "civil rights and obligations." In addition, although article 14(1) does not require judicial or administrative proceedings to be held "within a reasonable time," the UNHRC has implied such a requirement in its case law. See *Casanovas*, *supra* note 101, ¶ 7.3 (citing prior case law requiring that procedures be conducted expeditiously).

<sup>108</sup> *Id.* ¶ 5.1. The UNHRC specifically stated:

[S]ince the rights of the European Convention differed in substance and in regard of their implementation procedures from the rights set forth in the Covenant, a matter that had been declared inadmissible *ratione materiae* had not, in the meaning of the reservation, been 'considered' in such a way that the Committee was precluded from examining it.



France's second argument, the UNHRC reasoned that article 14(1)'s application to civil service proceedings depended upon "the nature of the right in question rather than . . . the status of one of the parties."<sup>109</sup> It then stated without further analysis that a "procedure concerning a dismissal from employment" satisfied this standard and thus was within the scope of article 14(1).<sup>110</sup> On the facts presented, however, the Committee refused to find a violation of the article, reasoning that the French administrative tribunal had issued a decision within a reasonable time.<sup>111</sup>

Further evidence of the UNHRC's more permissive approach to forum shopping appears in its 1994 General Comment 24(52) on State party reservations.<sup>112</sup> With respect to the European States' forum shopping reservations to the Optional Protocol, the Committee stated that the reservations were generally consistent with the Protocol's fundamental objective of "secur[ing] independent third party review of the human rights of individuals."<sup>113</sup> But it also stressed that the reservations could be applied only "where the legal right and the subject matter are *identical* under the Covenant and under another international instrument."<sup>114</sup> This statement, together with the Committee's

---

<sup>109</sup> *Id.* ¶ 5.2.

<sup>110</sup> *Id.* The UNHRC's position is at odds with that of the ECHR, which recently "re-iterate[d] that 'disputes relating to the recruitment, careers and termination of service of civil servants are as a general rule outside the scope of Article 6 §1.'" Huber v. France, *European Court of Human Rights—Judgments and Decisions* 1998-I, 105, 115, App. No. 26637/95, 63 Eur. Ct. H.R. ¶ 36 (1998).

<sup>111</sup> See *Casanovas*, *supra* note 101, ¶ 7.4 (holding that the period of time that elapsed between the submission of the complaint and the decision did not violate Article 14(1)).

<sup>112</sup> See *General Comment 24(52) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, U.N. GAOR, Hum. Rts. Comm., 52d Sess., 1382d mtg. (adopted Nov. 2, 1994), available in *International Human Rights Documents* (visited Sept. 12, 1999) <<http://lawhk.hku.hk/demo/unhrdocs/hrgc24.htm>> [hereinafter *General Comment 24(52)*] (identifying the "principles of international law that apply to the making of reservations and by reference to which their acceptability is to be tested and their purport to be interpreted").

<sup>113</sup> *Id.* ¶ 14.

<sup>114</sup> *Id.* (emphasis added). That the Committee intended to construe the forum shopping reservations narrowly is suggested by another statement in the General Comment. Several States parties had attempted to predetermine the content of the rights protected by the ICCPR by linking them to the interpretation of the same rights found in domestic law or in other treaties. See, e.g., *International Covenant on Civil and Political Rights* (visited Oct. 31, 1999) <[http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_boo/iv\\_boo/iv\\_4.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_4.html)> ("Articles 19, 21, and 22 [of the ICCPR] shall be applied by the Belgian Government in the context of the provisions and restrictions set forth or authorized in articles 10 and 11 of the [European Conven-

*Casanovas* case, represents a substantial break with the "events and facts" standard applied in *Trébutien* and *V.M.Ø.* to bar successive petitions raising rights defined more broadly under the ICCPR than under another treaty.<sup>115</sup> The Committee has yet to reconcile these two lines of authority, an omission it will likely have to confront in a future case.<sup>116</sup>

---

tion]). The UNHRC rejected this approach, stating that "States should not seek . . . to determine that the meaning of a provision of the Covenant is the same as that given by an organ of any other international treaty body." *General Comment 24(52)*, *supra* note 112, ¶ 19. Yet the restrictive "events and facts" standard applied in *Trébutien*, *supra* note 94, and *V.M.Ø.*, *supra* note 82, indirectly achieves just this result. It precludes the Committee from adjudicating successive petitions concerning rights defined more broadly in the ICCPR than in other treaties, thereby limiting the relief available to the petitioner to the less rights-protective standards contained in those treaties.

<sup>115</sup> For a critical analysis of these two conflicting strands of case law, see *infra* Part IV.A.2.a.

<sup>116</sup> In its most recent forum shopping decision, the UNHRC held that Austria's forum shopping reservation did not preclude it from considering on the merits a petition that the European Commission had rejected in 1995 on the basis of a still earlier and successful petition by the same applicant to the UNHRC in 1992. See *Pauger v. Austria*, U.N. GAOR, Hum. Rts. Comm., 65th Sess., Annex, U.N. Doc. CCPR/C/65/D/716/1996 (1999). The UNHRC concluded that the petition, which presented new facts showing Austria's continuing violation of the petitioner's rights, had not been "examined" by the European Commission within the meaning of the Austrian reservation, but rather had been dismissed on procedural grounds. See *id.* ¶¶ 6.3-6.4.

In light of the *Pauger* decision and the 1994 General Comment, it is unclear whether the Committee's earlier decision in *V.E.M. v. Spain*, U.N. GAOR, Hum. Rts. Comm., 48th Sess., Annex, U.N. Doc. CCPR/C/48/D/467/1991 (1993), remains good law. In that case, the petitioner alleged a violation of article 6(1) of the European Convention concerning his dishonorable dismissal from the Spanish army. The European Commission of Human Rights dismissed his claim *ratione materiae* because the article did not cover proceedings concerning a dismissal from public service. See *id.* ¶ 2.5 ("[T]he Commission held that the guarantee of article 6 of the Convention did not cover disputes about public service, neither the question of access to it nor the dismissal from it."). *V.E.M.* then raised the same claim before the Committee. He relied on article 14(1) of the ICCPR, which the Committee later held in the *Casanovas* case applies to such dismissals. Rather than considering the merits of the petition, however, the Committee invoked Spain's forum shopping reservation, which precludes review of a petition that has previously been "submitted" to the European Commission (as opposed to the "considered" or "examined" language used in the reservations of other European nations). *Id.* ¶ 5.2. Such a reservation is arguably inconsistent with the Optional Protocol, since it precludes a petitioner whose claims are entirely outside the scope of the European Convention from later submitting those claims to the UNHRC.

## 2. The European Commission's Interpretation of "Substantially the Same" Matter

Prior to the recent merger of the European Court and European Commission of Human Rights, the European Convention barred the European Commission from considering a petition that is "substantially the same as a matter which . . . has already been submitted" to another human rights tribunal.<sup>117</sup> The Commission has issued two principal decisions applying the forum shopping ban in the context of rights defined differently in two human rights treaties.

In *Council of Civil Service Unions v. United Kingdom*,<sup>118</sup> a trade union and several of its members challenged, under the freedom of association right of European Convention Article 11, the government's refusal to permit employees of the Government Communications Headquarters from belonging to the union.<sup>119</sup> The United Kingdom invoked the treaty's forum shopping bar, arguing that a different labor group had already complained about the policy to the Committee on Freedom of Association ("CFA"), a quasi-judicial body within the International Labour Organization ("ILO") that examines complaints from workers' organizations and employees alleging violations of various labor rights treaties administered by the ILO.<sup>120</sup> Seeking to avoid dismissal of the petition, the union argued that the freedom of association rights protected by ILO Convention No. 87 and by Article 11 of the European Convention were not identical, in that the ILO treaty "contains no provisions comparable to Article 11 para. 2," which constrain the government's power to restrict the right to form and join

---

<sup>117</sup> European Convention, *supra* note 26, art. 27(1)(b). The identical standard now applies to petitions submitted directly to the European Court of Human Rights. See Protocol No. 11, *supra* note 36, art. 35(2)(b).

<sup>118</sup> App. No. 11603/85, 50 Eur. Comm'n H.R. Dec. & Rep. 228 (1987).

<sup>119</sup> This agency ensures the security of the United Kingdom's military and official communications. See *id.* at 230.

<sup>120</sup> Prior to the union's petition to the European Commission, the British Trades Union Congress had challenged the government's restrictions before the CFA. The CFA found that the government's actions were "not in conformity with [ILO] Convention No. 87," which protects freedom of association. *Id.* at 233. Its findings were adopted by the ILO's governing body. The report was later forwarded to the International Labour Conference Committee which "hope[d] that the Government would be able to find appropriate solutions to the problems raised by the application of the Convention." *Id.* at 233 (internal quotations omitted). For a discussion of petition procedures within the ILO, see BARTOLOMEI DE LA CRUZ ET AL., *supra* note 35, at 67-126, and 1 M.E. TARDU, *Procedures of the International Labour Organization and Other Specialized Agencies of the United Nations System*, in HUMAN RIGHTS: THE INTERNATIONAL PETITION SYSTEM pt. 1, § IIA (1985).

trade unions.<sup>121</sup> The United Kingdom responded that "there is a clear similarity of scope and purpose between the relevant provisions of the two Conventions, and the complaints arise out of the same facts."<sup>122</sup>

The Commission refused to dismiss the petition under the European Convention's forum shopping bar. The bulk of its analysis focused on the fact that the petitioners in the two proceedings were not the same. As to the different definitions of the rights protected by the two treaties, the Commission noted only that "the rights mentioned in Article 2 of the ILO Convention No. 87 of 1947 resemble to an extent the rights guaranteed in Article 11 para. 1 of the Convention."<sup>123</sup>

The same issue arose again in *Martin v. Spain*,<sup>124</sup> a case concerning the dismissal of factory workers who refused to return to work after toxic chemicals were transported near their factory. The workers' trade unions filed a complaint with the CFA, which rejected their claims.<sup>125</sup> The workers themselves then filed a complaint with the European Commission, neglecting to inform the tribunal of the prior proceeding. Spain invoked the forum shopping bar and the Commission agreed that the case should be dismissed.<sup>126</sup> As in *Council of Civil Service Unions*, the Commission focused principally on the identity of the parties in the two cases.<sup>127</sup> With respect to the overlapping rights issue, the Commission stated that both treaties guarantee the right to

---

<sup>121</sup> See *Council of Civil Service Unions*, *supra* note 118, at 236. It is uncertain how the petitioners would benefit from this difference between the two treaties, since the rights guaranteed in the ILO treaty appear to be broader than those guaranteed in article 11 and do not contain any limitations clauses. Compare ILO Convention No. 87, 68 U.N.T.S. 17, art. 2 (adopted July 9, 1948) ("Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."), and *id.* art. 5 ("Workers' and employers' organisations shall have the right to establish and join federations and confederations . . ."), with European Convention, *supra* note 26, art. 11(2) (permitting governments to restrict the right to join trade unions for "members of the armed forces, of the police or of the administration of the State").

<sup>122</sup> *Council of Civil Service Unions*, *supra* note 118, at 236.

<sup>123</sup> *Id.* at 237 (emphasis added).

<sup>124</sup> App. No. 16358/90, 73 Eur. Comm'n H.R. Dec. & Rep. 120 (1992).

<sup>125</sup> See *id.* at 131 (stating that the applicants complained to the ILO, who investigated the allegations and concluded that there had been no violation of the freedom of association).

<sup>126</sup> See *id.* at 134-35 (noting that the application to the Commission concerned substantially the same subject matter as the application to the ILO in violation of the spirit and letter of the Convention).

<sup>127</sup> As to the issue of the identity of parties, one commentator has characterized *Martin* as a "remarkable U-turn" from the Commission's decision in *Council of Civil Service Unions*. ZWART, *supra* note 43, at 181-82.

freedom of association, and that "applications concerning substantially the same subject-matter were submitted by the same complainants to two international bodies in turn."<sup>128</sup> It viewed this situation as "not compatible with either the spirit or the letter of the Convention, which seeks to avoid a plurality of international proceedings relating to the same cases."<sup>129</sup>

The Commission's reasoning in *Martin* suggests that it will interpret the Convention's forum shopping clause strictly and will dismiss successive petitions even if the treaty rights at issue are not defined identically. Such a construction is consistent with the European Convention's bar on simultaneous or successive petitions raising "substantially the same" issues as those previously submitted to another tribunal.<sup>130</sup> However, neither the Commission nor the ECHR has resolved the difficult issue faced by the UNHRC in the *Casanovas* case: whether an unsuccessful petition to another tribunal, alleging a violation of rights that are protected by the European Convention but not by another human rights treaty, can later be presented to the Commission.

---

<sup>128</sup> *Martin*, *supra* note 124, at 134.

<sup>129</sup> *Id.* at 133-34. The Commission invoked this same reasoning to dismiss two petitions by members of the Communist Party of Spain, who had been fed against their will by Spanish prison authorities while participating in a hunger strike. See *Fornieles v. Spain*, App. No. 17512/90, 73 Eur. Comm'n H.R. Dec. & Rep. 214 (1992) (dismissing the application as "substantially the same" as one previously submitted to the UNHRC). The petitioners challenged the forced feeding as cruel and degrading treatment and a violation of their rights to freedom of thought and freedom of expression. See *id.* at 222. One of the petitioners had previously submitted the same allegations to the UNHRC, and the second petitioner later joined that petition, but only after having petitioned the European Commission. Both petitioners then asked the UNHRC to "suspend" their petitions during the pendency of the European proceedings. The Commission rejected this attempt to circumvent the bar on simultaneous petitions, stating that "two international bodies . . . are simultaneously dealing with applications which are substantially the same," and characterizing the situation as "incompatible with the spirit and the letter of the Convention, which seeks to avoid a plurality of international proceedings relating to the same cases." *Id.* at 223. The Commission suggested, however, that it would have considered the petitioners' claims had they formally withdrawn their petitions from the UNHRC. See *id.* at 224 (stating that the "Commission has ruled that it is competent to look into an application submitted to another [tribunal] only where the matter has been [withdrawn]"); see also *Bordes v. France*, U.N. GAOR, Hum. Rts. Comm., 57th Sess., ¶ 5.2, U.N. Doc. CCPR/C/57/D/645/1995 (1996) (reviewing claims where a simultaneous petition pending before another tribunal had been withdrawn).

<sup>130</sup> See European Convention, *supra* note 26, art. 27(1)(b).

### 3. The Inter-American Commission's Interpretation of "Substantially the Same" Matter

Although the American Convention contains a forum shopping ban drafted in the same language as the ban contained in the European Convention, the Inter-American Commission's case law indicates that the Commission will entertain simultaneous and successive forum shopping petitions unless the factual allegations and legal claims raised therein are identical.

In *Fajardo v. Nicaragua*,<sup>131</sup> the Commission addressed a petition authored by a group of customs agents who were dismissed from their government employment in June 1993 after a strike. Nicaragua asserted that their strike was illegal because public employees do not enjoy the right to strike. The employees appealed their decision to the Supreme Court of Justice, which affirmed the illegality of the strike on grounds apparently unrelated to the government's argument.<sup>132</sup>

Immediately after the dismissals, two labor unions representing the dismissed employees filed a petition with the ILO's Trade Union Freedom Committee alleging violations of labor rights under two ILO Conventions.<sup>133</sup> One year later, the employees themselves filed a petition with the Inter-American Commission. When Nicaragua invoked the forum shopping ban, the employees argued that their claim before the Commission was limited to violations of the American Convention resulting from the Supreme Court's untimely and erroneous ruling,<sup>134</sup> whereas the petition before the ILO Committee related solely to the strike and its aftermath which had occurred one year earlier.<sup>135</sup>

The Inter-American Commission gave considerable attention to the duplication of proceedings issue. It began by noting that the alle-

---

<sup>131</sup> Case 11.381, Inter-Am. C.H.R. 535, OEA/ser. L./V./II.95, doc. 7 rev. (1997).

<sup>132</sup> The Supreme Court decision was based not on the governmental status of the employees, but rather on obstructive actions taken by them a year before the strike began. See *id.* ¶ 7 (stating that one year before the strike the "workers had put obstacles on the landing field"). The Commission's report does not discuss these events or their relationship to the strike.

<sup>133</sup> See *id.* ¶¶ 11, 13 (alleging violations under Conventions Nos. 87 and 88 and of Nicaraguan national labor law rights).

<sup>134</sup> Although Nicaraguan law required the Supreme Court to issue its decision within ninety days following the workers' appeal, the Court delivered its ruling in June 1994, one year after the workers' appeal was filed.

<sup>135</sup> See *id.* ¶¶ 7, 27 ("[T]he petitioners . . . reiterate that the contents of the petition formulated to the ILO deal with the violation of labor rights which occurred prior to issue of [this] ruling . . .").

gations in the two cases "must be objectively and subjectively the same for the petition to be declared inadmissible."<sup>136</sup> With regard to the two petitions' similar subject matters, the Commission noted that the case before it "deals with violations of freedom to association, the right to compensation for judicial error, violation of the right to a fair trial and violation of the right to judicial protection," whereas the ILO proceeding concerned "repression of these workers' trade union rights."<sup>137</sup> The Commission then quoted from the ILO Committee's report, which found that Nicaragua's actions did not violate the ILO treaties, but nevertheless recommended that the government reinstate the workers:

[T]he [ILO] Committee's recommendation refers to the right to strike and trade union freedom, and at no time deals with arbitrary court rulings and errors, and unjustified delay in the administration of justice, as are alleged in this petition . . . . The fact that the ILO frames the right of trade union organization as a fundamental right does not mean that the civil and political rights are exhausted in a single right, but rather that the right of trade union organization is a substantial labor right. The allegation of its violation, however, does not bar charges that other civil and political rights were violated in other spheres, as has occurred in the case . . . which is now before the Commission.<sup>138</sup>

As a result of the different factual allegations and legal claims contained in the two petitions, and because the ILO had no authority to address due process issues and had issued no binding ruling with respect to the strike, the Commission refused to apply the forum shopping bar to dismiss the employees' petition.<sup>139</sup>

---

<sup>136</sup> *Id.* ¶ 38. The Commission viewed this construction of its forum shopping rules as consistent with the practice of the UNHRC, which it characterized as "usually admit[ting] complaints taken up in other international organizations if the complaint refers to rights recognized [in the ICCPR], and . . . not established in the other international instrument that is being applied simultaneously even though the complaints are similar in terms of events." *Id.* ¶ 41. As explained above, however, the UNHRC's case law is unsettled on this very point. See *supra* Part II.A.1.

<sup>137</sup> *Fajardo*, *supra* note 131.

<sup>138</sup> *Id.* ¶¶ 44, 46.

<sup>139</sup> The Commission did not reach the merits of the petitioners' claims, merely declaring the petition admissible and making itself available to the parties for a friendly settlement. See *id.* ¶¶ 71-72. For an equally restrictive interpretation of the American Convention's forum shopping clauses, see *Mejía*, *supra* note 67, in which the Commission stated that the Convention's forum shopping bar

must be interpreted restrictively and only in relation to those assumptions in which the petition is limited to 'the same petition concerning the same individual.' This means that its application does not extend to alleged human rights violations concerning which the Commission or another similar organization has not yet given its opinion, even when they are included in a petition

The Inter-American Commission's approach to forum shopping, which in effect permitted the petitioners to split their legal claims between two international tribunals, is more liberal than the standard applied by its European counterpart. The Inter-American Commission was sensitive to the ILO Trade Union Freedom Committee's lack of authority to deal with the full scope of the petitioners' claims. The Commission did, however, permit the petitioners to raise a claim concerning the American Convention's right to freedom of association, the same right that was at issue before the ILO.<sup>140</sup> This suggests that the two proceedings may not have been as distinct as the petitioners contended, and that the Commission might have given more careful consideration to the contours of the rights protected in the two treaties before dismissing the government's arguments.

#### 4. The African Commission's Interpretation of "Cases Which Have Been Settled"

A discussion of the African Commission on Human Rights's forum shopping case law is hampered by the Commission's decision to publish only summaries of its decisions without any analysis. Based on a review of these summaries, the Commission has dismissed two successive petition forum shopping cases under the African Charter. In *Mpaka-Nsusu Andre Alphonse v. Zaire*, the Commission declared inadmissible a case concerning "false imprisonment" on the ground that "the communication [had] already been referred for consideration to the [UNHRC]."<sup>141</sup> In *Amnesty International v. Tunisia*, the Commission declared inadmissible a petition concerning "wrongful detention and torture" without even identifying the other international procedure.<sup>142</sup> A commentator examining the Commission's recent practice has stated, based on anecdotal evidence, that these two cases raise "a concern that the African Commission will be more strict" than other tri-

---

that also contains other questions that by their nature are inadmissible.

*Id.* at 1146 (section entitled "Duplication of Proceedings").

<sup>140</sup> See *Fajardo*, *supra* note 131, ¶ 38 ("The claim before the Commission deals with violations of freedom to association . . .").

<sup>141</sup> Comm. No. 15/88, *Seventh Activity Report of the African Commission on Human and Peoples' Rights, 1993-1994*, 30th Sess., June 13th-15th, 1994, Tunis, Tunisia, at case no. 14, available in *African Human Rights Resource Center* (visited Sept. 13, 1999) <<http://www1.umn.edu/humanrts/africa/ACHPR2.htm>> ("Considering that the communication has already been referred for consideration to the Human Rights Committee . . . the communication [is declared] inadmissible.").

<sup>142</sup> See *id.* at Comm. No. 59/92, case no. 39 ("The African Commission on Human and Peoples' Rights . . . [decides] to declare the communication of Amnesty International against the Republic of Tunisia inadmissible.").



bunals in its forum shopping jurisprudence.<sup>143</sup> This conclusion is based on her suspicion "that the *Mpaka-Nsusu* case before the [UNHRC] related to different issues from those before the African Commission."<sup>144</sup>

### B. *Diverging and Conflicting Approaches to Human Rights Norms*

In addition to the different interpretations of the forum shopping clauses contained in the treaties, human rights tribunals have also differed over the content of the rights and freedoms shared by more than one treaty. These differing standards can be broadly categorized as either divergences or conflicts. If the obligations created by one international agreement are more onerous than the obligations created by a second agreement concerning the same subject, a divergence of legal norms exists. A true conflict is created only where a signatory to the two agreements cannot comply with both treaty obligations at the same time.<sup>145</sup>

The cases discussed below present three case studies of diverging and conflicting human rights norms. In the first example, divergence by the UNHRC resulted in a lower standard of protection under the ICCPR after the Committee gave careful consideration to a landmark ruling of the ECHR. In the second case study, the UNHRC set a

---

<sup>143</sup> Murray, *supra* note 61, at 425.

<sup>144</sup> *Id.*

<sup>145</sup> As Professor Jenks observed in a classic article nearly half a century ago:

A *divergence* between treaty provisions dealing with the same subject or related subjects does not in itself constitute a conflict. Two law-making treaties with a number of common parties may deal with the same subject from different points of view or be applicable in different circumstances, or one of the treaties may embody obligations more far-reaching than, but not inconsistent with, those of the other. A *conflict* in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties.

C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT'L L. 401, 425-26 (1953) (emphasis added). Professor Meron has questioned the significance of the divergence/conflict distinction as a theoretical exercise. He notes that

[it] is indeed difficult to determine *in abstracto* whether a difference between norms contained in two instruments constitutes a conflict or merely a divergence. This determination can only be made *in concreto* taking into account the entire complex of relevant legal provisions, the reservations made, and the factual circumstances, including the identities of the particular States involved.

HUMAN RIGHTS LAW-MAKING, *supra* note 13, at 143. Professor Meron's observation highlights the crucial role played by human rights jurists in clarifying whether treaties in fact create diverging or conflicting rights and legal obligations for States. The jurist's role is discussed in detail below.

higher standard of protection than its European neighbors, but did not expressly distinguish the approach it had adopted.<sup>146</sup> The third example concerns the intersection between two potentially conflicting norms. It demonstrates how several tribunals have engaged in a dialogue over that intersection to avoid imposing conflicting obligations on States parties.

### 1. Higher Regional Standards: The Death Row Phenomenon

Over the last decade, a large number of national courts and human rights tribunals have considered whether prolonged detention on death row and its associated physical and psychological consequences amount to inhuman or degrading treatment.<sup>147</sup> Such treatment is prohibited by numerous national constitutions and human rights treaties.<sup>148</sup>

The ECHR first addressed the so-called "death row phenomenon" issue in 1989 in *Soering v. United Kingdom*.<sup>149</sup> The Court concluded that the extradition of Jens Soering to face a capital murder charge in the United States and await execution on death row would violate the European Convention's prohibition of degrading treatment or punishment. The ECHR's ruling was highly fact-specific. The Court examined the six to eight year delay prior to execution, the conditions on death row, Soering's age and mental state, the procedures available to challenge his conviction and sentence, and the possibility of extradition to another country where capital punishment had been

---

<sup>146</sup> What is most striking about these first two examples is that the diverging jurisprudence relates to rights that are defined identically or nearly so in two or more treaties. Where, by contrast, texts of two or more human rights treaties differ, a concomitant divergence in the jurisprudence of the tribunals interpreting those texts is to be expected under accepted principles of treaty construction.

<sup>147</sup> The United States Supreme Court recently joined the growing number of judicial bodies asked to address this question. See *Knight v. Florida*, 120 S. Ct. 459, 462-63 (mem.) (1999) (Breyer, J., dissenting from denial of certiorari) (citing to decisions of the ECHR, the UNHRC, and national courts as supporting defendant's allegation that confinement on death row for 20 years or more violates the Eighth Amendment's prohibition on cruel and unusual punishment).

<sup>148</sup> See Richard B. Lillich, *Harmonizing Human Rights Law Nationally and Internationally: The Death Row Phenomenon as a Case Study*, 40 ST. LOUIS L.J. 699 (1996) (referencing various constitutions and treaties that prohibit infliction of inhuman or degrading treatment upon prisoners). For a recent decision by the Inter-American Commission condemning the death row detention of a criminal defendant for more than 18 years, see *Andrews v. United States*, Case 11.139, Inter-Am. C.H.R. 1, OEA/ser. L/V/II.98, doc.7 rev, ¶ 178 (Feb. 19, 1998) (on file with author and the *University of Pennsylvania Law Review*).

<sup>149</sup> 161 Eur. Ct. H.R. (ser. A) (1989).

abolished.<sup>150</sup>

While the ECHR was considering the *Soering* case, the UNHRC was also reviewing a petition involving the death row phenomenon. In *Pratt & Morgan v. Jamaica*,<sup>151</sup> two condemned prisoners argued that their detention on death row for nearly ten years violated the ICCPR, which bans inhuman and degrading treatment in language that is essentially identical to language used in the European Convention.<sup>152</sup> The Committee, apparently unaware that *Soering* was pending before the European tribunals, adopted "a somewhat more conservative approach than the European Court."<sup>153</sup> Rejecting the petitioners' claim on the facts presented, the UNHRC held that "[i]n principle prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners."<sup>154</sup> It stressed, however, that "an assessment of the circumstances of each case would be necessary."<sup>155</sup>

In the years following *Pratt & Morgan*, the UNHRC continued to reject allegations that prolonged confinement on death row alone violates the ICCPR. The UNHRC did, however, expressly seek to harmonize its views with those of the ECHR by adopting a fact-specific analysis. Thus, in *Kindler v. Canada*,<sup>156</sup> the Committee, while reaffirming that death row detention does not *per se* violate the ICCPR, gave "careful regard to" the ECHR's approach, adopting much of the Court's reasoning while distinguishing the unique facts of *Soering* from the case before it.<sup>157</sup>

---

<sup>150</sup> See *id.* at 42-44 (discussing the particular factual circumstances of the case).

<sup>151</sup> U.N. GAOR, Hum. Rts. Comm., 44th Sess., Supp. No. 40, Nos. 210/1986 & 225/1987 at 222, U.N. Doc. A/44/40 (1989).

<sup>152</sup> The relevant articles of the European Convention and the ICCPR are virtually identical. Compare European Convention, *supra* note 26, art. 3 ("No one shall be subjected to . . . inhuman or degrading treatment or punishment."), with ICCPR, *supra* note 24, art. 7 ("No one shall be subjected to . . . cruel, inhuman or degrading treatment or punishment.").

<sup>153</sup> Richard B. Lillich, *Towards the Harmonization of International Human Rights Law*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG 453, 466 (Ulrich Beyerlin et al. eds., 1995).

<sup>154</sup> *Pratt & Morgan*, *supra* note 151, ¶ 13.6.

<sup>155</sup> *Id.*

<sup>156</sup> U.N. GAOR, Hum. Rts. Comm., 48th Sess., Supp. No. 40, Annex XII, at 138, 151 U.N. Doc. A/48/40 (1993); see also *Barrett v. Jamaica*, U.N. GAOR, Hum. Rts. Comm., 44th Sess., Supp. No. 40, Annex IX, at 254, & App., U.N. Doc. A/47/40 (1992) (separate opinion of Committee member Chanet) (citing *Soering* as support for rejecting the majority's position that the 14-year stay on death row did not violate the ICCPR).

<sup>157</sup> The Committee stated:

In determining whether . . . the imposition of capital punishment could con-

In cases following *Kindler*, however, the UNHRC's promise to conduct a fact-specific review of each case has not always been realized. In *Francis v. Jamaica*, the Committee found that twelve years on death row, together with numerous aggravating factors including beatings by prison wardens, violated the ICCPR.<sup>158</sup> In other decisions involving equally lengthy periods of detention, however, the Committee has consistently rejected petitioners' claims, notwithstanding the fact that several national courts have relied upon the ECHR's *Soering* decision to adopt a more pro-petitioner approach.<sup>159</sup>

Tension within the Committee itself over this restrictive approach surfaced in *Johnson v. Jamaica*,<sup>160</sup> in which an eleven-member majority of the Committee acknowledged "that its [own death row] jurisprudence [had] given rise to controversy," and, as a result, decided to "set out its position in detail."<sup>161</sup> Although the majority stated that it would continue to apply a facts and circumstances approach to death row petitions, its opinion contained more restrictive language than in

stitute a violation of article 7, the Committee will have regard to the relevant personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent. In this context the Committee has had careful regard to the judgment given by the European Court of Human Rights in the *Soering v. United Kingdom* case. It notes that important facts leading to the judgment 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.

*Kindler*, *supra* note 156, ¶ 15.3 (footnote omitted).

<sup>158</sup> U.N. GAOR, Hum. Rts. Comm., 54th Sess., ¶¶ 9.1-9.2, U.N. Doc. CCPR/C/54/D/606/1994 (1995) (concluding that the "circumstances reveal[ed] a violation of Jamaica's obligations under . . . the Covenant").

<sup>159</sup> See *id.* ¶ 4.4 (citing decisions of the India Supreme Court, the Zimbabwe Supreme Court, and the Judicial Committee of the Privy Council that followed *Soering* and found constitutional violations based on prolonged death row detentions).

<sup>160</sup> U.N. GAOR, Hum. Rts. Comm., 56th Sess., Annex, U.N. Doc. CCPR/C/56/D/588/1994 (1996).

<sup>161</sup> *Id.* ¶ 8.1. The majority reasoned that because the death penalty was not per se prohibited by the ICCPR, merely placing a defendant on death row to await execution could not in itself violate the treaty. The ICCPR, however, also strongly encourages States to abolish the death penalty and limit its use to the most serious crimes. See *id.* ¶ 8.2(a) (stating that the ICCPR places severe restrictions on the use of the death penalty). Imposing 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. . . ." *Id.* ¶ 8.4.

prior cases. Specifically, the majority stated that a treaty violation would be found only if a petitioner could demonstrate "compelling circumstances of the detention" other than its length.<sup>162</sup> After *Johnson*, it seems unlikely that the Committee will find a violation of the ICCPR unless the prisoner's treatment has been exceptionally egregious.<sup>163</sup>

What prompted the UNHRC to retreat from its use of a fact-specific analysis paralleling the approach adopted by the ECHR? Although the Committee has not explained the shift away from European jurisprudence, one possible justification may be found in the differing legal and political climate in many States parties to the ICCPR as compared to the climate existing in European nations. As former Committee member Rosalyn Higgins has written, "what may be an appropriate and sensitive interpretation for the Western European democracies is not necessarily so for a global system embracing highly diverse political and economic systems."<sup>164</sup> Stated more candidly, death row conditions in many States subject to the Committee's jurisdiction may not be compatible with the more stringent requirements of the *Soering* case. Were the Committee to adopt the ECHR's more rigorous approach, it would be setting a standard of protection so far out of touch with domestic laws that many States might be unwilling to follow it.<sup>165</sup>

---

<sup>162</sup> *Id.* ¶ 8.5. The six dissenters strongly objected to this formulation as demonstrating "a lack of flexibility that would not allow [the Committee] to examine . . . the circumstances of each case . . ." *Id.* (dissenting individual opinions of Committee members Bhagwati, Bruni, Celli, Pocar, and Vallejo). The dissenters predicted that the Committee would rarely find a violation of the ICCPR in death row phenomenon cases, even where time spent awaiting execution exceeds 15 years. *Id.* at app. B (dissenting opinion of Committee member Chanet) (hypothesizing that this decision would not allow for a finding of cruel, degrading, or inhuman punishment regardless of the length of time a prisoner is on death row).

<sup>163</sup> For recent decisions reaffirming the majority's approach in *Johnson*, see *Bickaroo v. Trinidad and Tobago*, U.N. GAOR, Hum. Rts. Comm., 61st Sess., Annex, ¶ 5.3, U.N. Doc. CCPR/C/61/D/555/1993 (1997), and *LaVende v. Trinidad and Tobago*, U.N. GAOR, Hum. Rts. Comm., 61st Sess., Annex, ¶ 5.3, U.N. Doc. CCPR/C/61/D/554/1993 (1997).

<sup>164</sup> Higgins, *supra* note 47, at 7-8. It is significant that *Soering* involved extradition of a defendant to the United States to face a possible stay on death row. Nearly all European nations, by contrast, no longer impose death sentences. See *Soering*, *supra* note 149, ¶ 102 ("De facto the death penalty no longer exists in time of peace in the Contracting States to the Convention."). It is thus extremely unlikely that the European tribunals will ever be faced with a challenge to the death row phenomenon within a European nation.

<sup>165</sup> If the Committee was concerned about the political palatability of its decisions, its anxiety appears to have been well-founded. In October 1997, Jamaica denounced the Optional Protocol, becoming the first State ever to do so. Jamaica's action represents a potentially grave threat to supranational human rights adjudication. See Natalia

The Committee's experience with Jamaica illustrates this problem. As of August, 1999, Jamaica had been named as a defendant in 177 cases (many involving the death penalty and death row phenomenon), far more than any other signatory State to the Optional Protocol.<sup>166</sup> Unlike some other States, Jamaica has openly resisted the Committee's authority: it has failed to submit periodic reports as required under the ICCPR and has frequently ignored the Committee's recommendations.<sup>167</sup> Faced with this intransigent stance, the majority in *Johnson* may have refrained from adopting a standard requiring a detailed factual review of each death row case, a review that Jamaica could avoid by carrying out hasty executions. The majority's more cautious approach also conserves the Committee's authority for extreme cases such as *Francis*, where there can be little doubt that the petitioner's rights were violated.

For purposes of analyzing diverging human rights norms, the UNHRC's approach suggests that political or pragmatic concerns may lead jurists sitting on one human rights tribunal to adopt approaches that differ from those adopted by other tribunals when interpreting treaty texts that on paper are identical. The UNHRC's actions, however, also demonstrate that jurists can more carefully refine their reasoning and analysis by engaging in a dialogue with their juridical neighbors over shared legal standards. Thus, putting to one side the merits of the Committee's restrictive approach to death row cases, its jurisprudence has plainly been influenced by the existence of analo-

---

Schiffirin, *Jamaica Withdraws the Right of Individual Petition Under the International Covenant on Civil and Political Rights*, 92 AMER. J. INT'L L. 563, 563 (1998) (stating that Jamaica may "roll back the international legal protection of human rights" by denouncing the Optional Protocol to the ICCPR). For a discussion of Jamaica's actions and their significance for structuring forum shopping reform, see *infra* Part IV.B.2.

<sup>166</sup> See Statistical Survey of Individual Complaints Dealt with by the Human Rights Committee Under the Optional Protocol to the ICCPR (Aug. 3, 1999), available in *United Nations High Commissioner for Human Rights* (last modified Mar. 12, 1999) <<http://www.unhchr.ch>> (showing that the country closest to Jamaica in number of cases naming the country as defendant is Canada with 89).

<sup>167</sup> Compare *Johnson*, *supra* note 160, at app. C, ¶ 4 (dissenting opinion of Committee member Aguilar Urbina) (noting that Jamaica has refused "to comply with its obligation to report to the Human Rights Committee"), and *Annual General Assembly Report of the Human Rights Committee*, U.N. GAOR, Hum. Rts. Comm., 50th Sess., Supp. No. 40 ¶ 549, U.N. Doc. A/50/40 Vol.I (1995), available in Treaty Bodies Database (visited Nov. 19, 1999) [hereinafter 1995 Annual Report] <<http://www.unhchr.ch/tbs/doc.nsf>> (noting Jamaica's explicit refusal to implement the Committee's recommendations in cases decided under the Optional Protocol), with Christian Tomuschat, *Making Individual Communications an Effective Tool for the Protection of Human Rights*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG 615, 629 (Ulrich Beyerlin et al. eds., 1995) (noting that Jamaica has always complied with the Committee's requests not to carry out death sentences pending consideration of petitions).

gous European precedents. It can hardly be an accident that the majority in *Johnson* felt obligated to explain its reasoning in greater detail when petitioners had repeatedly asked it to follow national and international case law adopting a more pro-petitioner approach. Because that more rights-protective case law has persuaded several dissenting Committee members, it will likely continue to be a subject of debate by the UNHRC in future cases.

## 2. Higher Global Standards: Discrimination Between Conscientious Objectors

The UNHRC's restrictive approach to the death row phenomenon should not mislead observers into believing that it always adopts a less rights-protective standard than regional tribunals. To the contrary, several recent decisions demonstrate the Committee's willingness to interpret rights shared by several human rights treaties in a manner more favorable to individuals than the ECHR or the European Commission. The Committee's recognition of the emerging right of conscientious objection clearly illustrates this trend.<sup>168</sup>

Both the European Commission and the UNHRC initially interpreted their respective treaties as *not* protecting a right to conscientious objection.<sup>169</sup> Petitioners imprisoned for failing to perform military service or substituted civilian service alleged that these punishments violated the freedom of conscience and religion guaran-

---

<sup>168</sup> See Emily N. Marcus, Note, *Conscientious Objection as an Emerging Human Right*, 38 VA. J. INT'L L. 507 (1998) (discussing how the UNHRC is beginning to acknowledge conscientious objection as a human right). A similar trend is found in the UNHRC's extension of due process guarantees to civil servants denied relief before the European Commission. See *Casanovas*, *supra* note 101. For another example of the UNHRC considering the merits of a petition previously rejected by the European Commission, see *Coeriel v. The Netherlands*, U.N. GAOR, Hum. Rts. Comm., 52d Sess., Annex, ¶ 10.5, U.N. Doc. CCPR/C/52/D/453/1991 (1994), in which the UNHRC concluded that the Netherlands had violated the Hindu petitioners' right of privacy when it denied a request to change their last names to follow their religious beliefs. The European Commission had previously rejected a challenge by the same petitioners under the freedom of religion clause of the European Convention. See *id.* ¶ 2.4 (stating that the complaint did not establish "that their religious studies would be impeded by the refusal to modify their surnames").

<sup>169</sup> See, e.g., *L.T.K. v. Finland*, U.N. GAOR, Hum. Rts. Comm., 25th Sess., at 61, ¶ 5.2, U.N. Doc. CCPR/C/OP/1 (1985) ("The Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3(c)(ii) of article 8, can be construed as implying that right."); *Conscientious Objectors v. Denmark*, App. No. 7565/76, 9Eur. Comm'n H.R. Dec. & Rep. 117, 118 (1987) ("[T]he right of conscientious objection is not included among the rights and freedoms guaranteed by the Convention.").

teed by the two treaties.<sup>170</sup> Both the UNHRC and the Commission, however, relied upon another clause exempting from the treaties' prohibition of forced or compulsory labor "any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service."<sup>171</sup> Based on this language, both tribunals concluded that the treaties did "not give conscientious objectors the right to exemption from military service, but leaves each contracting state to decide whether or not to grant such a right."<sup>172</sup>

The European Commission has adhered to this interpretation in recent decisions,<sup>173</sup> and it has also rejected a challenge to a Swedish law that exempts Jehovah's witnesses from both military service and civilian service as a substitute, but requires substitute civilian service for those whose beliefs are not religious in nature.<sup>174</sup> The UNHRC, by contrast, has slowly modified its practice to recognize a human right of conscientious objection and the right of different groups of objectors to be treated equally. After alluding to the possible existence of this right in a 1991 decision,<sup>175</sup> the Committee formally modified its position in a 1993 General Comment on freedom of thought, con-

---

<sup>170</sup> See European Convention, *supra* note 26, art. 9(1); ICCPR, *supra* note 24, art. 18(1) ("Everyone shall have the right to freedom of thought, conscience and religion . . . [and] to manifest his religion or belief in worship, observance, practice and teaching.").

<sup>171</sup> European Convention, *supra* note 26, art. 4(3)(b); accord ICCPR, *supra* note 24, art. 8(3)(c)(ii) (exempting from the prohibition of compulsory labor "any service of a military character, and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors").

<sup>172</sup> A. v. Switzerland, App. No. 10640/83, 38 Eur. Comm'n H.R. Dec. & Rep. 219, 223 (1984); accord *L.T.K.*, *supra* note 169 and accompanying text (stating that the right to conscientious objection is not covered by the ICCPR).

<sup>173</sup> See *Johansen v. Norway*, App. No. 10600/83, 44 Eur. Comm'n H.R. Dec. & Rep. 155, 159 (1985) ("There is no possibility of exemption from both military and civilian service, except for medical reasons.").

<sup>174</sup> See *N. v. Sweden*, App. No. 10410/83, 40 Eur. Comm'n H.R. Dec. & Rep. 203, 208 (1985) ("[M]embership of Jehovah's Witnesses constitutes strong evidence that the objections to compulsory service are based on genuine religious convictions. No comparable evidence exists in regard to individuals who object to compulsory service without being members of a community with similar characteristics.").

<sup>175</sup> See *J.P. v. Canada*, U.N. GAOR, Hum. Rts. Comm., 43d Sess., Annex, ¶ 4.2, U.N. Doc. CCPR/C/43/D/446/1991 (1991) ("Although article 18 of the Covenant certainly protects the right to hold, express and disseminate opinions and convictions, including conscientious objection to military activities and expenditures, the refusal to pay taxes on grounds of conscientious objection clearly falls outside the scope of protection of this article.").



science, and religion.<sup>176</sup>

Later that year, the Committee applied its new approach in *Brinkhof v. The Netherlands*.<sup>177</sup> A military tribunal had sentenced Brinkhof, a pacifist, to twelve months imprisonment for refusing to perform military or substitute civilian service. After exhausting his appeals, Brinkhof petitioned the European Commission, alleging that a Dutch statute exempting only Jehovah's Witnesses from all compulsory service was incompatible with the European Convention's prohibition of discrimination. Upholding prior case law, the Commission summarily rejected this claim.<sup>178</sup>

Brinkhof then filed a petition with the UNHRC, alleging that the Dutch law discriminated against individuals holding non-religious objections to compulsory service. The government raised the same arguments that had persuaded the European Commission to dismiss the petition, namely that Jehovah's Witnesses are part of "a closely-knit social group with strict rules of behaviour, membership of which is said to constitute strong evidence that the objections to military and substitute service are based on genuine religious convictions."<sup>179</sup> Without addressing the prior European precedents, the Committee rejected the government's reasoning:

The Committee considers that the exemption of only one group of conscientious objectors and the inapplicability of exemption for all others cannot be considered reasonable. In this context, the Committee refers to its General Comment on article 18 and emphasizes that, when a right of conscientious objection to military service is recognized by a State

---

<sup>176</sup> The General Comment states:

[A] growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs . . .

*General Comment 22, Article 18*, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 48th Sess., at 38, U.N. Doc. HRI/GEN/1/Rev.1 (1994) (emphasis added).

<sup>177</sup> U.N. GAOR, Hum. Rts. Comm., 48th Sess., Annex, U.N. Doc. CCPR/C/48/D/402/1990 (1993).

<sup>178</sup> See *id.* ¶ 7.4 (citing European Commission decisions).

<sup>179</sup> *Id.* ¶ 9.2. The Netherlands could not seek to dismiss Brinkhof's petition on successive petition forum shopping grounds because it had not filed a reservation to the Optional Protocol prohibiting the UNHRC from considering such petitions.

party, no differentiation shall be made among conscientious objectors on the basis of the nature of their particular beliefs.<sup>180</sup>

On the facts presented, however, the Committee refused to find a violation of the ICCPR because Brinkhof had not demonstrated that "his convictions as a pacifist are incompatible with the system of substitute service in the Netherlands."<sup>181</sup> However, the Committee suggested that a violation might be found in another case, and it urged the Netherlands to amend its laws and regulations and to "give equal treatment to all persons holding equally strong objections to military and substitute service."<sup>182</sup>

Significantly, the Committee in *Brinkhof* did not analyze or distinguish the European Commission's more restrictive approach to conscientious objection claims. This omission is unfortunate because the Committee lost a valuable opportunity to engage in a dialogue with the Commission over textually identical human rights norms shared by both the ICCPR and the European Convention. In fact, a large body of international practice supports the Committee's more liberal interpretation of the ICCPR, and the UNHRC might have invoked this practice both to justify its decision in *Brinkhof* and to encourage the Commission to reconsider its more restrictive and arguably outdated approach.<sup>183</sup> Moreover, by overtly considering and distinguishing

---

<sup>180</sup> *Id.* ¶ 9.3.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* ¶ 9.4.

<sup>183</sup> Numerous U.N. resolutions and recommendations have advocated formal recognition of a right to conscientious objection, and European regional organizations have also urged European nations to recognize this right. See Ulrike Davy, *Refugees from Bosnia and Herzegovina: Are They Genuine?*, 18 SUFFOLK TRANSNAT'L L. REV. 53, 110 nn.175-77 (1995) (noting these sources); Marcus, *supra* note 168, at 532-36 (discussing the various groups and organizations that have advocated a formal recognition of a right to conscientious objection). That these recommendations were made by both European and U.N. bodies suggests that the European tribunals may eventually reconsider their approach in light of the Committee's recent practice. Some evidence of this reconsideration can be found in the European Commission's recent decision in *Tsirlis v. Greece*, in which two Jehovah's Witness ministers were initially denied an exemption from military service and imprisoned notwithstanding the fact that they belong to a "known religion" in Greece. *Tsirlis v. Greece*, *European Court of Human Rights—Judgments and Decisions* 1997-III, 908, 942, App. No. 19233/91, 25 Eur. H.R. Rep. 198, ¶¶ 118-19 (1998), *aff'd on other grounds*, No. 54/1996/673/859-60, available in *European Court of Human Rights Home Page* (May 29, 1997) <<http://www.dhcour.coe.fr/eng/Judgments.htm>>. The Commission found that the Greek authorities' failure to grant a speedy exemption to the prisoners was discriminatory because members of the Orthodox Church would have received an exemption without difficulty. The ECHR affirmed the Commission's decisions on other grounds and did not reach the discrimination issue. *Id.* ¶¶ 68-70.

relevant precedents from another human rights tribunal, the Committee could have bolstered the quality of its own reasoning and signaled to individual petitioners and States parties that its decision to diverge from its European counterpart did not occur by chance or inadvertence.

### 3. Avoiding Conflicting Standards: Racist Speech

Human rights standards can conflict as well as diverge. When two tribunals interpret treaty texts that are in tension with each other, they may issue conflicting decisions that make it impossible for a defending State to comply with both of its international obligations. The tension between protecting freedom of expression and prohibiting the dissemination of racist speech is one area in which a true conflict of human rights norms and decisions may occur.<sup>184</sup> At least four tribunals have addressed the intersection between these two opposing principles: the ECHR, the European Commission, CERD, and the UNHRC.

The European Commission first addressed the racist speech issue in *Glimmerveen & Hagenbeek v. The Netherlands*,<sup>185</sup> concluding that the Netherlands had not violated the free expression rights of two petitioners whom it had prosecuted for possessing and intending to distribute pamphlets advocating white superiority and inciting racial hatred against foreigners. Noting that the European Convention did not grant individuals the right to destroy the rights and freedoms of

---

<sup>184</sup> The Race Convention requires its signatories to:

[C]ondemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, *with due regard* to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin . . .

Race Convention, *supra* note 29, art. 4(a) (emphasis added). The "due regard" clause of article 4 requires States to consider, when prohibiting racist speech, the right to freedom of expression, which is referred to in article 5(d)(viii) of the Race Convention and protected by article 19 of the Universal Declaration, article 19 of the ICCPR, article 10 of the European Convention, and other international treaties.

<sup>185</sup> App. Nos. 8348/78 and 8406/78, 18 Eur. Comm'n H.R. Dec. & Rep. 187 (1979).

other members of society,<sup>186</sup> the Commission reviewed the contents of the leaflets and concluded that they were clearly aimed at promoting racial discrimination. Had the Netherlands allowed the petitioners "to proclaim freely and without penalty their ideas," it would have "encourage[d] the discrimination prohibited by the provisions of the European Convention . . . and the [Race Convention]."<sup>187</sup> The Commission thus relied upon the U.N. treaty to support its conclusion that the petitioners' free expression rights had not been violated.<sup>188</sup>

The CERD next addressed the intersection of the two competing international obligations in its General Comment on article 4 of the Race Convention.<sup>189</sup> The Committee adopted the position that "the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression."<sup>190</sup> Although acknowledging that free expression is protected in the Universal Declaration of Human Rights, the Committee stated that the "exercise of this right carries special duties and responsibilities, specified in . . . the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance."<sup>191</sup> With these statements, CERD appeared to place the States' obligation to criminalize racist speech in a position superior to the right to free expression, adopting a stance in harmony with that previously espoused by the European Commission.<sup>192</sup>

---

<sup>186</sup> See *id.* at 194-95 (citing article 17 of the European Convention). Article 17 provides that:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

*Id.*

<sup>187</sup> *Id.* at 196.

<sup>188</sup> The Commission reaffirmed this position three years later, upholding against a free expression challenge a judicial order prohibiting the display and sale of brochures stating that the holocaust was a "zionist swindle or lie." *X. v. Germany*, App. No. 9235/81, 29 Eur. Comm'n H.R. Dec. & Rep. 194, 194 (1982). Carefully interpreting the free speech provisions of the European Convention, the Commission reasoned that the order not only served "a legitimate purpose recognised by the Convention (namely the protection of the reputation of others), but could also be considered as necessary in a democratic society" to promote "the principles of tolerance and broad-mindedness." *Id.* at 198.

<sup>189</sup> *General Recommendation XV on Article 4 of the Convention*, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 42d Sess., at 68, U.N. Doc. HRI/GEN/IV/Rev.1 (1994).

<sup>190</sup> *Id.* ¶ 4.

<sup>191</sup> *Id.*

<sup>192</sup> The CERD, however, has not yet had an opportunity to apply these principles to

A more significant challenge to the tribunals' ability to harmonize the clash between free expression and race discrimination occurred in *Jersild v. Denmark*.<sup>193</sup> In *Jersild*, a journalist who produced a television program about a group of racist youths living in Copenhagen was charged with aiding and abetting the making of racially insulting and degrading statements. Jersild conducted extensive interviews of the youths, during which they made numerous racist remarks about blacks and immigrant workers. After the journalist broadcast excerpts of these interviews as part of a news documentary, a Danish prosecutor brought criminal proceedings against the youths for making statements insulting or degrading to a group of persons on the basis of their race and national origin. Jersild was convicted of aiding and abetting the making of these statements. Jersild unsuccessfully challenged his conviction before the Danish courts and then petitioned the European tribunals for relief.

The European Commission ruled in Jersild's favor<sup>194</sup> and Denmark appealed to the ECHR, which affirmed the Commission's ruling by a twelve to seven vote.<sup>195</sup> Jersild argued before the Court that "a fair balance had to be struck between the 'protection of the reputation or rights of others' and the applicant's right to impart information."<sup>196</sup> He based this argument on article 4 of the Race Convention, which requires States to have "due regard" for freedom of expression when criminalizing the dissemination of ideas based on racial superiority or hatred.<sup>197</sup> The ECHR expanded upon Jersild's effort to harmonize the Race Convention's obligations and the free expression rights of the European Convention. It considered the competing interests at stake

---

a specific case brought before it under the optional petition procedure of the Race Convention.

<sup>193</sup> 298 Eur. Ct. H.R. (ser. A) (1994).

<sup>194</sup> App. No. 15890/89, 19 Eur. H.R. Rep. 1 (1995) (Commission report). The Commission stated that it had "taken into consideration" Denmark's obligation under the Race Convention, but it also stressed the need to review broadcasts "in the light of the context of the programme and all the circumstances of the case," and to strike "a fair balance" between the rights of the targets of the racist attacks and Jersild's right to communicate information to the public. *Id.* ¶ 41. It then considered Jersild's motivation for broadcasting the interview with the youths and its relationship to the program as a whole, concluding by a twelve to four vote that Jersild's prosecution violated the right to freedom of expression protected by the European Convention. *See id.* ¶¶ 42-45 (concluding that although the applicants' remarks were "highly offensive," article 10 was breached because "the Government [did] not suffice to show that the interference complained of was proportionate to the legitimate aim pursued").

<sup>195</sup> *Jersild*, *supra* note 193, at 27.

<sup>196</sup> *Id.* ¶ 28.

<sup>197</sup> *See* Race Convention, *supra* note 29, art. 4(a).

in an effort to avoid creating a conflict between the two treaties:

The Court would emphasise at the outset that it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations. . . . Consequently, the object and purpose pursued by the UN Convention are of great weight in determining whether the applicant's conviction, which . . . was based on a provision enacted in order to ensure Denmark's compliance with the UN Convention, was "necessary" within the meaning of Article 10 §2.

In the second place, *Denmark's obligations under Article 10 must be interpreted, to the extent possible, so as to be reconcilable with its obligations under the UN Convention.* In this respect it is not for the Court to interpret the "due regard" clause in Article 4 of the U.N. Convention, which is open to various constructions. *The Court is however of the opinion that its interpretation of Article 10 of the European Convention in the present case is compatible with Denmark's obligations under the U.N. Convention.*<sup>198</sup>

The Court then analyzed the youths' statements and the context of their broadcast in detail, stressing that Jersild "did not make the objectionable statements himself but assisted in their dissemination in his capacity of television journalist responsible for a news programme."<sup>199</sup> The Court contrasted Jersild's conviction with that of the youths, stating that "[t]here can be no doubt that the[ir] remarks . . . were more than insulting to members of the targeted groups and did not enjoy the protection of [the Convention's freedom of expression clause]."<sup>200</sup>

When Denmark presented its next report on its efforts to combat

---

<sup>198</sup> *Jersild*, *supra* note 193, ¶ 30 (emphasis added). The ECHR also considered comments by CERD regarding Jersild's case made during Denmark's periodic report to CERD. The Court noted that CERD was

[D]ivided in its comments on [Jersild's] conviction . . . Whilst some members welcomed it as "the clearest statement yet, in any country, that the right to protection against racial discrimination took precedence over the right to freedom of expression", other members considered that "in such cases the facts needed to be considered in relation to both rights." The Court concluded from these statements that "[t]he effects of the 'due regard' clause . . . have given rise to differing interpretations," a fact that provided further support for its own circumspect, fact-intensive approach.

*Id.* ¶ 21.

<sup>199</sup> *Id.* ¶ 31.

<sup>200</sup> *Id.* ¶ 35. In reaching this result, the ECHR relied on the European Commission's decisions in *Glimmerveen*, *supra* note 185, and *Künen v. Germany*, App. No. 12194/86, 56 Eur. Comm'n H.R. Dec. & Rep. 205 (1988). See *Jersild*, *supra* note 193, ¶ 35 (citing cases in support of the contention that the statements were insulting to members of protected groups and not protected under Article 10); *supra* text accompanying notes 185-92 (discussing the ECHR's decision in *Glimmerveen*).

race discrimination to CERD, the Committee members expressly referred to the ECHR's judgment.<sup>201</sup> Committee member Banton agreed with the Court's assessment that the judgment in *Jersild* was compatible with the U.N. treaty. He proposed that "the Committee should collectively affirm its agreement with that judgment."<sup>202</sup> Although other members believed that CERD should not express an opinion on the ECHR's ruling,<sup>203</sup> when the Committee issued its concluding observations to Denmark it "not[ed]" the ECHR's judgment and "affirm[ed]" that the 'due regard' clause of article 4 of the Convention requires due balancing of the right to protection from racial discrimination against the right to freedom of expression."<sup>204</sup> This formulation, which is significantly more tempered than CERD's statement in its General Comment on article 4, embodies the essence of the ECHR's effort to weigh carefully the competing obligations at stake.

The most recent case addressing racist speech, *Faurisson v. France*,<sup>205</sup> provides another example of human rights tribunals harmonizing potentially conflicting standards. In *Faurisson*, the UNHRC considered a petition from a university professor who publicly disputed the historical existence of the Holocaust and, in particular, the use of gas chambers in Nazi death camps.<sup>206</sup> Several citizens successfully filed a private criminal action against Faurisson under France's recently-enacted Gayssot Act, which makes it a criminal offense to contest the existence of crimes against humanity that have been recognized by the International Military Tribunal at Nuremberg, Germany in 1945.

Faurisson challenged his conviction before the UNHRC. In defense of the law and its application to Faurisson, France cited the *Glimmerveen* and *Kunen* decisions of the European Commission.

---

<sup>201</sup> Committee on the Elimination of Racial Discrimination, 48th Sess., 1137th mtg. (Summary Record), ¶ 9, U.N. Doc. CERD/C/SR.1137 (1996).

<sup>202</sup> *Id.* (noting Committee member Banton's statement that the ECHR's interpretation of article 10 of the European Convention "was compatible with Denmark's obligations under the United Nations Convention").

<sup>203</sup> *Id.* ¶ 21 (noting that Committee member van Boven stated that it was not appropriate to comment on the court's ruling).

<sup>204</sup> *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Denmark*, 48th Sess., 1149th mtg., ¶ 3, U.N. Doc. CERD/C/304/Add.2 (1996).

<sup>205</sup> U.N. GAOR, Hum. Rts. Comm., 58th Sess., Annex, U.N. Doc. CCPR/C/58/D/550/1993 (1996).

<sup>206</sup> Faurisson expressed his opinion in an interview published in a monthly magazine, stating that "the myth of the gas chambers is a dishonest fabrication . . . endorsed by the victorious powers of Nuremberg." *Id.* ¶ 2.6.

France argued that the *Glimerveen* case contained "many similarities with the present case and its *ratio decidendi* could be used for the determination of Mr. Faurisson's case."<sup>207</sup> France also stressed its obligation under the Race Convention to prohibit racist speech, noting that CERD had reviewed the Gayssot Act favorably in its concluding observations on France's periodic report.<sup>208</sup>

In rejecting Faurisson's petition, the UNHRC carefully avoided creating a conflict with the earlier decisions of the European tribunals and CERD, although it did not cite or directly distinguish them. The Committee suggested that the Gayssot Act might well be incompatible with the ICCPR's right to freedom of expression were it to be applied broadly. On the facts presented, however, the Committee found that the restriction on Faurisson's freedom of expression was necessary to protect the rights of others, notably the Jewish community in France.<sup>209</sup> This approach is strikingly similar to that adopted by the ECHR and European Commission in its earlier case law.<sup>210</sup>

The foregoing case study of racist speech provides compelling evidence that human rights jurists can communicate with each other in a common enterprise to develop consistent human rights norms. In the abstract, the tension between protecting freedom of expression and combating racial discrimination and punishing racist speech is formidable and perhaps even insoluble. In deciding how these obligations apply to specific cases, however, human rights tribunals have avoided issuing conflicting decisions by using a narrow, fact-specific approach and avoiding broad pronouncements of principle. They have also mitigated any potential conflict by expressly considering each other's decisions and interpretations and by seeking to develop coherent standards for States to follow.

---

<sup>207</sup> *Id.* ¶ 7.4.

<sup>208</sup> *See id.* ¶ 7.7 ("[CERD] specifically welcomed the adoption of the Law . . . during the examination of the periodic report of France in 1994.").

<sup>209</sup> *See id.* ¶¶ 9.5-9.7 (holding that the court convicted Faurisson for violating the rights and reputation of people in the Jewish community and expressing satisfaction that the application of the Gayssot Act was in accord with the provisions of the ICCPR).

<sup>210</sup> *See supra* text accompanying notes 185-88, 193-200 (noting the approach taken by the European tribunals in the *Glimmerveen* and *Jersild* decisions). Several concurring opinions elaborated upon the Committee's analysis, but all of these statements agreed that the law as applied did amount to a breach of the right to freedom of expression. *See Faurisson, supra* note 205 (providing the text of the concurring opinions of Committee members Ando, Evatt, Kretzmer, Quiroga, Lallah, and Bagwati).



### III. FORUM SHOPPING THEORY

The potential for human rights forum shopping has existed since the creation of overlapping treaties and petition procedures in the 1960s and 1970s. During this formative period, human rights commentators examined the theoretical and policy justifications for and against forum shopping. Their studies fall into two groups. One set of studies analyzed the effects of forum shopping on the interests and incentives of petitioners and defending States before human rights tribunals. The other set focused on institutional and normative implications that forum shopping raised for the coexistence of international petition procedures. The conclusion reached by most commentators at this early stage was that review of a single petitioner's human rights claims by more than one tribunal was undesirable and should generally be prevented.

In this Section, I first describe both of these strands of commentary. Then, focusing on the numerous ways in which the petition system has matured over the last twenty five years, I offer a more comprehensive appraisal of the justifications for and against duplicative review from both the aggrieved individual's perspective and from the perspective of the petition system as an institution for clarifying States parties' treaty obligations. My analysis reveals that, as in many domestic legal systems, the objectives of finality, certainty, and efficient use of scarce resources support a rule limiting a petitioner's ability to engage in simultaneous or successive petition forum shopping. Yet, my analysis also demonstrates that there are many powerful justifications, absent from domestic law, which do favor relitigation of human rights claims in the international arena.

#### A. *The Parties' Interests and Incentives*

In a 1976 article comparing the petition procedures of the Inter-American system and the ICCPR, Maxime Tardu cogently identified the competing interests and incentives of individuals and States as litigants before human rights tribunals.<sup>211</sup> For individuals, Tardu stressed the "legitimate procedural interests of the victims of human rights vio-

---

<sup>211</sup> See Tardu, *supra* note 13. At the time Tardu published this article, none of the cases discussed in Part II had been decided. Tardu's study focused instead on treaty texts, on the recent practice of U.N. and regional non-judicial monitoring bodies, and on hypothetical cases that might arise under the regional and global individual petition systems. See *id.* at 786-87 (discussing generally the admissibility of complaints to both the U.N. and regional bodies).

lations" under a doctrine she termed "procedural laissez-faire."<sup>212</sup> According to advocates of this approach, allowing individuals to engage in forum shopping maximizes their chances of vindicating their rights.<sup>213</sup> Multiple review was also thought to be warranted because petitioners' "procedural rights are still far weaker than those of plaintiffs before national courts" and because the treaties' admissibility rules "often lead to the rejection of complaints on nonsubstantive grounds."<sup>214</sup>

Directly contrary to the procedural laissez-faire theory is an approach Tardu labeled the "unification doctrine." Proponents of this doctrine opposed any dual examination of a petition by multiple tribunals, stressing the States parties' interests in "the good administration of justice," the importance of "safeguard[ing] the feeling of 'legal security' among the States and the petitioners concerned," and the need to prevent "abusive and repetitive complaints."<sup>215</sup> Tardu rejected both of these approaches as too extreme, advocating instead that individuals should be permitted to file a petition with a second tribunal if their first petition had been totally or partially rejected by a previous tribunal.<sup>216</sup>

### B. Institutional and Normative Concerns

Many other early commentators analyzing forum shopping focused not on the interests and incentives of the parties, but on institutional and normative concerns. These commentators concluded

<sup>212</sup> *Id.* at 794.

<sup>213</sup> *See id.* ("[T]he availability of two recourse procedures could only strengthen the protection of human rights [because] it is the end which matters, not the means: the more numerous the procedures, the better it will be' for the protection of human rights." (citation omitted)). For a similar claim in the context of the United States Constitution, see Chemerinsky, *supra* note 60, at 300-26.

<sup>214</sup> Tardu, *supra* note 13, at 794.

<sup>215</sup> *Id.* at 793, 795 (citations omitted). Professor Robertson, an advocate of the "unification" theory, argued that States' interest in the finality of litigation militated against multiple review of petitions. *See* Robertson, *supra* note 13, at 47 (stating that an "applicant who wishes to bring a case against a State . . . should have the right of choice between the two methods of bringing his case before an international organ but . . . should accept the consequences of his decision and not have the possibility of going from one forum to another").

<sup>216</sup> In essence, Tardu proposed that the human rights petition system as a whole adopt a standard similar to that contained in the ICCPR's First Optional Protocol. *See* Tardu, *supra* note 13, at 795-98. Tardu did not, however, discuss how the tribunals should interpret the key phrase "the same matter" or dispose of successive petitions concerning rights that are not drafted or interpreted identically in two or more treaties. For a discussion of this issue, see *infra* Part IV.

overwhelmingly that multiple review of individual petitions should be prohibited based on three related justifications: the threat to the authority of human rights tribunals; a desire to promote the primacy of regional human rights regimes comprised of States with similar legal, political, and cultural systems over more heterogeneous global systems; and a fear of divergence and conflict in the jurisprudence of different tribunals interpreting the same or similar legal norms.

### 1. Threatening the Authority of Tribunals

The most frequently cited justification for refusing to permit the filing of successive petitions is the danger that this conduct poses to the authority of the tribunals. As one commentator forcefully stated:

[D]uplication of proceedings would lead to shocking consequences. Differences in assessment would almost inevitably occur between the [UNHRC] and the Strasbourg bodies. Furthermore, the former would in practice be given a right to look into, if not to censure, the activities of the latter, who would in turn enjoy the same right. For instance, a State resorting to the [UNHRC] after having vainly lodged an application under the Convention would appear to be making a kind of appeal: it would in effect be asking the Committee to uphold a claim which the Commission [or] Court... had declared inadmissible or ill-founded. This would undermine the authority of institutions empowered by the Convention to make binding and final decisions in their respective domains.<sup>217</sup>

Other commentators agreed, stating for example that to permit an individual to present a petition to the UNHRC after that petition had been previously rejected by the European tribunals "would almost amount to an 'appeal' from the European organs to the United Nations Committee; such an 'appeal' would be bound to undermine, to some extent, the authority of those organs."<sup>218</sup>

---

<sup>217</sup> Eissen, *supra* note 13, at 189. Although Eissen's comments were directed at forum shopping in inter-State disputes, he believed that the same concerns were raised by forum shopping by individuals. See *id.* at 202 n.70 (discussing the need to avoid duplication of proceedings).

<sup>218</sup> Robertson, *supra* note 13, at 46; see also COMMISSION TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND HUMAN RIGHTS 177 (1968) ("[I]t would seem undesirable to provide for an appeal to the United Nations from a final and binding decision of a regional body or of a specialized agency."); Information Report on the Protection of Human Rights in the United Nations Covenant on Civil and Political Rights and Its Optional Protocol and in the European Convention on Human Rights, EUR. PARL. DOC. 3773 ¶ 19 (1976) (arguing against permitting States to file with the UNHRC a case previously filed with one of the European tribunals because "this might create the impression of an 'appeal' from the European organs to the U.N. committee and this might undermine, or at least weaken, the authority of those or-

## 2. Preserving the Primacy of Regional Human Rights Regimes

Closely linked to the threat to jurists' authority was a perceived need to prohibit forum shopping to bolster regional human rights regimes as superior fora in which to resolve disputes. This claimed superiority was premised on the juridical nature of regional tribunals and their more developed system of supervision, particularly in Europe. Eissen, for example, justified his preference for regional settlement of disputes by noting that U.N.-based human rights treaties "suffer from an inherent weakness in the way they are to be implemented; for example, they do not provide for binding decisions comparable to those of the [European institutions]."<sup>219</sup> He also argued that European nations "have a legitimate interest in settling *en famille* any disputes that may arise among them in the field of human rights" to the exclusion of dispute settlement procedures within the United Nations.<sup>220</sup>

Permitting individuals to file a second petition outside of Europe after their attempt to receive redress from the European tribunals had been rejected would seriously erode these regional advantages.<sup>221</sup> For this reason, the Council of Europe urged its member States to file reservations to the First Optional Protocol to prohibit individuals from filing a petition with the UNHRC once that same petition had been

---

gans"); Möse & Opsahl, *supra* note 103, at 306 ("It has been argued that one should avoid the possibility of an individual 'appeal' from the European organs to the Human Rights Committee, and some countries have tabled reservations to this effect."); TRINDADE, *supra* note 13, at 113 (noting that commentary concerning "co-ordination" of human rights petition systems "aim[s] at the preservation of the authority of international supervisory organs and their decisions").

<sup>219</sup> Eissen, *supra* note 13, at 183; see also Möse & Opsahl, *supra* note 103, at 286 (arguing that a regional approach to human rights protection is superior to a global approach in "achieving common standards and efficient procedures of implementation"); Robertson, *supra* note 13, at 26 (noting that, unlike the European Convention, the ICCPR contains "no provision leading to the judicial determination of the existence (or the absence) of a violation"). More recently, commentators have made the same arguments concerning the Inter-American human rights system. See TRINDADE, *supra* note 13, at 117.

<sup>220</sup> Eissen, *supra* note 13, at 183. Eissen also asserts that encouraging regional settlement of disputes benefited individuals, since "[b]y addressing themselves to the [UNHRC], individuals would run the risk of prejudicing their own cause as the cases they submitted on the world scene might have had a better chance of being settled to their satisfaction before the Strasbourg organs." *Id.* at 201.

<sup>221</sup> See P.R. Ghandhi, *The Human Rights Committee and the Right of Individual Communication*, 57 BRIT. Y.B. INT'L L. 201, 230 (1986) (arguing that UNHRC review of European tribunal decisions would be undesirable); Robertson, *supra* note 13, at 46-47 (arguing that States parties to the European Convention should file reservations to the ICCPR to prevent "appeals" from the European Commission to the UNHRC).

rejected by the European tribunals.<sup>222</sup> In this way, these States could solve the problem of coexistence between the U.N. and regional human rights systems by adopting a preference for a "European" settlement to 'European' disputes."<sup>223</sup>

### 3. Avoiding Diverging and Conflicting Decisions

A third rationale frequently articulated by commentators to justify their opposition to forum shopping is the need to preclude human rights tribunals from reaching conflicting or diverging decisions. As P.R. Ghandhi wrote in a passage that links this justification to the previous two rationales:

[I]t is understandable that States parties which have also ratified the European Convention should not wish the final decisions of the Strasbourg bodies to be the subject of further scrutiny [by the UNHRC]. Such an examination would weaken the authority of the European Commission or Court . . . *especially if the Committee disagreed with the European institutions and came to the conclusion that a breach or breaches of rights covered in both instruments had occurred.*<sup>224</sup>

Other commentators share this view. Professor Meron, for example, has written that successive review of the same petition by different tribunals "might lead to difficulties as a result . . . of divergencies in the case law of the two systems."<sup>225</sup> Such divergencies, he argued, could prevent the attainment of "normative uniformity" and encourage States "guilty of human rights violations" to "take advantage of conflicting opinions . . . by acknowledging only the milder opinion."<sup>226</sup>

---

<sup>222</sup> See Eissen, *supra* note 13, at 204-05 (citing the Committee of Ministers' decision recommending that individual petitioners not be permitted "to bring the same case under both procedures either at the same time or successively" and recommending reservation to the ICCPR Optional Protocol to achieve that result); see also *supra* Part I.C.3 (discussing the Protocol and its relation to successive petition forum shopping).

<sup>223</sup> Jan De Meyer, *International Control Machinery*, in PROCEEDINGS OF THE COLLOQUY ABOUT THE EUROPEAN COMMISSION ON HUMAN RIGHTS IN RELATION TO OTHER INTERNATIONAL INSTRUMENTS FOR THE PROTECTION OF HUMAN RIGHTS 290 (1978). That preference did not, however, extend as far as prohibiting individuals from engaging in choice of tribunal forum shopping. See *supra* Part I.C.1 (explaining forum shopping involving choice of tribunals).

<sup>224</sup> Ghandhi, *supra* note 221, at 230 (emphasis added).

<sup>225</sup> HUMAN RIGHTS LAW-MAKING, *supra* note 13, at 236.

<sup>226</sup> *Id.* at 143, 236, 241; see also Tardu, *supra* note 13, at 788 (noting that because of the co-existence of procedures within the Inter-American and U.N. systems, "[d]ual examination of the same, or similar matters . . . may lead to the adoption of conflicting substantive conclusions").

In a recent petition to CAT, the government of Sweden voiced similar concerns. The case concerned a Djibouti national who alleged that he would be tortured were

C. *Critiquing the Conventional Wisdom: Identifying the Interests of Individual Petitioners Favoring Forum Shopping*

All litigants seeking relief in a judicial or quasi-judicial forum would naturally prefer a rule that multiplies the chances to receive a favorable ruling. Yet no system of adjudication has deemed that preference, standing alone, as sufficient to justify endless relitigation of claims. In the context of the international human rights petition system, however, there are several powerful arguments favoring at least some forms of duplicative review.

Consider first the far more limited jurisdictional and claims joinder rules governing human rights tribunals as compared to many domestic courts.<sup>227</sup> These limitations are a product of the disaggregated nature of the petition system, in which only one tribunal is authorized to adjudicate claims by individuals arising under any given treaty.<sup>228</sup> As

---

Sweden to deport him to Djibouti. Sweden argued that although the "test applied" by both CAT and the European Commission for determining whether to grant asylum to foreign nationals at risk of torture was "in principle the same," in practice CAT had applied that standard more liberally than its European counterparts:

The State party expresses its concern about a possible development of different standards under the two human rights instruments of essentially the same right. The State party argues that diverging standards in this respect would create serious problems for States which have declared themselves bound by both instruments. Problems would arise when States attempt to adapt themselves to international case-law, if this case-law is inconsistent. According to the State party, inconsistent case-law may also have serious detrimental effects on the overall credibility of the human rights protection system at [the] international level.

I.A.O. v. Sweden, U.N. GAOR, Hum. Rts. Comm., 20th Sess., Annex, ¶ 5.11, U.N. Doc. CAT/C/20/D/65/1997 (1998). The petitioner responded that there was no inconsistency because Sweden could simply "apply the stricter of the two [standards]." *Id.* ¶ 6.11. The CAT did not address this issue, although it declined to find a treaty violation on the facts presented. *See id.* ¶ 14.6. For an explanation of why Sweden's concerns are unjustified, see *infra* Part III.D.3.

<sup>227</sup> Domestic courts' preclusion rules are also influenced by the extent to which plaintiffs and defendants can join additional parties to pending litigation. *See* Erichson, *supra* note 9, at 955-56 (discussing joinder of parties in various jurisdictions). In the human rights context, by contrast, nearly all claims are made against a single State party, and a joinder of parties problem is unlikely to arise.

<sup>228</sup> There are only a few, limited exceptions to this rule. The Inter-American Court of Human Rights is authorized to give advisory opinions, when requested by OAS Member States or organs, interpreting "other treaties concerning the protection of human rights in the American states." "Other Treaties" Subject to the Consultative Jurisdiction of the Court, *Advisory Opinion OC-1/82 of Sept. 24, 1982*, Inter-Am. C.H.R. (ser. A) No. 1 (1982), ¶ 9 [hereinafter *Other Treaties*]. However, the Court may not interpret these treaties as part of its contentious jurisdiction concerning petitions by individuals. The proposed (but not yet created) African Court on Human and People's Rights, by contrast, would have jurisdiction to hear petitions alleging violations of any human rights treaty ratified by the State party. *See* Makau Mutua, *The African Human Rights*

the hypothetical case of the Norwegian criminal defendant discussed in Part I.B illustrates, a petitioner with distinct claims arising under multiple human rights treaties may not consolidate all of her treaty claims in a single forum. The only way she can obtain a complete review of the rights violations she alleges is by petitioning two or more tribunals concurrently or successively. In this situation, it is unclear whether even the most finality-driven domestic preclusion rules bar relitigation.<sup>229</sup>

Not all petitioners will face such stark choices, of course. Many will proffer human rights claims that can readily be adjudicated in their entirety under more than one treaty (for example a violation of the right to free expression, which is protected by both the Inter-American Convention and the ICCPR in similar, albeit not identical language), or claims that are only partially within the jurisdiction of one tribunal but are wholly within the jurisdiction of another (for example combined torture and due process claims that can be raised in part before CAT but entirely before the ECHR). Because in these situations there is at least one tribunal competent to hear all claims, it might be argued that a petitioner should be afforded only one opportunity to litigate, regardless of the particular legal instrument under which her claims arise.

Even for these cases, however, there are justifications favoring redundant litigation. At a most basic level, relitigation of *any* individual rights claims has some persuasive force. Indeed, it is the abhorrence of erroneously denying meritorious constitutional claims that in large measure supports the broad exceptions to finality found in American and English habeas corpus law.<sup>230</sup> In the human rights context as well, claims are always against the government or its agents for abuses of governmental power. In this situation, allowing relitigation to minimize the erroneous denial of fundamental rights claims—even claims

---

*Court: A Two-Legged Stool?*, 21 HUM. RTS. Q. 342, 354 (1999) (discussing the extent of the proposed Court's jurisdiction).

<sup>229</sup> Compare *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 382 (1985) (stating that "claim preclusion generally does not apply where '[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter jurisdiction of the courts'" (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982))), with *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 386-87 (1996) (holding that claim preclusion applies to a state court class action settlement encompassing claims within exclusive jurisdiction of federal court).

<sup>230</sup> See Cover & Aleinikoff, *supra* note 10, at 1045-46 (discussing the constitutional benefits of redundancy in the American habeas corpus system); Tardu, *supra* note 13, at 795 & n.68 (discussing the benefits of successive appeals before High Court judges in the English habeas corpus system).

cognizable in multiple fora—weighs heavily against finality and efficiency concerns.

One should also consider the nature of human rights adjudication between aggrieved individuals and defending States. In many cases, petitioners, whether acting on their own behalf or represented by counsel,<sup>231</sup> have only rudimentary knowledge of a treaty's substantive rights or the numerous and often highly technical procedural hurdles that must be cleared before jurists may entertain a claim on the merits.<sup>232</sup> Taking into account that defending States are often repeat players before the tribunals and are thus familiar with both its procedural and substantive law, the comparative inequality of the parties as litigants might justify relitigation on the theory that many petitioners will not enjoy a full and fair opportunity to litigate in the first proceeding.

Finally, the differing remedial powers of human rights tribunals also justify greater limitations on finality and narrower preclusion rules. Unlike U.S. domestic law, where judgments of both state and federal courts are enforceable against the losing party, not all human rights tribunals can issue legally binding decisions (as contrasted with recommendations for remedial action). This basic remedial distinction militates in favor of forum shopping. For example, a petitioner might reasonably choose to file her complaint before a tribunal that issues legally binding rulings, even if that tribunal does not have jurisdiction to hear all of her claims. A defeat before that tribunal arguably should not be given preclusive effect if the petitioner then seeks to

---

<sup>231</sup> See Helfer & Slaughter, *supra* note 1, at 352-53 nn.368-69 (showing that petitioners in about half of the cases before the UNHRC were represented by counsel during the 1980s and 1990s, although many of those cases involved claims against only two defending States). The majority of petitioners before CERD and CAT have been represented by counsel, although that has not prevented the dismissal of numerous claims on both procedural and substantive grounds. See also *United Nations High Commissioner for Human Rights, Treaty Bodies Database, CERD, Jurisprudence* (visited Nov. 24, 1999) <<http://www.unhchr.ch/tbs/doc.nsf>> (noting that four of six petitioners to CERD were represented by counsel); *United Nations High Commissioner for Human Rights, Treaty Bodies Database, CAT, Jurisprudence* (visited Nov. 24, 1999) <<http://www.unhchr.ch/tbs/doc.nsf>> (citing the fact that 44 of 56 petitioners to CAT were represented by counsel).

<sup>232</sup> See, e.g., *D.S. v. Sweden*, Comm. No. 9/1997, ¶ 6.4, U.N. Doc. CERD/C/53/D/9/1997 (1998) (failure to exhaust domestic remedies); *Barbaro v. Australia*, Comm. No. 7/1995, ¶¶ 1, 10.4, 10.5, U.N. Doc. CERD/C/51/D/7/1995 (1997) (failure to specify which treaty articles State had violated and failure to exhaust domestic remedies); *Darwish v. Austria*, Comm. No. 679/1996, ¶ 6.5, U.N. Doc. CCPR/C/60/D/679/1996 (1997) (failure to sufficiently substantiate allegations); *K.K.H. v. Canada*, Comm. No. 35/1995, ¶ 5, U.N. Doc. CAT/C/15/D/35/1995 (1995) (failure to exhaust domestic remedies).



present her claims to a second tribunal whose decisions are merely hortatory.

D. *Critiquing the Conventional Wisdom: Identifying Normative and Institutional Factors Favoring Forum Shopping*

Taken together, these basic differences between domestic and international adjudication suggest that the interests of aggrieved individuals may justify duplicative review of human rights claims. In addition, the broader institutional and normative objectives of the petition system as a whole support relitigation, contrary to the arguments advanced by many commentators.

1. From Vertical Hierarchy to Horizontal Dialogue Conceptions of Human Rights Litigation

The disaggregated nature of the petition system, together with overlapping treaties protecting interrelated rights and freedoms, create a compelling case for coordination among tribunals to promote the evolution of a coherent jurisprudence. In the absence of any supreme arbiter of human rights law, however, the jurists serving on these tribunals must act on their own to create coherence within the jurisdictional limits the treaties impose on them.

I argue that jurists can most effectively achieve coherence by engaging in a "horizontal dialogue" with their colleagues on other tribunals over both the substance of shared human rights norms and the procedural rules under which the petition system operates. I describe that dialogue as horizontal because it involves a relationship among relative equals engaged in a common interpretive enterprise. This relationship differs from the vertical hierarchy conception of human rights litigation advanced by early commentators, who perceived forum shopping as creating unwarranted opportunities for an appeal to one tribunal in order to "correct" the "errors" of another.<sup>233</sup>

---

<sup>233</sup> See *supra* Part III.B.1. According to this view, forum shopping erodes the authority of tribunals and jurists because the last tribunal to consider a petition acts as a de facto court of appeal, having the final say as to whether a violation of any human rights treaty has occurred. This later decision effectively nullifies or supersedes the decision of the first tribunal that considered the same petition under a different treaty. This result undermines the first tribunal's authority. As this Article demonstrates, however, a vertical hierarchical conception does not accurately reflect present day human rights litigation. See also 1993 *Alston Report*, *supra* note 38, ¶ 245 ("[T]here is . . . an underlying presumption that the various organs are all engaged in a common endeavour to promote understanding of, and respect for, internationally recognized

Horizontal dialogue, by contrast, does not require one set of jurists either to defer to or to overrule the case law generated by their colleagues. Rather, it seeks to have jurists treat the relevant decisions of sibling tribunals as persuasive authority,<sup>234</sup> subject to being followed or distinguished on a reasoned basis grounded in the texts, objectives, or policies of the overlapping treaties.<sup>235</sup> The core feature of horizontal dialogue is open acknowledgement of *the existence* of relevant precedents from other treaty systems as a way to enhance the precision, certainty, and reasoned decision-making that are essential features of a coherent body of human rights law.<sup>236</sup>

So described, horizontal dialogue among human rights jurists closely resembles the evolution of the common law by state court judges in the United States. Thus, it might be argued that dialogue will arise through iterative litigation by *different* parties and that the tribunals can achieve coherence without entertaining sequential petitions by the *same* individual. There are several reasons, however, why horizontal dialogue has not adequately developed along the lines of the U.S. common law and why it can be encouraged and enhanced

---

human rights principles.”).

<sup>234</sup> For excellent recent examples of a national court using international human rights precedents in this way, see the decisions of the South African Constitutional Court in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, Case No. CCT/11/98 (Oct. 9, 1998), available in *Wits Law School Constitutional Law Archive: Decisions of the Constitutional Court of South Africa* (visited Dec. 29, 1999) <<http://www.law.wits.ac.za/judgments/1998/gayles.html>> (abolishing a criminal ban on same-sex consensual sodomy); and *The State v. T. Makwanyane*, Case No. CCT/3/94 (June 6, 1995), available in *Wits Law School Constitutional Law Archive: Decisions of the Constitutional Court of South Africa* (visited Dec. 29, 1999) <<http://www.law.wits.ac.za/judgements/deathsn.html>> (abolishing the death penalty).

<sup>235</sup> For a detailed discussion of how horizontal dialogue promotes convergence and divergence of standards between the UNHRC and the European human rights tribunals, see Helfer & Slaughter, *supra* note 1, at 373-86.

<sup>236</sup> Horizontal dialogue benefits the petition system by “seek[ing] to ensure that human rights law develops consistently—indeed, that it is possible to speak of ‘human rights law’ at all, and not simply the provisions of particular conventions.” J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 224 (2d ed. 1993). As Maxime Tardu has observed:

The simultaneous attention given by different bodies to the same types of problem[s] does not necessarily create confusion, duplication or contradictions. Experience seems to prove that it may, on the contrary, through exchanges and emulation between bodies, enrich human rights concepts and strengthen the awareness of them by public opinion. The in-depth exploration of the concept of “torture” by the jurisprudence of the European Commission and the [ECHR], the [UNHRC] and the Inter-American Commission may be mentioned in this regard, for example.

Maxime Tardu, *The Effectiveness of United Nations Methods and Mechanisms in the Field of Human Rights: A Critical Overview*, U.N. Doc. A/CONF.157/PC/60/Add.5, ¶ 75 (1993).

through forum shopping.

First, outside Europe, the universe of petitions submitted to human rights tribunals over the last three decades numbers in the dozens or the hundreds, as compared with the thousands of cases decided by domestic courts each year.<sup>237</sup> Although the number of petitions filed has risen rapidly in the 1990s,<sup>238</sup> the relative paucity of cases limits the opportunities for dialogue through disputes involving different litigants. Second, human rights tribunals reference and consider precedents from outside their own legal systems far less habitually than do judges in common law jurisdictions. Although dialogue has increased significantly in the last decade in both forum shopping and non forum shopping cases,<sup>239</sup> it has yet to obtain the consistency required for a coherent cross-treaty jurisprudence to emerge.<sup>240</sup>

---

<sup>237</sup> See, e.g., *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 53d Sess., Supp. No. 18, ¶¶ 483-85, U.N. Doc. A/53/18 (1998) (noting that as of 1998, CERD had issued seven decisions); *Report of the Committee Against Torture*, U.N. GAOR, 53d Sess., Supp. No. 44, ¶ 271, U.N. Doc. A/53/44 (1998) (reporting that in 1997-98, CAT received 70 petitions); *Report of the Human Rights Committee*, U.N. GAOR, Hum. Rts. Comm., 53d Sess., Supp. No. 40, ¶¶ 420-21, U.N. Doc. A/53/40 (1998) (declaring that as of July 1998, the UNHRC had received 823 petitions and had issued 293 "views" on the merits); Richard J. Wilson, *Researching the Jurisprudence of the Inter-American Commission On Human Rights: A Litigator's Perspective*, 10 AM. U. J. INT'L L. & POL'Y 1, 19-319 (1994) (containing a comprehensive index of the several hundred petitions filed with the Inter-American Commission up to 1994).

<sup>238</sup> See 1996 *Alston Report*, *supra* note 2, ¶ 7(e) ("The number of communications being processed under the various [U.N.] complaints procedures has greatly increased . . .").

<sup>239</sup> See ZWART, *supra* note 43, at 2 (noting the UNHRC's increasing references to European case law); Liz Heffernan, *A Comparative View of Individual Petition Procedures Under the European Convention on Human Rights and the International Covenant on Civil and Political Rights*, 19 HUM. RTS. Q. 78, 92 (1997) ("[A] tangible manifestation of co-existence between the Strasbourg and Geneva systems is the increasing willingness of parties and institutions in each system to cite developments in the other."); Helfer & Slaughter, *supra* note 1, at 359 n.398 (documenting this trend in the case law of the UNHRC). The Inter-American Commission has been particularly active in consulting the case law of other human rights tribunals to decide on the proper interpretation of the American Convention. See, e.g., *Rodriguez v. Mexico*, Case 11,430, INTER-AM. Y.B.H.R. 994, 1020 (1996) ("Even though the Convention has not clarified the scope of the expression 'reasonable time,' there are a great many precedents in the jurisprudence of international bodies according to which . . . the following criteria have been considered . . ."); *Gimenez v. Argentina*, Case 11,245, INTER-AM. Y.B.H.R. 238, 264-76 (1996) (referencing case law from other tribunals in concluding that prolonged imprisonment was unreasonable); *Garcia v. Peru*, Case 11,006, INTER-AM. Y.B.H.R. 232, 288 (1995) (referencing the ECHR in evaluating Article 7 of the American Convention). See also cases discussed *supra* Parts II.B.1, II.B.3.

<sup>240</sup> See, e.g., 1993 *Alston Report*, *supra* note 38, ¶¶ 246-51 (noting the "lack of interaction" among U.N. and regional tribunals, notwithstanding the importance of interaction to promote normative consistency); Mutua, *supra* note 228, at 348 (stating that

In some instances, the absence of dialogue occurs not because jurists eschew consulting persuasive authority from sibling tribunals but because they may simply be unaware of its existence.<sup>241</sup> Forum shopping, and successive petition forum shopping in particular, remedies this information failure by directly and repeatedly exposing jurists to on-point precedents from other treaty systems. When jurists on one tribunal are aware that the same petition has recently been decided by another tribunal, they will be hard pressed to ignore that tribunal's analysis and conclusions in shaping their interpretation of analogous rights found in their own treaty.<sup>242</sup> Forum shopping thus increases coherence by reducing the possibility for inadvertent divergences or conflicts in international human rights jurisprudence.<sup>243</sup>

More fundamentally, forum shopping actively promotes horizontal dialogue by providing a structured setting for jurists to clarify the similarities and differences among overlapping treaty texts. In this setting, the second tribunal to consider a petition can benefit signifi-

---

African Commission decisions "do not reference jurisprudence from national and international tribunals"); THE AM. SOC'Y OF INT'L LAW, *The UN Human Rights Regime: Is It Effective?*, in PROCEEDINGS OF THE 91ST ANNUAL MEETING: IMPLEMENTATION, COMPLIANCE, AND EFFECTIVENESS 460, 481 (Apr. 9-12, 1997) ("[U.N.] treaty bodies seldom explicitly reference the findings or recommendations of other human rights mechanisms, such as special rapporteurs or sister treaty bodies, and produce varying commentaries on identical abuses and rights.") (remarks by Dinah PoKempner, Human Rights Watch) [hereinafter *UN Human Rights Regime*].

<sup>241</sup> See 1993 *Alston Report*, *supra* note 38, ¶¶ 247, 252-54 (stating that there is no regular forum to become acquainted with other tribunals' decisions and suggesting ways to remedy this problem); Lillich, *supra* note 153, at 466 (noting, in two death row cases, that "neither body apparently was aware that the other was simultaneously grappling with the same issue").

<sup>242</sup> As Professor Cover has stated with respect to forum shopping by litigants in the United States:

Forum shoppers and those who oppose them . . . become the carriers that pollinate one system of courts with the information about another system's experience. Moreover, where synchronic or diachronic redundancy is possible, each system must confront the potentially conflicting outcome *in the same case* of some other court with its alternative norms. Such a possibility makes second thoughts and adjustments more likely.

Cover, *supra* note 7, at 678 (footnote omitted).

<sup>243</sup> This benefit of forum shopping occurs even where the second tribunal does not expressly distinguish the first tribunal's reasoning. In *Brinkhof* and *Casanovas*, for example, the UNHRC's citation of prior petitions to the European Commission, together with its discussion of the parties' reliance on regional precedents, demonstrates the UNHRC's awareness of regional approaches to the problem when it interpreted the ICCPR to provide more extensive protection than the European Convention. As I argue above, however, more open deliberation and analysis of the Commission's precedents would have bolstered the Committee's decision to diverge from the Commission's interpretation of rights guaranteed in the same language in both treaties. See *supra* Part II.B.1.

cantly from the first tribunal's reasoning and conclusions, using them either to confirm in its case law similarities in the treaties' texts, or to employ as a point of departure from which to justify a divergent approach. Whether the second tribunal chooses convergence (as will likely occur in most cases where treaties enshrine identical legal standards) or divergence (where treaty texts and objectives are similar but not identical), the petition system benefits by a more coherent evolution of human rights standards.

## 2. From Regional Protectionism to Robust Regionalism

A second argument advanced by early commentators was that forum shopping would undermine regional human rights regimes. Contrary to these commentators' fears, regional human rights systems have not been hobbled by forum shopping or the divergence of standards it can engender. Instead, these systems have increased in strength and effectiveness.<sup>244</sup>

### a. *The European Convention*

The European human rights system in particular has flourished. The ECHR and European Commission are widely regarded as the most effective human rights institutions in the world.<sup>245</sup> The European Convention now has more than forty Western and Eastern European signatories, a fact that has resulted in a meteoric rise in the number of petitions filed with the tribunals. As delays resulting from managing the ever-increasing workload continued to mount, European States refused to permit the regional petition system to become a victim of its own success. Instead, they streamlined the Convention's petition system, abolishing the Commission and creating a permanent

---

<sup>244</sup> See Torkel Opsahl, *The Coexistence Between Geneva and Strasbourg: Inter-Relationship of the International Covenant on Civil and Political Rights and the European Convention on Human Rights and Their Respective Organs of Implementation*, 1991-1992 CAN. HUM. RTS. Y.B. 151, 165 (arguing that interactions between European tribunals and the UNHRC have "not threatened or damaged but rather promoted the regional system"); see also Heffernan, *supra* note 239, at 84 (interpreting ratification of the Optional Protocol by European States as "evidence of the growing acceptance in Europe of the stature of the Human Rights Committee in its adjudication of individual petitions").

<sup>245</sup> See Helfer & Slaughter, *supra* note 1, at 296 n.96 (citing authorities that describe the effectiveness of the ECHR's judgments); see also Heffernan, *supra* note 239, at 91 ("The stature of the [ECHR] as the foremost international judicial arbiter of human rights issues imbues the Strasbourg system with presence and prestige.").

Court of Human Rights to which States must grant individuals direct access.<sup>246</sup>

b. *The Inter-American Convention*

The Inter-American Convention is also increasing in strength and respect, albeit more slowly. Its petition system is broader than the European system, requiring States to recognize the Inter-American Commission's competence to entertain complaints by individuals, groups, and non-governmental organizations, and eliminating the requirement that complaints be submitted by the victims of a treaty violation.<sup>247</sup> It thus "plays a considerably wider and more interventionist role in the management of the system than does its European analogue."<sup>248</sup> The Commission has also "over a period of some thirty years developed a *modus operandi* with which the States of the region are familiar and willing to accept."<sup>249</sup>

States parties have been far more reluctant to recognize the jurisdiction of the Inter-American Court to hear individual petitions referred by the Commission. A recent and comprehensive study of the Inter-American system, however, concludes that States have gradually become more receptive to the Court's adjudication of such petitions.<sup>250</sup> Equally as important, the Court has firmly endorsed a horizontal dialogue conception of human rights litigation. In the *Other Treaties* case, the Court rejected "a strict distinction between univer-

<sup>246</sup> See Andrew Drzemczewski & Jens Meyer-Ladewig, *Principal Characteristics of the New ECHR Control Mechanism*, 15 HUM. RTS. L.J. 81 (1994) (explaining the characteristics and procedures of the new, single European Court of Human Rights, which replaced the existing Commission). For a discussion of the European Commission's increasing workload, see Henry G. Schermers, *The European Court of Human Rights After the Merger*, 18 EUR. L. REV. 493, 496 (1993).

<sup>247</sup> See DAVIDSON, *supra* note 36, at 157 (noting that, unlike most human rights tribunals, in applications before the Inter-American Commission "there is no primary requirement that petitioners be the actual victims of a Convention violation").

<sup>248</sup> *Id.* at 193.

<sup>249</sup> *Id.* For a different perspective on the function of individual petition procedures in a democratic era, see Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox*, 19 HUM. RTS. Q. 510, 543-45 (1997).

<sup>250</sup> Davidson notes that the low number of contentious cases before the Court is beginning to change as the democratic impulse becomes more firmly embedded in a number of States Parties who have committed themselves to effective human rights protection through a variety of measures, including greater participation in the region's human rights instruments and a willingness to allow the Court to adjudicate on human rights violations.

DAVIDSON, *supra* note 36, at 204-05.

salism and regionalism," and endorsed a comparative approach and dialogue as a means of integrating human rights systems.<sup>251</sup>

### c. *The African Charter*

The African petition system also shows a strengthening trend. The African Charter did not even exist when commentators first articulated their concern with regional primacy. Adopted in 1981, the treaty entered into force only five years later and now has received forty-nine ratifications.<sup>252</sup>

Although a neophyte compared to its more established regional neighbors, the African Commission has begun to hear a wide range of cases from individuals and groups under the Charter's mandatory petition procedures. The Commission's textually-defined powers are somewhat vague, but it has used a "dynamic interpretation of its formal protective mandate" to enhance its authority to hear individual petitions.<sup>253</sup> A recent survey concludes that the Commission is developing a "quasi-judicial role to pronounce on violations committed by States" and is treating its decisions as legally binding.<sup>254</sup> The Commission's independence and assertiveness may soon lead to further strengthening of the petition procedures: in December 1997, the Organization of African Unity adopted a protocol to create an African Court of Human Rights and Peoples' Rights comparable to other regional courts.<sup>255</sup>

## 3. From Resisting to Embracing Differing Human Rights Standards

### a. *Diverging Standards*

The possibility of diverging<sup>256</sup> human rights decisions is an equally insufficient basis upon which to bar forum shopping. To the contrary,

<sup>251</sup> *Other Treaties*, *supra* note 228, ¶¶ 40-41.

<sup>252</sup> *African [Banjul] Charter on Human and Peoples' Rights*, available in *University of Minnesota Human Rights Library* (visited Sept. 21, 1999) <<http://www.umn.edu/humanrts/instree/ratzlafchar.htm>>. Only Eritrea and Ethiopia have failed to ratify the Charter. See Murray, *supra* note 62, at 419 n.59.

<sup>253</sup> *Id.* at 414.

<sup>254</sup> *Id.* at 428, 431. For a somewhat less sanguine assessment, see Mutua, *supra* note 228.

<sup>255</sup> For a discussion of the new court, see *Draft Additional Protocol*, *supra* note 36; Mutua, *supra* note 228.

<sup>256</sup> For a definition of "divergence" among international legal norms, see Jenks, *supra* note 145, at 425-26.

diverging decisions reflect differing substantive standards in the treaties themselves, which, in turn, are often the result of deliberate policy choices by treaty drafters.<sup>257</sup> Where textual, contextual, or historical indicia of differing human rights standards exist, accepted principles of treaty construction require the tribunals to give effect to them in their decisions.<sup>258</sup> Once diverging rulings are seen as a natural reflection of human rights lawmaking, forum shopping becomes a useful way to encourage dialogue among jurists regarding how similarities and differences among the treaties should be harmonized.<sup>259</sup>

---

<sup>257</sup> In some instances, textual differences between treaties result from an evolution in State practice or an awareness of a new human rights problem that convinces States to incorporate more stringent or more precisely defined obligations into a subsequently drafted treaty than were contained in an earlier agreement. Examples include CEDAW and the Convention Against Torture, each of which contains more specific and extensive human rights standards that first appeared in the ICCPR and ICESR. See also DAVIDSON, *supra* note 36, at 62-67 (discussing the Inter-American Convention to Prevent and Punish Torture). In other cases, a treaty may enshrine higher substantive standards because it is directed to a regional grouping of States. See, e.g., Jan Lathouwers, Council of Europe: The Plans for an Additional Protocol on Non-Discrimination to the ECHR (1998) (draft on file with author) (discussing proposed protocol on race and national origin discrimination). Finally, a treaty may contain higher standards than other agreements addressing the same subject matter, but achieve those standards only by settling for weaker implementation provisions. See HUMAN RIGHTS LAW-MAKING, *supra* note 13, at 165 & n.78 (citing the Protocol relating to the Status of Refugees as an example).

Textual differences may also be a product of poor draftsmanship or "incompetence, hasty consideration and approval, lack of adequate research and editing." *Id.* at 269. In such cases, because the drafters did not make a deliberate decision to enshrine differing substantive standards, it may be possible for tribunals to avoid needless diverging interpretations and harmonize human rights law across different treaties. See *Glaser v. Federal Rep. of Germany*, 104 Eur. Ct. H.R. (ser. A) ¶ 48, at 25 (1986) (suggesting that the ECHR may have less interpretive freedom where the absence of a right in the European Convention was not "a chance omission," but a deliberate exclusion).

<sup>258</sup> See Vienna Convention on the Law of Treaties, arts. 31, 32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 340 [hereinafter Vienna Convention] (specifying interpretive methodologies for all treaties). The ECHR has refused to find certain rights implicitly protected by the European Convention in part because its drafters had deliberately excluded those rights with the knowledge that they were contained in other human rights agreements. See, e.g., *Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser. A) at 99-102 (1991) (finding no explicit obligation to comply with the tribunal's interim rulings); *Johnston v. Ireland*, 112 Eur. Ct. H.R. (ser. A) ¶¶ 51-58, at 24-26 (1986) (finding no explicit right to divorce).

<sup>259</sup> Even where treaty texts are identical, however, diverging rulings may be appropriate based on the differing objectives of two treaties. For example, the European tribunals have often read higher human rights standards into the European Convention by using a comparative methodology that examines national law trends among the treaty's signatory States. See Helfer & Slaughter, *supra* note 1, at 382-84 (discussing this method of interpretation). A similar purposive approach may explain the UNHRC's



Contrary to some commentators' fears, diverging decisions are unlikely to produce a "race to the bottom" in which States comply only with the "weakest" decision interpreting a right protected by two or more treaties to which they are parties.<sup>260</sup> Most human rights treaties contain a "most-favorable-to-the-individual clause" which ensures that "the individual should have the benefit of the instrument which gives him greater protection against governmental interference with his rights."<sup>261</sup> As applied to tribunals' case law, these clauses preclude a

---

more rights-protective rulings in the *Brinkhof* and *Casanovas* cases. See *supra* notes 101, 177.

<sup>260</sup> HUMAN RIGHTS LAW-MAKING, *supra* note 13, at 145, 241 (suggesting such a concern).

<sup>261</sup> COMMISSION TO STUDY THE ORGANIZATION OF PEACE, *supra* note 218, at 175; see also TRINDADE, *supra* note 13, at 114-15 (reviewing treaty provisions and case law adopting as a principle of coexistence between human rights systems "the choice or primacy of the most favourable provision to the individual concerned, when the same rights are guaranteed by two or more instruments"). See ICESCR, *supra* note 25, art. 5(2), for relevant text stating:

No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Equivalent language is found in the ICCPR, *supra* note 24, art. 5(2). See also European Convention, *supra* note 26, art. 60 ("Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."); American Convention, *supra* note 27, art. 29 ("No provision of this Convention shall be interpreted as . . . [r]estricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party."); CEDAW, *supra* note 30, art. 23 ("Nothing in this Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained . . . [i]n any other international convention, treaty or agreement in force for that State."); Convention Against Torture, *supra* note 31, art. 1(2) (providing that the Convention's definition of torture "is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application").

Although the Race Convention and the African Charter do not contain similar clauses, commentators have argued that the most favorable to the individual standard has evolved into a general principle of construction that applies even in the absence of a specific treaty provision. See TRINDADE, *supra* note 13, at 121 ("Where States have undertaken obligations under parallel co-existing instruments of protection of human rights, it may be taken to have been the intention to accord individuals a more extended and effective protection . . ."); Lillich, *supra* note 153, at 475 n.115 (arguing that "other international and regional bodies should be allowed to interpret similar human rights norms differently when in so doing they accord individuals a greater measure of protection"). But see HUMAN RIGHTS LAW-MAKING, *supra* note 13, at 145 (noting that in the absence of a specific treaty clause, "States might argue that the principle of the most favourable treatment constitutes a principle *de lege ferenda* and try to benefit from the existence of two different standards by observing the lower of the

State from invoking a less rights-protective decision interpreting treaty "A" as a basis for rejecting a more rights-protective decision of another tribunal interpreting the same right protected by treaty "B."<sup>262</sup> The clauses thus enhance the legal protections available to human rights victims under overlapping treaty provisions and provide a meta-rule to resolve any uncertainties generated by divergent rulings on the same subject. With the "dangers" of divergence so diminished, the need to bar forum shopping as a means of preventing divergence also dissipates.

### b. *Conflicting Standards*

Conflicting human rights rulings present a more troublesome problem requiring more careful scrutiny. Unlike domestic law, there is no final judicial arbiter of international human rights law empowered to preempt conflicting decisions. Where arguably conflicting rights are protected by different treaties overseen by different tribunals, forum shopping may produce rulings that make it impossible for the defending State to comply with both sets of its treaty obligations at the same time. The most favorable to the individual rule does not resolve this problem since it does not indicate which set of opposing individual rights is paramount.

A closer examination, however, reveals that even the risk of conflicting decisions fails to justify a broad-based forum shopping ban. First, instances of conflict are likely to be rare. There is a broad concordance of human rights standards across universal, regional, general, and specialized treaties—all of which find their common genesis in the Universal Declaration on Human Rights. As a result, divergent rulings will predominate over cases of conflict.<sup>263</sup>

---

two").

<sup>262</sup> In theory, a State might argue that the most favorable of the individual clauses apply only to treaty texts and not to the decisions of the tribunals interpreting them, particularly with decisions that are not legally binding. Such a position is, however, inconsistent with the treaties' objects and purposes, which contemplate an authoritative, interpretive role even for tribunals that issue non-binding recommendations. See *General Comment 24(52)*, *supra* note 112, ¶¶ 11, 13 (discussing States' reservations to substantive treaty obligations). This position also undermines the widely accepted rule of construction that human rights treaties are to be given an expansive rather than restrictive interpretation that favors the rights of individuals. See Helfer & Slaughter, *supra* note 1, at 378-79 (discussing case law adopting expansive interpretations of human rights treaties).

<sup>263</sup> See, e.g., TRINDADE, *supra* note 13, at 409 (identifying the "essentially complementary nature" of different human rights treaty systems and tribunals); Heffernan, *supra* note 239, at 82 (discussing how "the European Convention would join with the [Universal] Declaration in providing a blueprint for the subsequent elaboration of civil

Second, active horizontal dialogue among tribunals is also likely to reduce conflict. The case study of racist speech demonstrates that human rights jurists can consider and harmonize each other's decisions and interpretive statements to avoid placing States in situations where they are forced to disregard one of their international obligations. In this way, forum shopping may actually lead to greater convergence of standards, as issues that appeared to be conflicting in the abstract are shown through case law to be compatible with each other.<sup>264</sup>

Third, even assuming that it is desirable to avoid conflicting decisions, a ban on forum shopping is ill-suited to achieve that objective. As the case studies of racist speech and the death row phenomenon demonstrate, whether a treaty permits or prohibits forum shopping is often irrelevant to whether jurists are presented with identical or similar legal issues that may lead to divergent or conflicting rulings. Even in treaty systems that bar successive and simultaneous petition forum shopping, jurists may entertain identical legal claims where the identity of the petitioner differs.<sup>265</sup> Thus, a forum shopping ban is an overbroad tool for preventing conflicting rulings, and it is achieved at the cost of preventing human rights victims from receiving redress under all of the treaties to which their governments are parties.

Finally, the limited number of conflicting legal norms that do exist reflect the international community's commitment to respect rights that are, at least in the abstract, incompatible.<sup>266</sup> Given the tensions between universal and culturally influenced conceptions of human rights and the differing stages of development among States, it may not be possible to avoid conflicting rulings entirely. Even here, how-

---

and political rights protection"); see also *Other Treaties*, *supra* note 228, ¶¶ 51-52 (noting the Inter-American Court's competence to interpret human rights treaties outside the Inter-American system and the Court's rejection of the claim that this would lead to "the possibility that the opinions of the Court might conflict with those of other tribunals or organs").

<sup>264</sup> This convergence will also restrict States' ability to take advantage of unadjudicated potential conflicts by selectively choosing which treaty obligations to follow or by invoking such potential conflicts to justify their refusal to conform their domestic law to either treaty's standards.

<sup>265</sup> See *supra* note 67 (noting that petitions will only be barred on the grounds that they address "the same matter" when they are brought by the same, or by "virtually the same" complainants).

<sup>266</sup> In addition to racist speech, two other significant areas of potential conflict are the rights of women versus religious freedom, and the rights of unborn children versus the privacy rights of pregnant women. See HUMAN RIGHTS LAW-MAKING, *supra* note 13, at 77-79, 137-40, 153-60 (highlighting the conflicts between religious freedom and women's equality, and between the right to life and the right to privacy).

ever, forum shopping can encourage dialogue that will permit jurists to avoid conflicting decisions where possible, while precisely defining those conflicts that are unavoidable in carefully limited, fact-specific contexts. States faced with such conflicting decisions will then be given a concrete issue for future corrective law-making.

*E. Refocusing on Institutional Interests: Burdens of Expanding Responsibilities, Crowded Dockets, Delays, and Inadequate Resources*

Having demonstrated that the early commentators' concerns do not justify a blanket forum shopping ban, and that forum shopping has significant advantages for both aggrieved individuals and the petition system as a whole, I now consider in detail evidence relating to finality concerns and efficient use of resources that strongly suggest a need to restrict forum shopping.

Human rights litigation at the close of the twentieth century looks very different than it did only a few decades ago. Human rights tribunals have increased in number, as have the States parties participating in adjudication before them. The number of petitions filed has also risen, reflecting the growing awareness by individuals, attorneys, and non-governmental organizations ("NGO"s) of the advantages of seeking international review when domestic efforts at redress fail.<sup>267</sup>

Swelling dockets bring with them significant problems as well as opportunities to interpret treaty obligations and redress wrongs. From the individual's perspective, challenging a government before a human rights tribunal is a long and arduous process. For example, until the 1998 merger of the ECHR and the European Commission, petitioners with meritorious claims waited more than five years for their cases to be heard by both tribunals.<sup>268</sup> The delays outside of Europe are also significant. "It usually takes two to three years [for the UNHRC] to adopt Views on a case, though in exceptional cases the procedure may be completed in under a year."<sup>269</sup>

Moreover, the UNHRC is not a permanent body and meets three times a year for three-week sessions. This schedule permits the Com-

<sup>267</sup> See sources cited *supra* notes 237-38.

<sup>268</sup> See Schermers, *supra* note 246, at 495 (discussing the "increasing backlog of cases"). It should be noted, however, that only meritorious cases require such prolonged consideration. Decisions dismissing a case at the admissibility stage are made much more quickly, usually in under a year. *Id.* at 495-96.

<sup>269</sup> Oldrich Andrysek, *Gaps in International Protection and the Potential for Redress Through Individual Complaints Procedures*, 9 INT'L J. REFUGEE L. 392, 403 (1997).

mittee to issue final decisions for no "more than thirty to forty cases annually."<sup>270</sup> According to UNHRC member Thomas Buergenthal, the Committee can barely keep pace with its growing docket.<sup>271</sup> A steady flow of cases from each of the ninety-five Optional Protocol signatories "would paralyze the Committee."<sup>272</sup> Although such a paralyzing increase does not appear imminent, it might occur if universal ratification of the ICCPR is achieved early in the next century.<sup>273</sup>

Adding to the backlog are hundreds of petitions that are frivolous or relate to issues unambiguously outside the treaty's scope. The tribunals have adopted a variety of mechanisms to process these claims, most notably shifting decision-making authority to sub-committees, working groups, or Secretariat staffs to screen such cases and discourage their formal registration. Each year, for example, the UNHRC's Secretariat dismisses several hundred communications and refuses to register several hundred others until the complainants have provided adequate information to determine their admissibility.<sup>274</sup> The European Commission's Secretariat staff goes even further, actively dissuading individuals with no prospect of success from formally registering their petitions.<sup>275</sup> In more serious cases, individual jurists

---

<sup>270</sup> *UN Human Rights Regime*, *supra* note 240, at 483 (remarks by Thomas Buergenthal, George Washington University National Law Center). This figure apparently does not include admissibility decisions. For example, the Committee's 1994 report to the General Assembly indicated that in three sessions over a one-year period it issued final views in 32 cases, declared another 30 cases inadmissible, and declared 26 additional cases admissible for further review on the merits. See *Annual General Assembly Report of the Human Rights Committee*, U.N. GAOR, Hum. Rts. Comm., 49th Sess., Supp. No. 40, U.N. Doc. A/49/40 vol. 1, ¶¶ 380-82 (1994) [hereinafter *1994 Annual Report*].

<sup>271</sup> See *UN Human Rights Regime*, *supra* note 240, at 483 (stating that the Committee "is every day less able to discharge its responsibilities") (remarks by Thomas Buergenthal, George Washington University National Law Center).

<sup>272</sup> *Id.*

<sup>273</sup> See *1996 Alston Report*, *supra* note 2, ¶¶ 14-36 (discussing the recent increase in ratification of U.N. human rights treaties and efforts made to achieve "universal ratification"). The smaller number of signatories to the optional petition procedures of CERD and CAT has thus far resulted in a less crowded docket for those tribunals. See *United Nations High Commissioner for Human Rights*, Treaty Bodies Database <<http://www.unhchr.ch/tbs/doc.nsf>> (noting 56 cases decided by CAT and 6 cases decided by CERD as of Sept. 22, 1999). However, the push to achieve more widespread ratification of U.N. human rights treaties may lead to a significant increase in future case loads. See *1993 Alston Report*, *supra* note 38, ¶ 249 (noting that optional communications procedures are "likely to grow in the years ahead").

<sup>274</sup> See *1994 Annual Report*, *supra* note 270, ¶ 378 (noting that many communications require further information); ZWART, *supra* note 43, at 11 (discussing the decision process for accepting communications).

<sup>275</sup> See ZWART, *supra* note 43, at 24-25 (detailing the process for establishing a provisional file and advising the applicant on whether or not to proceed). These attempts

appointed as special rapporteurs, or working groups composed of a few jurists, make final admissibility rulings or recommend a decision to be taken by the plenary tribunal.<sup>276</sup> Through these approaches, the tribunals have made significant progress in reducing their workloads, although it is unclear whether further streamlining could result in significant additional efficiencies.<sup>277</sup>

In addition to considering complaints from individuals, U.N. treaty bodies and the Inter-American and African Commissions must devote a significant amount of their resources and meeting times to activities unrelated to the petition system, such as reviewing States parties' initial and periodic reports, generating studies of human rights issues (which sometimes include on-site investigations), and drafting general comments interpreting the treaties they superintend.<sup>278</sup> Here even more serious problems are plaguing jurists. With respect to States' reporting under U.N. human rights treaties, for example, two to three years elapse between a State's filing of a report and its review by jurists. The only reason that the treaty bodies can review reports this quickly is because so many States are dilatory in submitting them. If all States were to promptly submit their reports, an enormous backlog would be created.<sup>279</sup>

The broad range of judicial and non-judicial functions that human rights jurists must perform for an increasing number of States might have generated enhanced levels of material and financial support. Sadly, it has not. All tribunals, with the exception of the ECHR, are chronically starved for resources. The UNHRC, for example, has repeatedly requested that the Secretary General provide the staff and financial resources necessary to process in a timely fashion the petitions and reports it receives, and has warned that its ability to perform its functions is suffering as a result.<sup>280</sup> A similar resource vacuum

---

at dissuasion are remarkably effective in reducing the Commission's workload, for "only a fifth of the complaints submitted under the Convention are registered for examination by a committee." *Id.* at 29.

<sup>276</sup> See 1994 *Annual Report*, *supra* note 270, ¶¶ 385-87 (discussing the use of new approaches to examining communications, including the use of "Special Rapporteurs"); ZWART, *supra* note 43, at 10-11, 29-31 (discussing the changing role of the respective organs with respect to the use of special rapporteurs).

<sup>277</sup> See NOWAK, *supra* note 44, at 688-89 (discussing factors that determine the length of proceedings); ZWART, *supra* note 43, at 38-40 (discussing the use of time-saving procedures to ease caseload burdens).

<sup>278</sup> See DAVIDSON, *supra* note 36, at 107-18; Mutua, *supra* note 228, at 345-46; *supra* Part I.A (presenting an overview of the human rights treaty system).

<sup>279</sup> See 1996 *Alston Report*, *supra* note 2, ¶¶ 48-52 (discussing the "inadequacy of the current system to [handle] the timely submission of reports").

<sup>280</sup> See 1994 *Annual Report*, *supra* note 270, ¶ 27 (requesting additional resources to

plagues other tribunals.<sup>281</sup> Amendments to several treaties have been adopted to ease some of these resource concerns, but they are not comprehensive and have yet to enter into force.<sup>282</sup>

Taken together, these concerns suggest the emergence of a triage-like situation in which the tribunals conserve their limited resources to address only the most serious human rights concerns. Devoting significant time to processing forum shopping petitions, which by definition are being or have already been considered by at least one tribunal, seems from this perspective to be among the least compelling cases for the jurists' attention.

#### IV. FORUM SHOPPING REFORM

The complex and conflicting institutional and normative concerns that pervade the human rights petition system at the beginning of the twenty-first century warrant a significant restructuring of existing approaches to forum shopping. Any proposal for reform must, on the one hand, maximize the benefits that flow from adding additional cases to the tribunals' dockets—such as providing greater opportunities to redress individual human rights violations, enhancing the opportunities to clarify the treaties' substantive requirements, and harmonizing human rights standards through an informed and active horizontal dialogue among jurists. But it must also allow jurists sufficient flexibility to manage the additional administrative and financial burdens caused by the increase in petitions and to avoid alienating defendant States by an unduly prolonged petition process. Finally, such a proposal must be squared with the broader reforms of the treaty system currently being debated within the U.N.

The proposal that follows is divided into three stages. In the first stage, I set out a comprehensive proposal for forum shopping reform that balances the theoretical concerns identified in Part III and en-

---

meet an increasingly complex and intensive workload); 1995 Annual Report, *supra* note 167, ¶ 491 (reiterating a request to the Secretary-General to "take the necessary steps to ensure a substantial increase in the number of staff, specialized in the various legal systems, assigned to service the Committee," and noting "that the work under the Optional Protocol continues to suffer as a result of insufficient Secretariat resources").

<sup>281</sup> See 1993 *Alston Report*, *supra* note 38, ¶¶ 194-206 (stating that the funding and support that "each [committee] receives is inadequate and an impediment to more effective functioning"); Lynda E. Frost, *The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges*, 14 HUM. RTS. Q. 171, 177 (1992) (discussing the economic crisis of the Inter-American Court of Human Rights).

<sup>282</sup> See 1996 *Alston Report*, *supra* note 2, ¶¶ 98-99 (noting the need for such amendments, but observing the "domestic legal and political requirements needed to approve such an amendment to a treaty").

courages jurists to engage in a dialogue over human rights norms shared by more than one treaty. The proposal assumes that the current structure of the petition system, in which each tribunal is empowered to review petitions concerning one treaty only, will remain in place at least in the short term and perhaps for several decades.

The second stage addresses how this proposal can be implemented. Under one approach, States parties could amend the treaties to grant jurists discretion to decide which forum shopping cases to consider on the merits. Given the political difficulties of coordinating amendments across all global and regional treaties, this approach will likely be feasible as a near-term strategy only for those optional petition procedures that have not been finalized and opened for signature to States parties, at least until the U.N. undertakes more comprehensive reforms of the treaty system. In the interim, a different approach will be required. I therefore identify a series of concrete steps that jurists can adopt immediately to implement the bulk of my proposal into the petition system in its current form.

The third stage of the proposal highlights some cautionary concerns about broader reforms of the treaty system now being debated within the United Nations. Thus far, most of the reforms have concentrated on modifying the procedures for reviewing States parties reports. Several commentators, however, including some human rights jurists, have also advocated far-reaching reforms of the petition system, including abolishing the multiple tribunals within the U.N. and replacing them with a permanent human rights court. Although a single human rights court is a salutary long-term goal, prematurely abolishing the existing tribunals risks diminishing rather than enhancing opportunities for international review of national laws and practices.

#### A. *A Proposal for Forum Shopping Reform*

As a preliminary matter, my proposal to reform human rights forum shopping distinguishes between simultaneous and successive petition forum shopping.<sup>283</sup>

---

<sup>283</sup> See *supra* Part I.C. As noted above, "choice of tribunal forum shopping" is permitted under all human rights agreements. Because eliminating this choice would seriously undermine the efficacy of the treaty system for aggrieved individuals, I do not propose any restrictions on this type of forum shopping. See Eissen, *supra* note 13, at 201-02 (discussing the benefits and criticisms of "choice of tribunal forum shopping").



## 1. Simultaneous Petition Forum Shopping

### a. *Identical Factual Allegations and Legal Claims*

Although several treaties do not bar individuals from filing simultaneous petitions that raise identical factual allegations and legal claims,<sup>284</sup> the arguments against permitting such a practice are compelling. The principal objectives of the petition system are to provide aggrieved individuals with a neutral forum in which to determine whether their rights have been violated, to permit jurists to apply a treaty's text to a specific set of facts, and, where a violation is found, to issue judgments or recommendations to States parties to modify their national practices. Any single tribunal, acting alone, is competent to achieve each of these goals.<sup>285</sup>

Efficiency and finality concerns, as well as the need to promote horizontal dialogue among jurists, strongly counsel against simultaneous petition forum shopping. Permitting more than one review body to entertain the same complaint at the same time is highly inefficient, wasting scarce judicial resources and needlessly duplicating proceedings.<sup>286</sup> These concerns have become even more pressing in recent years as the tribunals' workloads have increased while their resources have remained stagnant. Nor are efficiency losses compensated for by the benefits of increased dialogue over human rights norms that successive petition cases can engender. To the contrary, simultaneous review precludes a dialogue among different sets of jurists that often occurs in successive petition cases, since neither formal nor informal mechanisms exist for jurists to review collectively a petitioner's pend-

---

<sup>284</sup> See *supra* note 62 (discussing the African Charter, ILO treaties, and the Race Convention).

<sup>285</sup> See Henry J. Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 9-10, 12 (Philip J. Alston & J. Crawford eds., forthcoming 2000) (draft on file with author) (identifying the three adjudicatory purposes the UNHRC seeks to fulfill as providing individual justice, protecting rights through deterrence and behavior modification, and expounding the meaning of the ICCPR).

<sup>286</sup> See TARDU, *supra* note 4, at 22 (stressing the need for "a minimum of cohesion at the international level and for reasonable safeguards against repetitive complaints"). In U.S. law, simultaneous petition forum shopping is allowed prior to final judgment, although the practice is limited somewhat through statutes, abstention doctrines, and certification procedures. See Cover, *supra* note 7, at 647. Permitting simultaneous litigation domestically also avoids a first-to-file race between the plaintiff and defendant to control the choice of forum, leaving that choice in part in the hands of a neutral judicial umpire. In the human rights context, by contrast, there is no race to file because only individuals and groups can file petitions against States. States cannot counterclaim or seek declaratory relief in response.

ing allegations or the legal norms shared by more than one treaty.<sup>287</sup> In light of these policies, I propose that no simultaneous petition forum shopping be permitted where the two pending petitions are based upon the same factual allegations and assert violations of the same treaty rights.<sup>288</sup>

b. *Distinct Legal Claims and Factual Allegations*

A more difficult problem arises, however, where the pending petitions address distinct legal issues or distinct factual allegations. Although the case law on this issue is limited, three different types of simultaneous forum shopping cases can be envisioned.<sup>289</sup>

i. *Distinct Legal Claims Arising Out of Related Factual Allegations*

The first type of case arises when a petitioner seeks to divide between two or more tribunals the adjudication of distinct legal claims arising out of the same underlying factual allegations. The UNHRC's decision in *V.M.Ø. v. Norway*<sup>290</sup> can be modified to provide an example. The petitioner in *V.M.Ø.* claimed that a domestic court had violated his rights by issuing a divorce and custody decree that did not grant him adequate visitation rights with his daughter. *V.M.Ø.* raised three distinct legal challenges to the decree: the right to a fair trial, the right to respect for family life, and the right to be free from sex discrimination. In the actual case, he presented all three claims first to the European Commission and then to the UNHRC. But could he have divided these three legal claims between the two tribunals, submitting two claims to the Commission while simultaneously submitting the remaining claim to the UNHRC?

---

<sup>287</sup> See Eissen, *supra* note 13, at 202 n.70 (discussing bars to collective deliberation of pending petitions); see also HUMAN RIGHTS LAW-MAKING, *supra* note 13, at 139 (noting that each human rights tribunal "tends to act in isolation").

<sup>288</sup> But see *infra* Part IV.B.2 (suggesting such review in one unique context).

<sup>289</sup> The admissibility clauses in existing human rights agreements implicitly endorse an individual's right to divide his or her factual allegations and legal claims and to present them simultaneously to two different human rights tribunals. By banning forum shopping only where the "same matter" or "substantially the same" matter is pending before another tribunal or review body, these clauses imply that litigating different legal claims or factual allegations in another forum is permissible. See, e.g., European Convention, *supra* note 26, art. 27(1)(b); Optional Protocol, *supra* note 42, art. 5(2)(a).

<sup>290</sup> *V.M.Ø.*, *supra* note 82. For a discussion of *V.M.Ø. v. Norway*, see *supra* text accompanying notes 82-92.

No international human rights decision clearly answers this question. As discussed in Part II, several decisions of the UNHRC have adopted an "events and facts" interpretation of the phrase "the same matter" as contained in the Optional Protocol's forum shopping clause and reservations.<sup>291</sup> By focusing on a petition's underlying factual allegations, this interpretation appears to preclude a petitioner from raising in a second petition a distinct legal claim arising out of the same factual allegations contained in a petition that is simultaneously pending before another tribunal, even if that precise legal claim had *not* been raised in the first proceeding. In its 1994 General Comment, however, the Committee adopted a seemingly contradictory position. It stated that the forum shopping bar should be applied only if "the legal right and the subject matter" set forth in both petitions are "identical."<sup>292</sup> This contrary interpretation suggests that the petitioner in *V.M.Ø.* could have split his three claims between two simultaneously-filed petitions, a possibility discussed in greater detail below.

## ii. Distinct Factual Allegations

A second type of simultaneous forum shopping occurs where the complaining party's pending petitions address distinct or unrelated factual allegations and, by implication, the distinct legal claims that flow from them. In the *Fajardo* case, for example, a group of dismissed government employees first challenged the government's suppression of union activities before the ILO's Trade Union Freedom Committee. While the ILO petition was pending, the employees filed a petition with the Inter-American Commission challenging the unfairness of judicial proceedings relating to that strike. They based their petition on different events and treaty rights. Given the significantly different focus of the two allegations, the Commission refused to dismiss the simultaneous petition under the American Convention's forum shopping bar.<sup>293</sup>

---

<sup>291</sup> See *supra* Part II.A.1.b (discussing *Trébutien*, *supra* note 94, ¶ 6.4). This standard is similar to the transactional tests applied by many U.S. courts to determine the scope of a claim. See Erichson, *supra* note 9, at 973 (discussing standards used to determine whether claims made in multiple lawsuits are the same).

<sup>292</sup> General Comment 24(52), *supra* note 112, ¶ 14. The Committee was addressing successive petition forum shopping cases, but its interpretation of "the same matter" in article 5, paragraph 2 of the Optional Protocol would apply *mutatis mutandis* to simultaneous petition cases.

<sup>293</sup> For a discussion of *Fajardo*, see *supra* text accompanying notes 131-40.

### iii. Claims Reviewable in Only One Forum

In both of the situations outlined immediately above, the petitioner will often be able to litigate all of her claims before either tribunal, rather than splitting those claims between two tribunals. However, the significant differences among human rights treaties identified in Part I raise the possibility that an individual may file a simultaneous petition with a second tribunal as a means of obtaining international review of some facet of her claim that could not be litigated before the first tribunal.

This possibility arises in both related and distinct factual allegation cases. For an example of a related factual allegation case, imagine that the petitioner in *V.M.Ø.* failed to pay the child support ordered by the Norwegian court when it awarded custody of his daughter to his ex-wife. The petitioner might have challenged the payment order, which arose out of the same factual allegations as his challenge to the custody order, as a violation of his right to the "peaceful enjoyment of his possessions."<sup>294</sup> However, because that right is protected by the European Convention but not the ICCPR, he could have raised this claim only before the European Commission, not the UNHRC.<sup>295</sup>

The *Fajardo* case illustrates how this issue can arise in a distinct factual allegations situation. The ILO Committee, to which the petitioners directed their claims concerning the government's suppression of union activities, only has jurisdiction to review petitions that allege violations of ILO labor treaties. The Committee could not have considered any of the petitioners' claims concerning unfair and arbi-

---

<sup>294</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Mar. 20, 1952, art. 1, Europ. T.S. No. 9 [hereinafter Protocol No. 1].

<sup>295</sup> See Robertson, *supra* note 13, at 40 (pointing to three rights which are "protected by the European system but not in the United Nations Covenant," including the right to property). Under the European Commission's deferential approach to property regulation, the likelihood that such a claim would succeed is extremely slim. See, e.g., App. No. 8906/80, Admissibility decision of 7 Dec. 1982 (unpublished), *reprinted in* 5 DIGEST OF STRASBOURG CASE-LAW RELATING TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Update, Part 4, at 29 (1997) (rejecting peaceful enjoyment of property claim based on spousal support order); see also VAN DIJK & VAN HOOF, *supra* note 36, at 641-42 (stating that in regard to the payment of taxes, "the States Parties have a wide margin of appreciation in deciding on the type of tax or contributions they wish to levy").

trary domestic judicial proceedings.<sup>296</sup> In short, only by filing a simultaneous petition with the Inter-American Commission could the petitioners have received international review of all of their human rights claims.

c. *Applying an "Events and Facts" Approach to Simultaneous Petitions*

To what extent should human rights jurists permit simultaneous petition forum shopping in the three different situations outlined above? The competing theoretical justifications identified in Part III can be balanced most effectively by applying an "events and facts" or transactional approach to evaluate the admissibility of a simultaneous petition. Under this standard, individuals would be precluded from presenting the same factual allegations and legal claims to different tribunals at the same time. They would also be compelled to raise in a single proceeding all legal claims arising out of those allegations that are within the jurisdiction of the tribunal considering the petition. Weeding out a distinct legal claim that could have been raised in the initial proceeding and presenting it to a second tribunal while the first petition is still pending would not be permitted.<sup>297</sup>

This "events and facts" approach would not, however, bar jurists from adjudicating a simultaneous petition containing factual allegations significantly distinct from those at issue in a petition pending before another body.<sup>298</sup> Nor would it prohibit them from entertaining a simultaneous petition to the extent that the first tribunal to hear the petition does not have the power to adjudicate all of the legal claims arising out of those factual allegations.

---

<sup>296</sup> See *Fajardo*, *supra* note 131, ¶ 47 ("The Committee would not be competent to rule on this issue since that would involve matters that were not charged in the case before it . . .").

<sup>297</sup> Prior to dismissing a petition on this basis, jurists should inform the petitioner of their decision and permit her to choose the forum in which to proceed. For example, an individual faced with the prospect that the second tribunal will dismiss her complaint should have the option to withdraw the complaint pending before the first tribunal and proceed solely before the second tribunal. The same rule should be applied where the first tribunal indicates that it will dismiss the complaint on the basis of a simultaneous petition forum shopping bar. The UNHRC has already adopted this practice. See *Bordes*, *supra* note 129, ¶ 5.2 (explaining that an individual withdrew his application from the first tribunal in order to present his case to the second tribunal).

<sup>298</sup> I use the phrase "significantly distinct" to stress that jurists should retain the discretion to dismiss simultaneous petitions that emphasize minor factual details that could have been raised in the first proceeding or that do not affect the substance of the petitioner's claims. See *infra* Part IV.B (discussing approaches to the implementation of forum shopping reform).

By significantly constraining the ability of litigants to split their claims, the "events and facts" standard will lead to a more efficient use of jurists' severely limited resources without unduly constraining petitioners' right to seek an effective international remedy. However, because the determination of which events and facts should be deemed "related" and which legal claims are beyond the jurisdiction of another tribunal necessarily vary with the details of each case, the standard cannot draw a definitive line in advance to separate those simultaneous petitions that should be considered from those that should be summarily dismissed. The touchstone for the jurists' analysis, therefore, should be whether the first tribunal seized of the case has the ability to issue a decision that will vindicate the petitioner's rights.

Again, the *V.M.Ø.* and *Fajardo* decisions provide helpful examples. The petitioner in *V.M.Ø.* raised three distinct legal claims, but his principal objective was to obtain a favorable supranational decision allowing him to pressure the Norwegian government or courts to overturn the order denying him custody of his daughter.<sup>299</sup> Because a favorable ruling on any of his three legal claims would achieve this result, permitting *V.M.Ø.* to divide his legal claims between two pending proceedings would be highly inefficient. It would require two sets of jurists to expend significant effort examining the same interrelated legal and factual issues, which would become moot for one set of jurists, possibly at an advanced stage of the proceedings, if the first set of jurists issued a decision in *V.M.Ø.*'s favor.<sup>300</sup>

Even if, under the child support hypothetical discussed above, *V.M.Ø.* had raised a property deprivation claim before the European Commission while his petition to the UNHRC was pending, compelling arguments would support the Commission's decision to dismiss

---

<sup>299</sup> See *V.M.Ø.*, *supra* note 82, ¶¶ 1-3. I phrase the petitioner's objective in this way because many petition procedures do not result in legally binding decisions, and even those that do are often not given direct effect in national laws. It is thus more accurate to describe petitioners as seeking *supranational* decisions that allow them to pressure government actors to modify national laws and practices. See Helfer & Slaughter, *supra* note 1, at 290.

<sup>300</sup> It might be argued that *V.M.Ø.* had an interest in having each of his three distinct legal claims fully adjudicated by some tribunal. This interest would survive the issuance of a decision by the first tribunal finding in his favor on only one of those claims. Such an argument is, however, inconsistent with the settled practice of human rights tribunals, which regularly decline to consider additional legal claims raised by a petitioner once a single treaty violation has been found. See, e.g., Hertel v. Switzerland, *European Court of Human Rights—Judgments and Decisions* 1998-VI, 2298, 2333, App. No. 25181/94, 87 Eur. Ct. H.R., ¶ 54 (1998); *A. v. Australia*, U.N. GAOR, Hum. Rts. Comm., 59th Sess., Annex, ¶ 9.7, U.N. Doc. CCPR/C/59/D/560/1993 (1997).

that petition. Although the UNHRC would not have the power to adjudicate V.M.Ø.'s property deprivation claim, a decision in his favor on one of the other legal claims raised in his petition would still have provided V.M.Ø. with the means to pressure Norwegian officials and judges to modify the court order containing both the custody decree and the hypothetical child support award. Because a favorable ruling by the Commission on V.M.Ø.'s distinct property rights claim would be unlikely to provide him any meaningful relief beyond what he could already expect from the UNHRC, the Commission could properly decline to consider the property claim.

The same arguments cannot be applied to the *Fajardo* case. Any recommendation by the ILO Committee concerning the petitioners' free association rights would not have affected the outcome of their petition to the Inter-American Commission seeking compensation for arbitrary and unfair judicial proceedings.<sup>301</sup> Those latter claims were factually distinct from the allegations presented to the ILO Committee and thus involved little duplication of effort by the two tribunals. Moreover, these claims raised legal issues going well beyond the ILO Committee's jurisdiction. Had the Inter-American Commission declined to hear the case on forum shopping grounds, a significant component of the petitioners' alleged human rights violations would never have been addressed by an international tribunal competent to review them.

## 2. Successive Petition Forum Shopping

Successive petition forum shopping presents even more complex issues. As explained in Part I, human rights treaties, States parties, and commentators are sharply divided over whether to permit this activity. This division exists because of the difficulty of balancing the opposing interests of the parties involved in human rights litigation as well as the competing institutional and normative concerns raised by such conduct.

It is possible, however, to reconcile these issues by breaking down successive petition forum shopping into three distinct types of disputes: first, disputes in which the petitioner could not have presented to the first tribunal the legal claims or factual allegations contained in the later petition; second, cases in which the petitioner could have

---

<sup>301</sup> *Fajardo*, *supra* note 131, ¶ 37 ("While it is true that the events in the two cases are the same, the rights that have presumably been violated are different and an ILO decision does not lead to any effective settlement of the violation denounced.").

presented to the first tribunal the legal claims or factual allegations contained in that later petition, but did not; and finally, cases in which the petitioner did present the legal claims or factual allegations contained in the later petition to the first tribunal, but the tribunal considered and rejected them on the merits.

I propose that human rights tribunals be given the authority to entertain all three types of successive petitions on their merits. As a matter of prudence, however, such authority should be exercised differently depending upon the type of case presented. Jurists should be most inclined to entertain the first category of cases, should be more reluctant to entertain the second class of disputes, and should entertain the third group of cases only rarely, if at all.

My proposal for successive petition forum shopping closely tracks the "events and facts" standard I advocate for simultaneous petition forum shopping, in that it encourages litigants to raise all factual allegations and legal claims that are within a tribunal's jurisdiction in a single proceeding. However, my proposal deviates from the "events and facts" standard in that it grants jurists limited discretion to entertain factual and legal issues that either were, or could have been, raised in an earlier proceeding. In the sections that follow, I describe each of these three case types in greater detail, explaining for each the arguments supporting my proposal and identifying prudential considerations to guide jurists facing any of these three circumstances.

I stress two points at the outset. The first is that my proposal does not require a tribunal to hold a full-blown hearing on the merits whenever it decides not to dismiss a complaint on forum shopping grounds. To the contrary, the jurists may reach the entirely defensible conclusion that, although a successive petition should not be summarily dismissed on the basis of a treaty's forum shopping bar, it nevertheless should be declared inadmissible for failing to satisfy one of the treaty's other admissibility requirements.<sup>302</sup> Under current practice, these forum shopping bars disempower human rights jurists from any consideration of the allegations contained in a successive petition, even in a summary fashion. Under my proposal, by contrast, jurists themselves will have the discretion to determine whether a successive

---

<sup>302</sup> Thus, it would be perfectly permissible, for example, for a tribunal to dismiss a petition for failing to disclose a colorable violation of the treaty, even though that petition should not be dismissed on the basis of a treaty's successive petition forum shopping bar. See ZWART, *supra* note 43, at 139-54 (discussing cases in which the European Commission and the UNHRC have decided cases on the merits at the admissibility stage). For a comprehensive discussion of treaty admissibility clauses, see *id.* at 41-228.



petition's allegations justify a full review on the merits or a summary dismissal at the admissibility stage.

Second, although I believe that jurists rather than States parties should control the pace and extent of forum shopping by petitioners, I do not propose that each forum shopping decision be based on an ad hoc assessment of case-specific factors having no precedential value for future disputes. Instead, jurists should use the prudential concerns I identify below, along with other relevant factors, to create clear and relatively constraining rules for petitioners and States parties to follow. What I envision is a common law-like process, in which tribunals use early forum shopping petitions to generate a fund of experiential knowledge upon which to build jurist-created rules to guide the parties' strategic behavior when utilizing the petition system.

*a. Legal Claims and Factual Allegations That Could Not Have Been Raised in the First Proceeding*

The strongest argument for permitting successive petition forum shopping exists regarding petitions that raise legal claims or factual allegations that are a proper subject for litigation before the second tribunal but that could not have been adjudicated in the first proceeding. In this situation, the full extent of the petitioner's allegations was beyond the competence of the first tribunal and thus could not even have been considered by its jurists in rendering their decision. Construing admissibility clauses or reservations so as to require the second tribunal to dismiss such successive petitions denies the petitioner the opportunity for a complete review of all of her human rights claims, thus intruding upon a core function of the petition system.<sup>303</sup>

*i. Legal Claims*

With respect to legal claims, the possibility that the first tribunal will be unable to entertain all of a petitioner's allegations arises because of the four types of differences among overlapping human rights treaties identified in Part I.B.<sup>304</sup> These differences create a seri-

<sup>303</sup> See *General Comment 24(52)*, *supra* note 112, ¶ 13 ("[T]he object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the [ICCPR] to be tested before the Committee . . .").

<sup>304</sup> The four types of differences are: (1) rights protected exclusively by treaty "A" or treaty "B," but not both; (2) rights protected by both treaties, for which one treaty alone provides more extensive protection for individuals; (3) rights guaranteed in both treaties with identical texts, but which are interpreted in different ways by the tribu-

ous hardship for petitioners if the second tribunal dismisses a successive petition in which the petitioner could not have raised the full scope of her legal claims before the first tribunal.

#### a. Exclusive Treaty Rights

The starkest example of this hardship occurs in cases in which a petitioner alleges a violation of two different human rights arising out of the same "events and facts," and each right is protected by only one treaty. Imagine, for example, that a government seizes private property belonging to members of an ethnic or religious minority group. Such conduct could be challenged as violating *both* the right to protection of property *and* the rights of ethnic and religious minorities to enjoy their own culture and practice their own religion. However, the right to peaceful enjoyment of possessions is protected only in the European human rights system, whereas express minority group rights are found only in the ICCPR.<sup>305</sup>

Under a strict interpretation of the "events and facts" approach to forum shopping, aggrieved individuals in such cases face an impossible choice. They can choose to bring one of their legal claims to either the ECHR or the UNHRC. They will not, however, be permitted to file a second petition with the other tribunal if their first petition is rejected, because the second petition is based on the same "events and facts."

A similar, albeit less severe, variation of this problem occurs where the petition alleges a violation of a cluster of rights relating to the same events, but where one or more of those rights are protected by only one of two applicable treaties. Such a case could arise, for exam-

---

nals; and (4) rights that conflict, such that it would be impossible for a State party to protect both of them at the same time. See *supra* notes 49-51 and accompanying text (discussing the types of differences amongst overlapping human rights treaties and giving examples).

<sup>305</sup> The right to peaceful enjoyment of possessions is found in Protocol No. 1 to the European Convention. See Protocol No. 1, *supra* note 294, art. 1 ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions."). The right of ethnic, linguistic, and religious minorities to the protection of their culture, language, and religion appears in article 27 of the ICCPR. See ICCPR, *supra* note 24, art. 27 ("[P]ersons belonging to such minorities shall not be denied the right . . . to enjoy their own culture, . . . practice their own religion, or use their own language."). It is also possible that the government's conduct in this hypothetical case would violate the right to nondiscrimination found in both the European Convention and the ICCPR. However, a leading commentator on the ICCPR has written that article 27 "goes beyond the mere prohibition of discrimination . . . and contains elements of a right to *de facto* equality." Nowak, *supra* note 18, at 500. Thus, it would not be possible for the petitioners to obtain a full review of their claims before the ECHR.

ple, when the government represses a minority political party and summarily dismisses its members from their positions of employment in government service. These facts suggest violations of the free association, free expression, and due process rights of the political party and its members. Only the ICCPR, however, expressly guarantees every citizen the right to "have access, on general terms of equality, to public service in his country."<sup>306</sup> Thus, a petition to the ECHR could raise violations of rights protected by both the ICCPR and the European Convention, but it could not allege a violation of the U.N. treaty's public service right.

Were the petitioners in such a situation to lose their case before the ECHR and then file a successive petition with the UNHRC directed solely at the violation of the public service right, a strict interpretation of the "events and facts" approach might well require its dismissal.<sup>307</sup> Although such a result might be justified in domestic litigation, the procedural constraints placed upon aggrieved individuals by the disaggregated nature of the petition system and the need to promote horizontal dialogue among tribunals outweigh the preclusion of these claims on finality or efficiency grounds.

#### b. Differently Defined or Interpreted Treaty Rights

Even assuming that most tribunals would permit successive review in exclusive treaty rights cases,<sup>308</sup> there is no consensus as to whether

<sup>306</sup> ICCPR, *supra* note 24, art. 25(c); cf. *Huber*, *supra* note 110, ¶ 36 (reaffirming "that 'disputes relating to the recruitment, careers and termination of service of civil servants are as a general rule outside the scope of Article 6 § 1'" of the European Convention).

<sup>307</sup> Of course, if the petitioners prevail before the ECHR and then seek to litigate their distinct participation right claim in a successive petition, the UNHRC should dismiss their petition unless the petitioners can demonstrate that the prior judgment does not afford them meaningful relief. See *Tardu*, *supra* note 13, at 793-95 (suggesting this standard).

<sup>308</sup> The tribunals' existing case law is divided as to whether petitioners may assert in a second proceeding legal claims that could not have been raised in a first proceeding. The UNHRC's decision in *Casanovas v. France*, in which the Committee refused to dismiss a successive petition alleging a violation of a government employee's due process rights which the European Commission had previously dismissed as falling outside the scope of the European Convention, provides a hopeful sign in this direction. See *Casanovas*, *supra* note 101, ¶¶ 5.1-5.2 (stating that because the initial petition alleged a violation not covered by the European Convention, the Committee was not precluded from examining it). The same is true of *Mejía v. Peru*, in which the Inter-American Commission stated that forum shopping clauses "must be interpreted restrictively," and do not apply where the petitioner alleges "human rights violations concerning which" another tribunal "has not yet given its opinion." *Mejía*, *supra* note 67, at 157; see

they would entertain cases in which the relevant rights are protected by both treaties, but have different textual definitions or have been interpreted differently in case law.<sup>309</sup> The UNHRC's jurisprudence illustrates the confusion. In *V.M.Ø.*, the Committee rejected the argument that a successive petition can be considered on its merits when the rights it alleges are defined more expansively in the ICCPR than in the European Convention.<sup>310</sup> However, in its 1994 General Comment, the UNHRC stated that it would not dismiss a successive petition unless the rights contained in the two treaties were "identical."<sup>311</sup> And in the *Casanovas* case, the Committee refused to dismiss a petition concerning a right defined identically in both treaties' texts, but interpreted more broadly in the Committee's case law.<sup>312</sup>

---

*also supra* text accompanying notes 101-111, 116 (discussing cases). In *V.E.M. v. Spain*, by contrast, a case essentially identical to *Casanovas* in terms of procedural posture and rights violations alleged, the UNHRC dismissed a petition that had merely been "submitted to" (as opposed to "considered by") the European Commission. See *V.E.M.*, *supra* note 116 (invoking Spain's forum shopping reservation to preclude review of a previously submitted petition). The dismissal suggests that States parties, through properly drafted admissibility clauses or reservations, can block successive petition review in these cases. See European Convention, *supra* note 26, art. 27(1)(b) (requiring the European Commission to dismiss cases that have "already been submitted to" another tribunal (emphasis added)).

<sup>309</sup> The likelihood of successive petition forum shopping occurring in a case of conflicting treaty rights is comparatively small, given that only one of the two treaties is likely to contain legal standards an aggrieved individual can invoke to support her petition. Consider the *Jersild* case, *supra* note 193 at 4; *supra* text accompanying notes 193-200. The European Convention, not the Race Convention, protects the right to freedom of expression that *Jersild* alleged had been violated. Thus, had *Jersild's* allegations been rejected by the European Commission and the ECHR, there would have been little basis for him to bring a successive petition before CERD. Indeed, conflicting rights situations are most likely to arise when a different petitioner raises the same issues before another tribunal, such as might have occurred had a member of a racial minority in Denmark petitioned CERD after *Jersild's* victory before the ECHR, alleging that the reversal of the journalist's conviction amounted to a failure of Denmark's obligation to prosecute individuals who disseminate racist speech. Because of the different identity of the petitioners, CERD would not be precluded from hearing such a petition. See *supra* note 67 (emphasizing that petitions addressing the same matter will not be dismissed unless the complainants are the same, or "virtually the same").

<sup>310</sup> See *V.M.Ø.*, *supra* note 82, ¶ 4.4.

<sup>311</sup> General Comment 24(52), *supra* note 112, ¶ 14.

<sup>312</sup> See *Casanovas*, *supra* note 101, ¶ 5.1 (stating the Committee's view that because "the rights of the European Convention differed in substance and with regard to their implementation procedures from the right set forth in the Covenant, a matter that had been declared inadmissible *ratione materiae* had not . . . been 'considered' in such a way that the Committee was precluded from examining it"). There is no justification for treating the *V.M.Ø.* and *Casanovas* cases differently for forum shopping purposes. The only difference between the two decisions is that the successive petition in *Casanovas* alleged the violation of a single right that the European Commission had construed to be outside the scope of the European Convention (a category (1) situation), whereas

Refusing to consider the merits of petitions alleging violations of differently defined or interpreted rights is highly problematic from the perspective of the theoretical arguments discussed in Part III. From the individual's perspective, such an approach categorically precludes the second-petitioned tribunal from addressing what may well be meritorious legal claims under the more expansive definitions or interpretations of the second treaty. It thus prevents aggrieved individuals from receiving a complete review of their claims commensurate with the differing levels of protection contained in the various treaties to which the defending State is a party. From an institutional and normative perspective, enforcing the forum shopping ban disempowers the second tribunal from charting its own interpretive course for the treaty it superintends, or from engaging in a horizontal dialogue with the jurists on the first tribunal to clarify the relationship between the rights and freedoms contained in both agreements. Finally, such an approach denies the opportunity for improved reasoning and analysis which can occur when one set of jurists receives the benefit of another tribunal's earlier decision. It thus leaves States parties, individuals, and NGOs with diminished guidance for assessing the contours of the differing standards contained in the two treaties.

## ii. Factual Allegations

Strong policy arguments also support granting jurists the authority to entertain successive petitions containing factual allegations that were beyond the jurisdiction of the first tribunal. Cases of this sort can arise when a petitioner alleges a series of discrete human rights violations occurring over a period of months or years.

For example, the obligation to exhaust all available and effective domestic remedies may preclude petitioners from introducing facts about later-arising treaty violations during the first proceeding. This

---

the allegations in *V.M.Ø.* concerned violations of several rights which are protected by both treaties, but more broadly under the ICCPR than the European Convention (a category (2) and (3) situation). In both cases, however, the European Commission's dismissal of the petitions demonstrated that the individuals' allegations did not amount to a violation of the European Convention. Similarly, both individuals sought further relief before the UNHRC, relief that they might have been entitled to under the more expansively-defined rights of the ICCPR. Yet, in only one of the two cases did the Committee recognize the differing substantive standards between the two treaties as a basis for avoiding the forum shopping bar and addressing the merits of the case. Indeed, the argument for applying the bar was more persuasive in *Casanovas* than in *V.M.Ø.*, since in the former case the texts of the treaties are virtually identical, and it was the Committee's case law that first identified the ICCPR as providing greater protection than the European Convention.

could occur if domestic remedies concerning those later violations were not exhausted until after the first tribunal had already rejected other allegations that the petitioner had exhausted at an earlier date.<sup>313</sup> A similar case might arise under the six-month limitations rule contained in several human rights treaties.<sup>314</sup> Under this rule, an individual must file a petition within six months of exhausting domestic remedies. However, other treaties do not contain any limitations period.<sup>315</sup> As a result, some of a petitioner's allegations may properly be submitted to a second tribunal even though they were time-barred in an earlier proceeding under a different treaty.<sup>316</sup>

In neither of these two situations should the forum shopping bar preclude jurists from considering a petitioner's unexamined factual allegations. If a petitioner is unable to raise certain allegations in the first proceeding, it would be manifestly unfair to prohibit her from raising them in a second proceeding because different factual allegations had previously been presented to the first tribunal.

### iii. Prudential Concerns

The foregoing arguments strongly suggest that human rights jurists should have the authority to review successive petitions that allege any legal or factual claims that were beyond the jurisdiction of another tribunal in an earlier proceeding. However, jurists should also

---

<sup>313</sup> Exhaustion of domestic remedies may also occur while the first petition is still pending. In that event, the petitioner should raise her allegations in a supplemental submission to the first tribunal. The failure to raise those exhausted allegations in the first proceeding should make it more difficult for the petitioner to raise it in a second proceeding. See *infra* Part IV.A.2.b. If such exhausted allegations were raised and rejected in the first proceeding, the petitioner's ability to litigate them in a second petition should be extremely limited. See *infra* Part IV.A.2.c.

<sup>314</sup> See, e.g., American Convention, *supra* note 27, art. 46(1)(b) (mandating a six-month limit); European Convention, *supra* note 26, art. 26 ("The Commission may only deal with a matter . . . within a period of six months from the date on which the final decision was taken."). The African Charter requires that a communication be "submitted within a reasonable period from the time local remedies are exhausted." African Charter, *supra* note 28, art. 56(6).

<sup>315</sup> See, e.g., Optional Protocol, *supra* note 42; Convention Against Torture, *supra* note 31. The Race Convention, *supra* note 29, art. 14, contains a six-month rule, but it applies only if the State party has empowered a national tribunal to hear petitions alleging that treaty rights have been violated.

<sup>316</sup> The UNHRC's jurisprudence supports jurists' authority to entertain such petitions. See *O.F. v. Norway*, U.N. GAOR, Hum. Rts. Comm., 23d Sess., Annex 12, ¶ 5.2, U.N. Doc. CCPR/C/23/D/158/1983 (1984) (refusing to apply a forum shopping bar to a petition dismissed by the European Commission under the six-month limitations rule).

have discretion to dismiss such petitions on forum shopping grounds where prudential concerns indicate that entertaining the petitions would create more problems than benefits for either the treaty they superintend or the global petition system as a whole.

For example, dismissal at the admissibility stage might be appropriate in cases where the petitioner has already filed more than one successive petition before the first tribunal, and thus has raised the inference that her petition before the second tribunal is frivolous, excessively delayed, or an abuse of the right of submission. Similarly, dismissal might be appropriate even if the petitioner's allegations relate to a distinct or more expansively defined or interpreted right protected by the second treaty, where the facts alleged do not reveal any possibility of a violation of a right that is expansively defined or interpreted by the second treaty and the tribunal believes that its limited resources should be devoted to other petitions. Dismissal might also be warranted for stale petitions, even in those treaty systems that do not contain a six-month limitations period. Finally, the second tribunal might also reasonably decline to hear a case on the merits where there is a lack of consensus among the tribunal's members over how to approach an unsettled legal issue common to more than one treaty regime, and where the jurists believe it would be better to permit the pertinent legal standards under a sister treaty to evolve before addressing the issue themselves.<sup>317</sup>

Conversely, the second tribunal's jurists might choose to entertain such claims for a variety of reasons, such as engaging in a horizontal dialogue with their colleagues to identify the existence of common standards in both treaties or to explain the need for divergent standards in light of the differences in the treaties' text, object and purpose, or preparatory work. Entertaining such petitions may also assist nascent or underutilized tribunals to stake out an area of expertise in adjudicating rights not covered by other treaties. The demonstration of such expertise may attract additional petitioners, which in turn would raise the jurists' profile and reputation.<sup>318</sup>

---

<sup>317</sup> Cf. ZWART, *supra* note 43, at 4 (noting that tribunals have applied admissibility hurdles to screen out cases because "their members were divided on the issues raised by the applicant" or "feared that a decision on the merits might alienate (potential) States parties").

<sup>318</sup> The CAT appears to have followed this course. See Anne F. Bayefsky, *The U.N. Human Rights Regime: Is It Effective? Remarks at the American Society of International Law Proceedings*, in PROCEEDINGS OF THE 91ST ANNUAL MEETING, Apr. 9-12, 1997, at 469 (stating that "word is spreading that the Committee . . . will decide for itself in deportation cases whether there are substantial grounds for believing that the author of the

These prudential concerns are illustrative rather than exhaustive. They suggest that, even when extra-jurisdictional legal claims or factual allegations are alleged in a successive petition, it may not be wise for tribunals to hear them. There is a crucial difference, however, between my proposal and the current approach to forum shopping. Under the current approach, jurists have interpreted the treaties' admissibility clauses and State party reservations to *compel* the dismissal of petitions containing these legal claims and factual allegations. Under my proposal, it is the jurists themselves, rather than the States, who have the discretion to determine when dismissal at the admissibility stage is appropriate. They thus can control the pace at which to hear successive petitions, and conserve their resources for the most serious claims by screening out frivolous petitions that needlessly expend their resources and those of defending States.

Aggrieved individuals and their counsel also have an important role to play under my proposal. Armed with the knowledge that tribunals may, but are not compelled to, consider successive petitions on their merits, they should articulate as carefully as possible those legal and factual allegations that could not have been litigated in the prior proceeding, paying particular attention to definitional and interpretive differences among parallel treaty rights. Although jurists have in the past been indulgent in framing legal claims for petitioners who have not done so themselves,<sup>319</sup> a tribunal more likely will choose to hear a successive petition when the petitioner or her representative highlights the novel legal or factual claims at issue. Improved reasoning and analysis is also likely to follow as petitioners make more precise and sophisticated arguments about a treaty's text, its objectives, and past decisions interpreting the rights under review.

b. *Claims That Could Have Been Raised in the First Proceeding, But Were Not*

The arguments in favor of entertaining a successive petition

---

communication would be in danger of being subjected to torture if returned to the country of origin," resulting in a "marked increase in the number of individuals" approaching the Committee after their asylum claims have failed); see also NOWAK, *supra* note 44, at 461 (discussing the range of responses to the UNHRC's interpretation of the ICCPR's non-discrimination clauses as providing a broader right than that contained in the European Convention).

<sup>319</sup> See, e.g., *Bozize v. Central African Republic*, U.N. GAOR, Hum. Rts. Comm., 49th Sess., Supp. No. 40, at 124, ¶¶ 3, 6, U.N. Doc. CCPR/C/50/D/428/1990 (1994) (finding a violation of the ICCPR even though petitioner did not specify which rights under the ICCPR the defending State had violated).



weaken when the petitioner did not exercise her opportunity to litigate legal claims and factual allegations before the first tribunal. Although it is uncertain whether existing admissibility clauses and reservations actually compel tribunals to dismiss these claims and allegations, when considered from the perspective of the competing theoretical rationales discussed above, the case for entertaining these successive petitions is decidedly mixed.

On the one hand, the fundamental principle that every aggrieved individual should have the right to present each of her factual allegations and legal claims to at least one tribunal supports permitting jurists to entertain such petitions. Victims of human rights abuses, particularly those not residing in nations with active and independent NGO support groups, are often at a disadvantage compared to defending States, many of whom are repeat players in human rights adjudication. Individuals with limited knowledge or support systems may have difficulty understanding their treaty rights and the often complex procedures they must follow to bring their claims before international tribunals.<sup>320</sup> Petitioners therefore should be given some leeway to raise novel factual allegations or legal claims in a successive petition after the first tribunal has dismissed their initial petition on other grounds.

On the other hand, where a petitioner has surmounted the hurdles to international review and is sufficiently sophisticated to seek out not one, but two human rights tribunals for redress, it would not be unduly burdensome to require her to raise all factual and legal arguments in the first petition. This requirement would allow the first tribunal to consider the full scope of the allegations and to determine whether any of them constitute a treaty violation, which might well moot further litigation. Requiring a petitioner to raise all cognizable factual allegations and legal claims also encourages opportunities for dialogue and more precise reasoning if a successive petition raising those issues is later presented to a second tribunal.

Although the UNHRC has twice permitted petitioners to raise claims that could have been raised in earlier proceedings,<sup>321</sup> the Euro-

---

<sup>320</sup> See *supra* Part III.C (discussing the complex choices facing individuals when choosing a forum).

<sup>321</sup> See, e.g., *Glaziov*, *supra* note 100, ¶ 7.2 (refusing to apply forum shopping bar to an allegation of prison beating not presented to the European Commission in an earlier petition but excluding it for lack of substantiating evidence); *Valentijn*, *supra* note 100, ¶ 5.4 (permitting review of a challenge to retroactivity of a sentencing statute because it had not been raised in the first proceeding).

pean Commission has been more circumspect. In *Ajinaja v. United Kingdom*,<sup>322</sup> the European Commission considered whether a petition that it had previously dismissed could be reopened when the petitioner asserted legal and factual claims that he had not raised in the first proceeding.<sup>323</sup> The Commission categorically rejected this possibility, stating that it "cannot accept, as a basis for reconsidering a case, information, further submissions or reformulated complaints which were known to the applicant and could clearly have been presented by him with the original application."<sup>324</sup>

The *Ajinaja* case involved an attempt to seek successive review within the same human rights system, and thus is not directly applicable to successive petition forum shopping among treaty systems. The Commission's reasoning, however, suggests that petitioners who do engage in forum shopping and who do not raise all of their claims in an initial proceeding should bear the burden of explaining why a second set of jurists should consider their claims in a subsequent proceeding. Here too, jurists should consider a variety of prudential concerns in deciding whether or not to hear such claims on the merits. These concerns include: the petitioner's reasons for originally omitting the claim; whether the petitioner was represented by legal counsel in the first proceeding; whether the omitted claims are closely related to claims that were actively litigated in the first proceeding; and whether the petitioner originally did not raise the omitted allegations because the first tribunal's prior case law foreordained an unfavorable decision. To facilitate the jurists' decision, petitioners or their counsel should directly address in their pleadings the reason they declined to raise the omitted allegations in the prior proceeding.

### c. *Claims That Were Raised and Rejected in the First Proceeding*

The last and weakest case for permitting successive petition forum shopping arises where a petitioner seeks to relitigate factual allegations or legal claims that the first tribunal rejected either after a full

---

<sup>322</sup> App. No. 13365/87, 55 Eur. Comm'n H.R. Dec. & Rep. 294 (1988).

<sup>323</sup> *Ajinaja's* second set of allegations were "entirely different from his original complaints." *Id.* at 296. His first petition alleged "unlawful arrest, conviction and detention, contrary to Article 5 para. 1(a) and (c), and Articles 3 and 4 of the Convention," whereas his second petition asserted violations of the "minimum rights of defence" under Article 6. *Id.* at 294-95.

<sup>324</sup> *Id.* at 296. The Commission also dismissed the second petition for failing to comply with the Convention's six-month limitations rule. *See id.* at 295 ("[T]he Commission is not competent to deal with the applicant's complaints because he has failed to observe the six months rule laid down in Article 26 of the Convention . . .").

hearing on the merits or on the basis of a substantive objection to their admissibility.<sup>325</sup> In these cases, the petitioner has already exercised the right to present her claims to a human rights tribunal, and now seeks further review of the identical claims in a different forum. In this situation, both the tribunal's interest in efficient use of its limited resources and the defending State's interest in finality and the prevention of meritless or abusive litigation weigh heavily against the individual's interest in receiving a second opportunity for review. In addition, where both treaties protect the same legal standards, there is little need for a dialogue among the jurists to clarify ambiguous areas of treaty law. For all of these reasons, the second tribunal should adopt a strong presumption in favor of dismissal.

Three narrow situations might justify an exception to this presumption, however. First, a petitioner may not always articulate clearly her belief that the second tribunal should consider her successive petition because the rights guaranteed by the treaty at issue in the second proceeding are broader than those protected by the treaty at issue in the first proceeding. In *Brinkhof*, for example, the petitioner did not expressly argue that the European Commission's treatment of different categories of conscientious objectors was insufficiently rights-protective. Rather, he simply presented his successive petition to the UNHRC, which itself identified the ICCPR as providing broader protection than the European Convention.<sup>326</sup> It should thus be possible for such a tribunal to entertain previously rejected claims in a successive petition where the jurists wish to use the case to explore differ-

---

<sup>325</sup> Not all petition dismissals at the admissibility stage are substantive. Where a tribunal concludes that a petitioner's allegations conclusively fail to demonstrate a treaty violation and thus require no further consideration, it will dismiss the petition as "manifestly ill-founded," "manifestly groundless," or "incompatible with the provisions of" the treaty. For treaty text requiring the relevant tribunal to consider inadmissible any petition that is groundless or otherwise not compatible with the treaty, see American Convention, *supra* note 27, art. 47(c); Optional Protocol, *supra* note 42, art. 3; European Convention, *supra* note 26, art. 27(2). Such dismissals are loosely equivalent to a U.S. court granting a motion to dismiss with prejudice.

By contrast, dismissals based on procedural grounds, such as the failure to exhaust domestic remedies, the failure to comply with a treaty's six-month limitations rule, and the submission of anonymous petitions, fall into the non-substantive category. See ZWART, *supra* note 43, at 155-72, 187-230 (discussing anonymous and abusive complaints, and exhaustion of domestic remedies, respectively); Möse & Opsahl, *supra* note 103, at 291-311 (discussing the different conditions of admissibility). Dismissals on these grounds should not be the basis for a later forum shopping bar, since the petitioner's claims were never considered on the merits by another tribunal.

<sup>326</sup> See *Brinkhof*, *supra* note 177, ¶ 9.3 (noting that although differential treatment of different categories of conscientious objectors is unreasonable, petitioner did not show that his rights were adversely affected as a result of this disparity).

ences between two human rights agreements. In such situations, of course, the successive petition is more properly viewed as one in which the petitioner's allegations were beyond the jurisdiction of the first tribunal.<sup>327</sup>

Second, the second tribunal may wish to review the allegations set forth in a successive petition solely for the purpose of mapping out a claim which falls outside both the treaty that the tribunal superintends and the treaty at issue in the first proceeding. Such review will likely occur at the admissibility stage rather than at the review on the merits, since the definition of the treaties' boundaries will lead the second set of jurists to reject the petitioner's allegations, just as the first tribunal did. Although this type of review provides no additional relief to petitioners seeking a second opportunity to litigate their claims, it does permit jurists to harmonize the borders of global and regional human rights standards. As the margins of protection shared by two or more treaties become more fully understood, the need to review successive petitions for the limited purpose of harmonization will diminish.

Finally, and most controversially, the second set of jurists may choose to entertain a petition on the merits where failing to do so would result in manifest injustice to the petitioner. Although most tribunals give careful consideration to petitions that raise serious questions regarding human rights abuses or treaty interpretation, the rising number of petitions being filed with regional and U.N.-based tribunals suggests that occasionally a complaint may not receive the attention it deserves.<sup>328</sup> In such cases, it should not be beyond the power of the second tribunal to consider the petitioner's previously rejected factual allegations or legal claims, even where both treaties define or interpret the protected right identically.

In deciding whether to entertain such claims, however, the second set of jurists must proceed with caution. When the reason for hearing a successive petition is the first tribunal's failure to review adequately the matter in a prior proceeding, the second panel is tacitly suggesting that the first panel missed a legal or factual issue that raises a *prima*

---

<sup>327</sup> See *supra* Part IV.A.2.a (discussing successive petitions containing legal claims or factual allegations that could not have been raised in the first proceeding).

<sup>328</sup> In Europe in particular, the large volume of petitions submitted to the European Commission, see Schermers, *supra* note 246, at 495 (noting the increasing backlog and length of European Commission proceedings), together with its extremely high rate of dismissal at the admissibility stage, increase the chance that a few meritorious cases might not receive adequate consideration. See A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN EUROPE* 264 (3d ed. 1993) (noting that the Commission rejects more than 90% of filed cases at the admissibility stage).

facie treaty violation. Reviewing the merits of such a petition may thus call into question the authority and abilities of the first set of jurists. To minimize this result, the second set of jurists should not conduct a *de novo* review of the petition's allegations. Rather, they should grant substantial deference to the decision of the first tribunal, and declare the petition admissible only if the petitioner's allegations reveal a clear treaty violation.<sup>329</sup> This way, the second set of jurists can avoid manifest injustice to petitioners without unduly undermining the international standing of the first set of jurists.

### B. *Implementing Forum Shopping Reform*

The proposal just advanced seeks to balance the competing interests of the parties and to take into account institutional and normative concerns in order to develop a coherent and comprehensive approach to human rights forum shopping. How might this proposal be implemented into the international human rights petition system? Two alternative approaches are possible.

#### 1. Amending the Treaties to Increase Jurists' Discretion

The first implementation strategy would require amending admissibility clauses contained in all global and regional human rights agreements that contain petition procedures permitting individuals to bring suit against their national governments. The amendments would delete existing forum shopping admissibility clauses and replace them with two new admissibility clauses: one concerning simultaneous petition forum shopping, and the other concerning successive petition forum shopping. Below, I set forth two draft articles, which together would permit human rights jurists to implement the above proposal.

---

<sup>329</sup> The standard of review that I contemplate is analogous to that applied by the UNHRC when reviewing challenges to procedural rulings and jury instructions issued by domestic trial courts. The Committee has stated that the scope of review in such cases is extremely limited, and that no treaty violation will be found unless the petitioner demonstrates that the trial court's decisions "were clearly arbitrary or amounted to a denial of justice." *Tomlin v. Jamaica*, U.N. GAOR, Hum. Rts. Comm., 57th Sess., Annex, ¶ 6.3, U.N. Doc. CCPR/C/57/D/589/1994 (1996). Regional tribunals have adopted similarly deferential review standards. See, e.g., *Murray v. United Kingdom*, 269 Eur. Ct. H.R. (ser. A) at 17 (1993) ("It is not normally within the province of the European Court to substitute its own assessment of the facts for that of the domestic court."). These rules provide a settled body of case law for tribunals to draw upon when deciding whether to hear a case that falls within this narrow category of successive petitions.

***Draft admissibility clause concerning simultaneous petition  
forum shopping:***

The [Court/Commission/Committee] shall have the discretion to declare a petition inadmissible to the extent that the petition raises:

(a) essentially the same factual allegations or legal claims that are contained in a petition pending before another procedure of international investigation or settlement, or

(b) novel legal claims arising from essentially the same factual allegations that are contained in a petition pending before another procedure of international investigation or settlement. For purposes of this subsection, "novel legal claims" shall mean legal claims that have not been asserted in a petition pending before another procedure of international investigation or settlement, without regard to whether such legal claims were outside the jurisdiction of that procedure.

***Draft admissibility clause concerning successive petition  
forum shopping:***

The [Court/Commission/Committee] shall have the discretion to declare a petition inadmissible to the extent that the petition raises:

(a) essentially the same factual allegations or legal claims that have already been examined by another procedure of international investigation or settlement, or

(b) factual allegations or legal claims that were not asserted in a petition that has already been examined by another procedure of international investigation or settlement, having due regard to whether such allegations or claims were outside the jurisdiction of that procedure.

Although parts of these admissibility clauses track language used

in existing human rights agreements,<sup>330</sup> the clauses differ in several respects from existing forum shopping clauses. Thus, several points of explanation are in order.

As for the specific language of the clauses, I use the phrases "to the extent that" and "essentially the same factual allegations or legal claims" to emphasize that jurists may dismiss all or only part of a petition, and may do so because either the factual or legal claims it contains duplicates those at issue in a pending or previously decided case. These phrases also permit jurists to consider on the merits a petition that raises factual or legal questions distinct from those at issue in another proceeding, even if those distinctions relate to subtle differences between the two treaties' texts, object and purpose, or jurisprudence.

The phrase "novel legal claims" in subparagraph (b) of the simultaneous petition forum shopping clause adopts the "events and facts" standard discussed above. The standard will encourage petitioners to resolve all of their claims in a single proceeding. At the same time, it will grant jurists the authority to dismiss simultaneous petitions raising unexamined legal issues that are unlikely to provide any more relief to the petitioner than can be obtained in the pending proceeding. Finally, the phrase "due regard" in subparagraph (b) of the successive petition forum shopping clause directs jurists to give careful consideration to reviewing legal or factual claims that were beyond the jurisdiction of the first tribunal. As explained above, such claims are likely to be particularly worthy of review on the merits when raised in a successive petition.

More fundamentally, the two admissibility clauses are drafted in precatory language, reflecting the need to provide jurists with sufficient flexibility to engage in a common law-like rulemaking process to address the wide variety of forum shopping disputes identified above.

---

<sup>330</sup> For example, the draft clauses use the phrase "another procedure of international investigation or settlement." Although cumbersome, this phrase appears in most human rights agreements and is generally understood to cover only judicial or quasi-judicial procedures "concerned with the examination of claims by individuals." ZWART, *supra* note 43, at 174; *see also id.* at 182-83 (explaining that the European Commission has recognized both the "procedure before the HRC on the basis of the Optional Protocol and the machinery for the protection of the freedom of association of the ILO" as being "another procedure" within the meaning of article 27(1)(b) of the Convention (footnotes omitted)). In addition, the draft admissibility clauses do not alter the well-settled rule that a forum shopping bar applies only to petitions filed by the same individual or by someone with standing to act on his or her behalf. *See id.* at 177, 181-82 ("The HRC will not deal with a communication if the same claim concerning the same individual is being examined by another international organ.").

On the surface, this discretionary approach may seem at odds with existing admissibility clauses, which are drafted using the mandatory phrase "shall."<sup>331</sup> However, such mandatory clauses actually mask the discretion created by ambiguous or undefined terms that appear in all existing admissibility conditions.<sup>332</sup>

Including permissive language in the forum shopping admissibility clauses is essential to ensure that jurists have the discretion to control their own dockets and to devise forum shopping control rules that balance their scarce resources against the other competing policy objectives for and against duplicative review.<sup>333</sup> An overtly discretionary approach is also preferable to the existing system, where jurists, confronted with what appear to be mandatory forum shopping clauses, have interpreted (and arguably misinterpreted) the clauses to allow them flexibility in deciding which cases to hear on the merits.

Finally, adopting a single set of admissibility clauses for all human rights agreements will require jurists to work from the same textual blueprint. This increases the likelihood that different tribunals will consult each others' decisions as persuasive precedents and reach the same results when faced with similar types of forum shopping issues.<sup>334</sup> It is these precedents, rather than the discretionary clauses set forth above, that will ultimately provide the most precise guideposts for liti-

---

<sup>331</sup> See, e.g., Optional Protocol, *supra* note 42, art. 5(2)(a), at 303 ("The Committee shall not consider any communication from an individual unless it has ascertained that . . . [t]he same matter is not being examined under another procedure of international investigation or settlement." (emphasis added)).

<sup>332</sup> See generally ZWART, *supra* note 43, at 4 (arguing that "policy considerations often play a part" in how admissibility clauses are applied); Mutua, *supra* note 228, at 221 (noting "the ambiguity of the text creating the [UN]HRC and defining its powers"). For example, the drafters of the Optional Protocol did not define the phrase "the same matter" in article 5(2)(a), thereby leaving to the UNHRC significant independence to decide which cases should be declared admissible under this clause. Another example can be found in article 3 of the Optional Protocol, which states that the Committee "shall consider inadmissible" any communication which "it considers to be . . . incompatible with the provisions of the Covenant." Optional Protocol, *supra* note 42, art. 5(2)(a), at 303 (emphasis added).

<sup>333</sup> The discretionary approach I advocate is a more modest form of a proposal advanced by Professor Henry Steiner. Professor Steiner argues that States should amend the Optional Protocol to grant the UNHRC broad-based "discretionary jurisdiction" to focus its scarce resources on cases its members can use to expound the meaning of the ICCPR and to "stimulat[e] thought and dialogue with diverse actors." Steiner, *supra* note 285, at 17-18.

<sup>334</sup> The beginnings of such a trend can be found in *Fajardo*, *supra* note 131, ¶ 41, where the Inter-American Commission consulted the practice of the UNHRC in determining the admissibility of a simultaneous forum shopping petition.



gants considering whether to file a simultaneous or successive petition.

## 2. Justifying Forum Shopping Discretion: Death Row Petitions and Treaty Denunciations in the Caribbean

Compelling evidence of the need for judicial discretion in forum shopping cases is provided by a recent series of treaty denunciations by three Caribbean nations. In October 1997, Jamaica denounced the ICCPR's First Optional Protocol, eliminating the right of individuals to petition the UNHRC concerning Jamaica's human rights practices.<sup>335</sup> In May 1998, Trinidad and Tobago denounced both the Optional Protocol and the American Convention, and, in January 1999, Guyana withdrew from the Optional Protocol. Trinidad and Tobago, and Guyana, later re-ratified the Optional Protocol with broad reservations covering death penalty issues.<sup>336</sup> Barbados is considering similar action.<sup>337</sup>

These troubling denunciations were precipitated by a 1993 decision of the London-based Judicial Committee of Privy Council, which functions as the highest court of appeal for several former British colonies in the Caribbean. In *Pratt & Morgan v. Jamaica*,<sup>338</sup> the Privy Council commuted the death sentences of two men who had spent more than fourteen years challenging their convictions and sentences while on death row. The court accepted the argument, which had been rejected by the UNHRC,<sup>339</sup> that prolonged periods of detention on death row constitute inhuman or degrading punishment. The

<sup>335</sup> See Schiffin, *supra* note 165, at 563 (reporting Jamaica as the first State to denounce the First Optional Protocol); Marvette Darien, *Rights-Jamaica: Spurning Rights Group Is Wrong Move, Advocates Say*, INTER PRESS SERVICE, Dec. 10, 1998 (reporting the reactions of critics to Jamaica's threat to withdraw from the Optional Protocol). Jamaica has yet to re-ratify the Optional Protocol. See Schiffin, *supra* note 165, at 567 n.31 (indicating that Trinidad and Tobago, unlike Jamaica, is considering re-ratifying).

<sup>336</sup> Both Trinidad and Tobago, and Guyana, then re-ratified the Optional Protocol with reservations prohibiting the UNHRC from receiving communications from "any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith." *Optional Protocol to the International Covenant on Civil and Political Rights: Trinidad & Tobago*, Aug. 26, 1998 (visited Mar. 1, 1999) <[http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_boo/iv\\_boo/iv\\_5.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_5.html)>.

<sup>337</sup> See Estrella Gutierrez, *Rights-Americas: Trinidad and Tobago Stands Up to OAS*, INTER PRESS SERVICE, June 4, 1998 (reporting that Barbados may denounce the Inter-American Convention).

<sup>338</sup> 2 App. Cas. 1 (P.C. 1993).

<sup>339</sup> For further discussion, see *supra* Part II.B.1.

Privy Council also imposed a presumptive five-year time limit for completing both domestic appeals and petitions to international human rights bodies, ruling that executing a defendant after that time period would be unconstitutional.<sup>340</sup>

Following the *Pratt & Morgan* decision, Jamaica and Trinidad and Tobago commuted the sentences of more than 100 prisoners incarcerated on death row for more than five years. The decision also encouraged other death row inmates to file petitions with international human rights tribunals. Many of these defendants engaged in successive petition forum shopping, filing petitions first with the Inter-American Commission and later with the UNHRC.<sup>341</sup>

The time required to complete these petition procedures, together with delays in national court proceedings, often exceeded the five-year time limit imposed by the *Pratt & Morgan* decision. Death row petitioners engaging in successive petition forum shopping could thus force the defending governments to commute their capital sentences simply by submitting two consecutive petitions to the tribunals. The result was a de facto abolition of the death penalty in these Caribbean nations, even though neither the ICCPR nor the American Convention proscribes capital punishment.<sup>342</sup> Faced with this unusual state of affairs, the governments chose to denounce their treaty obligations rather than abandon the death penalty.

These events demonstrate the importance of granting jurists broad discretion to fashion forum shopping rules in response to unanticipated situations such as the *Pratt & Morgan* decision. Had the Inter-American Commission and the UNHRC enjoyed greater flexibility than they do currently, they might have fashioned a workable solution when confronted with a large number of petitions by death row defendants who were understandably using every means available to overturn their capital convictions. For example, the jurists might have balanced the State's interest in speedy resolution of the claims against the petitioners' interests in maximizing the avenues for international review by coordinating the expedited review of petitions submitted to both bodies concurrently. Although such formal coordination be-

---

<sup>340</sup> The Privy Council found that review of a petition by a human rights body could normally be completed within 18 months. See Schiffrin, *supra* note 165, at 567.

<sup>341</sup> See *id.* at 566 n.27.

<sup>342</sup> See *id.* at 564 & n.5 (noting that ICCPR does not prohibit capital punishment); DAVIDSON, *supra* note 36, at 267-74 (discussing the limited circumstances under which the American Convention allows imposition of the death penalty); see also Francis Williams, *Jamaica Quits U.N. Accord*, FIN. TIMES, Oct. 27, 1997, at 3 (characterizing the *Pratt & Morgan* decision as creating "a de facto abolition of the death penalty").

tween human rights tribunals has not occurred in the past,<sup>343</sup> it seems a particularly appropriate response to the exigencies of capital punishment and the time constraints imposed by the Privy Council. Jurists could have reinforced the incentives for petitioners to file all of their claims simultaneously by refusing to consider any successive petitions absent extraordinary circumstances, such as the government's willful withholding of exculpatory evidence.

It is, of course, uncertain whether such expedited procedures would have prevented the denunciations. States willing to risk international opprobrium by denouncing their treaty commitments clearly have no interest in embracing forum shopping reforms or even in presenting reasoned arguments to explain why jurists should dismiss a particular petition.<sup>344</sup> Yet the repeated, unregulated use of successive petition forum shopping by death row defendants and their counsel highlighted a potential flaw in the petition system that Caribbean governments could use to justify their denunciations of the treaties.<sup>345</sup> Under the forum shopping revisions I propose, the tribunals could have addressed this flaw themselves. Under the current rules, they lack the discretion to do so.

### 3. The Prospects for Amending the Treaties

Even assuming that amending the treaties to grant jurists discretion to regulate forum shopping is desirable as a matter of policy, it is unlikely that the more than one hundred States parties to the numerous global and regional human rights agreements would be willing to undertake such a politically uncertain task. Forum shopping is, after all, far from the most pressing issue on the international human rights agenda, and it pales in comparison to the resource concerns and

---

<sup>343</sup> See Samson, *supra* note 46, at 658; HUMAN RIGHTS LAW-MAKING, *supra* note 13, at 139.

<sup>344</sup> For example, when a death row petitioner attempted to split his claims between the Inter-American Commission and the UNHRC, Trinidad and Tobago argued that "the splitting of petitions between two human rights bodies is an abuse of the right of submission" and a ground for dismissal. *Bethel v. Trinidad & Tobago*, U.N. GAOR, Hum. Rts. Comm., 65th Sess., ¶ 6.2, U.N. Doc. CCPR/C/65/D/830/1998 (1999).

<sup>345</sup> See Gutierrez, *supra* note 337 (reporting that Trinidad and Tobago foreign minister characterized successive petition forum shopping as "Death row inmates 'abusing' recourse to international entities"); see also Virginia Hardy, *Rights-Jamaica: Government Going the Wrong Way, Say Critics*, INTER PRESS SERVICE, Feb. 11, 1998 (noting that Jamaican national security minister justified withdrawal from either Optional Protocol or American Convention as necessary because "[a]ppeals to these human rights bodies take a considerable amount of time and have to run consecutively rather than concurrently").

backlog of work facing most tribunals.<sup>346</sup>

Amending the human rights agreements may be a realistic option in two circumstances, however. First, expert and political bodies within the United Nations are considering whether to adopt new optional petition procedures for two existing human rights agreements—CEDAW and the ICESCR. Since negotiations concerning the texts of these optional agreements are ongoing, it would be comparatively easy to include the forum shopping admissibility clauses set forth above before the treaties are finalized and opened for signature to States.<sup>347</sup> States parties to other human rights agreements could then monitor how these treaties apply the new forum shopping clauses and decide at a later date whether to adopt them for other petition procedures.

Second, as explained more fully below, there is pressure within the U.N. to reform the existing petition system and replace it with a single tribunal that has the power to review petitions under all U.N.-based human rights agreements. Although the political will to create such a tribunal is uncertain,<sup>348</sup> if and when such a proposal is given serious consideration, States will need to decide whether to permit forum shopping among the U.N. human rights tribunal and the three regional human rights systems.<sup>349</sup>

#### 4. Implementing Forum Shopping Reform in the Absence of Amendment

In the immediate future, the human rights tribunals currently reviewing individual petitions will continue to operate under existing

---

<sup>346</sup> See *supra* Part III.E (discussing inadequate resources of overburdened tribunals).

<sup>347</sup> See *supra* notes 63, 65 and accompanying text. The same result could be used for the Migrant Workers' Convention, which has been opened for signature but which has not yet entered into force. Cf. 1996 *Alston Report*, *supra* note 2, ¶ 96 (advocating amendment of Migrant Workers' Convention prior to its entry into force to eliminate existence of new treaty body and confer supervisory powers on an existing treaty body).

<sup>348</sup> See *id.* ¶ 94 (questioning "whether there is the political will to begin exploring in detail the contours of such a reform").

<sup>349</sup> See *UN Human Rights Regime*, *supra* note 240, at 483 (proposing consolidation of six existing U.N. treaty bodies into two monitoring bodies, one dealing with State party reports and the other with individual petitions, together with a United Nations human rights court with advisory jurisdiction) (remarks by Thomas Buergenthal, George Washington University National Law Center); Lillich, *supra* note 153, at 475 & n.115 (noting that any proposed International Court of Human Rights would be unlikely to cover regional human rights instruments, at least initially); see also 1993 *Alston Report*, *supra* note 38, ¶ 248 (stressing the need to develop harmonious relationships among regional human rights tribunals and U.N. treaty bodies).

procedures and admissibility clauses. Will it be possible for the jurists, if they are so inclined, to implement forum shopping reforms into the existing system?

As discussed in Part II, the texts of existing admissibility clauses have not produced congruent case law. To the contrary, the UNHRC's recent decisions demonstrate that there are inconsistent strands of jurisprudence even within a single tribunal. Notwithstanding these divergent decisions, however, jurists on all tribunals have construed the admissibility clauses to grant them some discretion in deciding when litigants may forum shop for a favorable decision.

As a result, in the case of treaties or reservations prohibiting simultaneous and successive petition forum shopping where the "same matter,"<sup>350</sup> "substantially the same" matter,<sup>351</sup> or "the subject of the petition or communication"<sup>352</sup> is being or has been examined by another tribunal, jurists do have sufficient flexibility to implement the bulk of the forum shopping reforms I propose. For example, the UNHRC's decision in the *Casanovas* case,<sup>353</sup> its statements in General Comment 24(52),<sup>354</sup> and the Inter-American Commission's decision in the *Fajardo* case<sup>355</sup> demonstrate that jurists can use existing treaty texts to achieve the most important policy objectives underlying my proposal—engaging in a horizontal dialogue to harmonize substantive differences among human rights treaties and permitting individuals to pursue in a second petition legal and factual claims that could not have been raised in an earlier proceeding. By contrast, the strict "events and facts" standard used by the UNHRC to dismiss other forum shopping petitions can be adapted to screen out most simultaneous petition forum shopping claims in the manner I propose.<sup>356</sup> To achieve

<sup>350</sup> CERD R. of Proc., *supra* note 62, Rule 84(1)(g); Migrant Workers' Convention, *supra* note 33, art. 77(3)(a); Convention Against Torture, *supra* note 31, art. 22(5)(a); Optional Protocol, *supra* note 42, art. 5(2)(a).

<sup>351</sup> European Convention, *supra* note 26, art. 27(1)(b); American Convention, *supra* note 27, art. 47(d).

<sup>352</sup> American Convention, *supra* note 27, art. 46(1)(c).

<sup>353</sup> See *Casanovas*, *supra* note 101 and accompanying text.

<sup>354</sup> See General Comment 24(52), *supra* note 112 and accompanying text.

<sup>355</sup> See *Fajardo*, *supra* note 131 and accompanying text.

<sup>356</sup> The only situations in which jurists will not be able to implement my proposal involve petitions where the same factual allegations or legal issues are being or have already been examined in an earlier proceeding. See *supra* Part IV.A.2.c (discussing claims that were rejected in a prior proceeding). The plain language of the treaties precludes jurists from considering such cases even if they believe that the first tribunal failed to redress a blatant human rights violation. In addition, the European and Inter-American tribunals, which are prohibited from entertaining successive petitions

this result, however, jurists will need to analyze forum shopping petitions more carefully, reconciling inconsistent strands of case law and reconciling their decisions with forum shopping cases decided by other tribunals.

Even in treaty systems that permit only simultaneous petition forum shopping or only successive petition forum shopping, or that do not regulate forum shopping at all, jurists are not required to entertain all forum shopping petitions on their merits. To the contrary, they can implement the broad outlines of my proposal by applying other admissibility clauses to screen out claims that do not further the interests of the petition system as a whole. For example, jurists might dismiss a successive petition on admissibility grounds "related to the merits"<sup>357</sup> when the allegations it contains have been fully explored in an earlier proceeding and do not raise any new issues worthy of consideration. Similarly, they could dismiss as an "abuse of the right of submission" successive petitions submitted after an unduly long delay or after earlier petitions have been repeatedly rejected by another tribunal.<sup>358</sup> Conversely, to the extent that a treaty system does not regulate forum shopping, jurists already enjoy wide discretion to declare admissible those simultaneous or successive petitions that are worthy of consideration on the merits, provided that they comply with the treaty's other admissibility requirements.

In short, although amending the treaty texts would be the most direct way to achieve forum shopping reform, it is not the only alternative available. Jurists currently possess the authority to regulate the practice. The extent to which they do so may vary with a tribunal's stage of development. Tribunals that have yet to attract a large number of claimants may choose to err on the side of admissibility to create additional opportunities to flesh out unexplored treaty questions. More established tribunals may impose more stringent admissibility requirements and conserve their resources for petitions raising the most significant or unsettled issues.

---

where "substantially the same" claims have been raised in an earlier proceeding, may feel obliged to declare inadmissible petitions that raise marginally different legal or factual claims. Such a position does not, however, require the tribunals to dismiss legal or factual claims that were beyond the jurisdiction of the first tribunal. See *supra* Part IV.A.2.a (discussing such cases).

<sup>357</sup> ZWART, *supra* note 43, at 139. These admissibility grounds are used to screen out claims that are "manifestly ill-founded," "incompatible with the provisions of" the treaty, unsubstantiated, or which fail to disclose the appearance of a violation. See *id.* at 139-50.

<sup>358</sup> For a discussion, see *id.* at 164-69.

C. *Reforming the U.N. Human Rights System: A Cautionary Note*

The forum shopping reforms I have proposed are incremental and presuppose the continued existence of decentralized fora for adjudicating human rights petitions. There is, of course, a far more radical method of addressing forum shopping: consolidating the profusion of venues in which claims may be brought into a single court or tribunal with the authority to interpret all human rights agreements. Professor Theodor Meron's 1984 study on human rights law-making in the U.N. endorsed such a proposal as a "desirable long-range solution" to the proliferation of treaties and tribunals: "By consistently and rationally applying and interpreting human rights instruments, and by proper balancing of the norms therein contained . . . such a tribunal would reduce immensely the risk of normative conflicts and would enlarge the range of norms which could be applied to specific violations."<sup>359</sup>

As a long-term aspirational goal, the proposal to create a single human rights tribunal has undoubted merit. It suggests a future in which aggrieved individuals throughout the world will assert all of their claims before one judicial body, which can then address and hopefully resolve the tensions created by diverging and conflicting standards contained in overlapping human rights agreements. As an immediate strategy to replace the existing petition system, however, the proposal's prospects are bleak. Given the nonbinding nature of many human rights decisions and the spotty record of compliance with those decisions outside of Europe, States are unlikely, as a political matter, to rush to replace existing tribunals with a human rights court possessing the power to oversee the laws and practices of all of the world's nations.<sup>360</sup> Moreover, geographically linked groupings of States which have developed confidence in regional human rights adjudication may resist abandoning regional procedures in favor of a less familiar global review system.<sup>361</sup>

Practical politics aside, serious normative concerns cast doubt upon the wisdom of consolidating the treaty bodies in the immediate future. As human rights expert Philip Alston has explained, those fea-

---

<sup>359</sup> HUMAN RIGHTS LAW-MAKING, *supra* note 13, at 212-13.

<sup>360</sup> See Helfer & Slaughter, *supra* note 1, at 366-67 (discussing reasons why the existing petition system is unlikely to be modified in the near future).

<sup>361</sup> This is particularly true for Europe, which has recently completed its own consolidation of the European human rights tribunals into a permanent European Court of Human Rights. See *supra* note 36 (describing how the ECHR and the European Commission merged).

tures of a consolidated tribunal that some observers view as advantages over the existing decentralized system are seen by others as serious disadvantages. For example, it is debatable whether a single tribunal will actually enhance, rather than diminish, the jurists' expertise to address the enormous range of human rights issues in a comprehensive way. This question is of particular concern to those parties championing historically underrepresented human rights perspectives such as children's rights, gender discrimination, and economic, social, and cultural rights. Such parties might fear that centralization would privilege a dominant interpretive position that marginalizes these issues.<sup>362</sup> In addition, amending the existing treaty system raises the disquieting prospect that some States would use the opportunity to press for a "least common denominator" approach. This approach would favor adopting for the new tribunal the least rights-protective petition procedures found among the six existing treaty bodies.<sup>363</sup>

Taken together, these cautionary concerns suggest that a single tribunal is not desirable as a short-term reform strategy, and that a more prudent approach would permit the existing decentralized system to mature further before implementing such a proposal. During this interim period, however, other reforms should actively be pursued, including streamlining existing procedures and improving coordination among the U.N. treaty bodies and their regional neighbors.<sup>364</sup> These reforms should enhance and formalize channels of

---

<sup>362</sup> See Philip Alston, *Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights*, U.N. GAOR, 44th Sess., Agenda Item 109, ¶ 182, U.N. Doc. A/44/668 (1989) [hereinafter *1989 Alston Report*] (noting that some parties argue that the consolidation process may cause underrepresented human rights perspectives to be glossed over); cf. Andrew Byrnes & Jane Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?*, 21 BROOK. J. INT'L L. 679, 778 (1996) (defending the creation of the optional petition procedure for CEDAW against the claim that the procedure will produce "normative inconsistency" on the ground that existing treaty bodies do not adequately address women's human rights issues); Elizabeth Evatt, *The Right to Individual Petition: Assessing Its Operation Before the Human Rights Committee and Its Future Application to the Women's Convention on Discrimination*, in THE AM. SOC'Y OF INT'L LAW, PROCEEDINGS OF THE 89TH ANNUAL MEETING: STRUCTURES OF WORLD ORDER 227, 230 (Apr. 5-8, 1995) (defending the new petition procedure on the basis of the superior "expertise" of CEDAW and its "deeper understanding of how discrimination against women works in practice" compared to other treaty bodies).

<sup>363</sup> See 1989 Alston Report, *supra* note 362, ¶ 183 (arguing that any changes might, in practice, diminish the effectiveness of already existing approaches); see also HUMAN RIGHTS LAW-MAKING, *supra* note 13, at 243 (suggesting that "over-zealous efforts to rationalize the existing multiplicity of procedures might cause the most favourable procedures to be brought into line with the less far-reaching ones").

<sup>364</sup> Over the last decade, the U.N. has given serious consideration to reforming the



communication among jurists to increase efficiency and promote an exchange of views over shared human rights standards.<sup>365</sup> For example, States might adopt a procedure for jurists and their secretariat staffs to share information concerning petitions submitted simultaneously to more than one tribunal. They might also permit two or more tribunals to entertain petitions together in cases where the need for concurrent, rather than successive, review is exceptionally pressing.<sup>366</sup>

existing human rights system. In three reports published in 1989, 1993, and 1996, human rights expert Philip Alston conducted detailed studies of the need for reform. His proposals include: (1) urging States to increase significantly the material and financial resources needed to support the treaty bodies in their work, including a push to ratify amendments that will improve funding sources for several treaty bodies; (2) overhauling the reporting system to adopt a system of consolidated or thematic reporting; (3) imposing a moratorium on the creation of new supervisory bodies to review compliance with new treaties and entrusting their functions to existing treaty bodies; and (4) formalizing information exchanges among existing treaty bodies, regional tribunals, and specialized U.N. agencies. See *1996 Alston Report*, *supra* note 2, ¶¶ 85-101; *1993 Alston Report*, *supra* note 38, ¶¶ 207-54.

According to Professor Alston, proposals to consolidate the six existing U.N. treaty bodies into one or two tribunals or review bodies, see *UN Human Rights Regime*, *supra* note 240, at 483 (arguing that the six committees of the U.N. treaty body system should be consolidated into two bodies) (remarks by Thomas Buergenthal, George Washington University National Law Center); Lillich, *supra* note 153, at 475 (discussing the establishment of an International Court of Human Rights); Mutua, *supra* note 228, at 359-60 (suggesting the establishment of an African Human Rights Court and an African Human Rights Commission), are still in the early stages of study. See *1996 Alston Report*, *supra* note 2, ¶ 94 (questioning whether "political will" exists to consolidate treaty bodies, but suggesting creation of a small expert group to study the issue). Thus, even if, as Professor Alston predicts, the U.N. undertakes "radical changes of one type or another within less than a decade," *id.* ¶ 80, such changes are unlikely to include creating a single U.N.-based human rights tribunal that would eliminate all opportunities for forum shopping.

<sup>365</sup> In 1993, Professor Alston proposed four approaches to enhance normative consistency in the jurisprudence of U.N. and regional tribunals. These included: (1) drafting "a programme of action designed solely to ensure that the United Nations treaty bodies and the relevant regional bodies are kept reasonably well informed of one another's activities;" (2) asking the U.N. Secretary General "to strengthen exchanges between the United Nations and regional intergovernmental organizations dealing with human rights;" (3) convening regular meetings for detailed briefings between representatives of the U.N. treaty bodies and their regional counterparts; and (4) developing sophisticated legal databases to permit jurists on different bodies to consult each other's jurisprudence. *1993 Alston Report*, *supra* note 38, ¶¶ 252-54. With respect to Alston's last proposal, the availability of human rights resources on the Internet through both official and unofficial sources has increased enormously since 1993, further facilitating jurists' ability to consult each other's case law. See, e.g., *United Nations High Commissioner for Human Rights*, Treaty Bodies Database (visited Oct. 26, 1999) <<http://www.unhcr.ch>> (providing numerous documents relating to the U.N. and human rights, including decisions of human rights tribunals); *University of Minnesota Human Rights Library* (visited Nov. 30, 1999) <<http://www.umn.edu/humanrts>> (providing access to U.N. and regional human rights documents).

<sup>366</sup> See *supra* Part IV.B.2 (advocating such an approach to address unique concerns

To the extent that proposals for a single human rights tribunal are designed to prevent "normative inconsistency" in a decentralized system composed of multiple tribunals with overlapping jurisdictions, the case law discussed in this Article demonstrates that jurists are fully capable of consulting each other's decisions and engaging in a dialogue about common legal questions. The threat to the "credibility and integrity" of human rights tribunals that arguably arises from a lack of normative consistency can only occur if jurists fail to engage in this dialogue and instead permit unthinking divergences or conflicts to emerge in their case law.<sup>367</sup>

The value of forum shopping, and successive petition forum shopping in particular, lies in reducing the chances of such inadvertent divergences and conflicts by providing jurists with a structured setting in which to communicate with each other about common legal questions. When the same factual allegations are submitted before two different tribunals consecutively, the second set of jurists cannot ignore the fact that another tribunal is wrestling with issues that they too must consider in their own treaty regimes. In exercising their discretion to decide whether to dismiss the petition or hear it on the merits, these jurists can benefit enormously from the first tribunal's reasoning and conclusions. The second tribunal can use them either to confirm similarities in the two treaties, or as a point of departure from which to justify a divergent approach based on the differing texts, structures, or objectives of the two agreements.<sup>368</sup> By adopting an openly deliberative approach and candidly weighing the persuasive value of decisions from outside their own treaty regime, jurists can fashion a forum shopping policy that not only does justice between the parties, but also builds a more fully informed and coherent human rights jurisprudence.<sup>369</sup>

Understanding the qualified virtues of forum shopping also sug-

---

raised by successive petition forum shopping by death row defendants in several Caribbean nations).

<sup>367</sup> The quoted language is from the 1993 *Alston Report*, *supra* note 38, ¶¶ 241-42.

<sup>368</sup> See *supra* Part III.D.1 (discussing the case for coordination and dialogue among human rights tribunals); see also 1993 *Alston Report*, *supra* note 38, ¶ 251 (arguing that jurists must "justify differences of approach and interpretation when they are deemed necessary").

<sup>369</sup> See *id.* ¶ 248 (arguing that the jurisprudence of the various treaty systems is readily available to each of the bodies to contribute to the continued development of a better and more sophisticated international human rights jurisprudence); cf. Henry G. Schermers, *Adaptation of the 11th Protocol to the European Convention on Human Rights*, 20 EUR. L. REV. 559, 560 (1995) (praising the "mutual criticism" between European Court and Commission which produced improved decision-making).

gests a way to implement more comprehensive structural reforms as the petition system matures. For example, before supplanting the existing system with a single human rights court, States could begin to chip away at the disaggregated nature of the petition system by granting existing tribunals jurisdiction to review claims arising under multiple human rights treaties.<sup>370</sup> Jurists would thus have an express mandate to consult the case law of their fellow tribunals and to promote convergence of norms. Such cross-treaty jurisdiction would also allow petitioners to raise all of their allegations before a single tribunal, mooted the need for forum shopping in many cases.

Alternatively, States might create a new conflicts tribunal for the limited purpose of resolving diverging or conflicting standards among existing tribunals. At least initially, the tribunal's jurisdiction could be confined to appeals from cases where the rulings of two or more tribunals were inconsistent or divergent. If the conflicts tribunal proved adept at resolving these inconsistencies, States could then grant it a wider jurisdiction to function as the principal arbiter of global and regional human rights disputes.

## CONCLUSION

The proposals I have developed in this Article are motivated by a re-envisioning of the relationship among the global and regional courts, tribunals, and review bodies that consider human rights petitions by individuals. The traditional analysis of the petition system views these entities as discrete and having little or no formal relationship to each other. According to this view, each set of human rights jurists acts essentially in isolation, interpreting the text of its founding treaty without referring to identical or analogous rights and freedoms protected by other human rights agreements. Any conflicts or divergences between the tribunals' case law over such shared legal norms is an accidental by-product of the litigation process, not the result of a deliberate decision to consider and reject the interpretation expounded by fellow jurists. Under this conception of human rights adjudication, permitting individuals to file a claim with more than one tribunal increases the possibility for normative schisms across the treaties' overlapping substantive standards and thus destabilizes the petition system.

This isolationist stance has been undermined by an increasing

---

<sup>370</sup> See *supra* note 228 and accompanying text (noting that Inter-American and proposed African tribunals have limited jurisdiction to hear such cases).

number of instances in which litigants have raised identical legal claims before different tribunals. Both individuals and States now regularly request that one human rights tribunal follow or distinguish the reasoning of prior decisions by another tribunal, and jurists are beginning to consider these decisions as persuasive precedents. In this environment, the corpus of case law generated by international human rights litigation should be viewed not as a series of disjointed decisions, but as a shared and ongoing enterprise in which jurists draw upon each other's experiences to formulate a harmonious, though not necessarily uniform, set of human rights standards. Seen from this perspective, permitting aggrieved individuals a limited opportunity to forum shop for a favorable human rights ruling enhances this common endeavor. Such limited forum shopping provides opportunities for jurists to engage in an extended dialogue over the content of human rights norms, to eschew unthinking conflicts or divergence of those norms, and, where such conflicts or divergence are unavoidable, to cogently identify the justifications for them so that treaty revisions can be considered by interested participants and observers after a full ventilation of the issues.