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Deference and the Human Rights Committee

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ABSTRACT

The decision of judicial bodies on whether or not to defer to previous decisions and findings by national authorities is increasingly attracting the attention of international legal scholars. Judicial bodies enjoy a certain degree of discretion in terms of defining the extent and intrusiveness of their review. In looking to structure the element of uncertainty that the question of deference brings with it (or conversely, to define the margin of appreciation of the state), the question is also addressed through the standard of review-notion. This article explores deference claims in the context of the Human Rights Committee. The aim of the article is to identify the structure of deference claims in the work of the Committee. A look at the Committee's recent practice in deportation cases provides an opportunity to illustrate the nature of the doctrine of deference as a mechanism for expressing disagreement.

KEYWORDS

Human Rights Committee; International Covenant on Civil and Political Rights; Derogations; Fourth Instance Rule; Deference; Standard of Review; Proportionality; Reasonableness; Deportation

1. Introduction

As Masih Shakeel, a Christian pastor born in Karachi, Pakistan, had his application for asylum rejected by Canadian authorities, there was a real threat that he would face torture and death were he to be returned to Pakistan. This was the Human Rights Committee's (HRC) conclusion, as outlined in its View, adopted on 24 July 2013.¹ Although the Canadian authorities had investigated the risks that Mr Shakeel would face and reached a negative decision on his application for asylum, the Committee was not satisfied with the assessment of the national immigration authorities. While recognizing that domestic authorities should be granted deference in assessing the evidence before them, the Committee nevertheless made its own (and contrary) assessment of the situation, much to the dislike of six Committee members who voiced a strong dissent.²

Masih Shakeel v Canada is only one out of many cases in a body of Views on deportation that has occupied the Committee in recent years. The applicants in these cases

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¹*Masih Shakeel v Canada*, Communication No 1881/2009, para 8.3 and 8.4 in particular.

²*Masih Shakeel v Canada*, Communication No 1881/2009, Individual opinion of Committee member Yuval Shany, joined by Committee members Cornelis Flinterman, Walter Kälin, Sir Nigel Rodley, Anja Seibert-Fohr and Konstantine Vardzelashvili (dissenting).

challenge the decision of national immigration authorities before the Committee. As a consequence, the Committee faces the question of whether or not to show deference to the decision made by the national authority.³ A discussion of whether and how far the Committee should rely on prior assessments made by national authorities fits nicely in a more general trend of exploring deference in international judicial bodies. As the extent of deference is also a question of defining the extent of the jurisdiction of the reviewing body, it is often addressed through the ‘standard of review’ notion.⁴

This article sets out to discuss deference in the context of the Human Rights Committee, and to identify the structure of deference claims in the Committee. Considering that previous studies have failed to identify any general trends in the practice of deference, this article takes a different approach and addresses deference at the conceptual level.⁵ As many recent deportation decisions are accompanied by dissenting opinions, they provide an opportunity for exploring the nature of deference claims. Eventually, this article claims, disagreement in the deportation cases before the Committee comes down to the characterization of the dispute. Presenting the core of the dispute as a question of substance or procedure becomes a way of legitimizing one’s position. In the process, the doctrine of deference reveals its open-ended nature.

2. The Function of Deference

At the international level, the question of deference arises (at least potentially) whenever interpretive, monitoring, or dispute settlement powers are exercised by an international institution. Deference works as a mechanism by which courts can respect domestic policy choices in its review. The point of departure is that law (in this case, international human rights law) constitutes a boundary that limits the exercise of policy discretion. As this boundary is not fixed, deference serves to strike a balance between law and public policies.⁶

A decision on whether or not to defer is also always a question of allocation of authority.⁷ In the context of international human rights courts and tribunals, such issues of competence take the form for example of the so-called fourth instance rule. In addition to defining the relationship between domestic and international actors, the question of deference also concerns the role of judicial review in a democratic system (and hereby the corresponding ‘counter-majoritarian’ question).⁸ In this respect, the legitimacy of judicial review requires sensitivity in exercising review.⁹ If the reviewing body appears to be forcing a set of values, its interpretation of rights will be considered controversial (lack

³Between 2013 and 2015 the Committee has delivered over 30 Views on deportation (including inadmissibility decisions).

⁴See eg L Gruszczynski and W Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (OUP, 2014).

⁵For a recent contribution exploring Committee practice, see eg A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP, 2012). Also see eg A Conte and R Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Ashgate Publishing 2009).

⁶TRS Allan, ‘Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review’ (2010) 60 *U Toronto LJ* 41, 42.

⁷M Ioannidis, ‘Beyond the Standard of Review: Deference Criteria in the WTO Law and the Case for a Procedural Approach’, in Gruszczynski and Werner (n 4) 92.

⁸For an overview, see B Friedman, ‘The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five’ (2002) 112 *Yale LJ* 153.

⁹For a revisiting of the question, see eg A von Staden, ‘The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review’ (2012) 10 *Int J of Const L* 1023, 1033.

of consensus being reason for deference in the European Court of Human Rights (ECtHR) context).

Since international human rights protection mechanisms essentially aim at affecting the values and policies of societies, a claim can be made that such mechanisms naturally raise an expectation of deference.¹⁰ In particular, the more unsettled the normative content of a particular obligation is, the stronger the mediating role of deference becomes.¹¹ Some questions also seem by their nature to elicit a higher degree of deference, such as national security concerns or matters of resource allocation.¹² The more the norms at stake raise questions that are anchored in domestic political choices, the stronger the expectation of deference will be.¹³ This way the substantive interpretation of legal obligations may turn into a dispute over whether a particular question can be legitimately settled by the international court or tribunal. In this sense, deference may be construed as a way of preserving the authority of the reviewing body.¹⁴ As a good example, the inclusion of the reasonableness test in the Communication procedure of the Convention on Economic, Social and Cultural Rights (CESCR) can be traced back to concerns of state parties on justiciability issues, and in particular, questions concerning the adjudication of positive obligations, allocation of resources, and national policy choices.¹⁵

A decision on whether or not to defer is a result of multiple considerations, such as the appropriate role of the court, the capacity of the court, and the substance of the dispute.¹⁶ As the degree of deference is a synthesis of several considerations, the intensity of the review cannot be predetermined, and is better thought of as a 'sliding scale'.¹⁷ This allows the doctrine of deference to be considered a safeguard for domestic policy choice and, at the same time, a tool for review of those domestic policies; as both a threat to and opportunity for the judiciary; and ultimately as both beneficial as well as detrimental for the effective protection of rights.¹⁸

¹⁰Y Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 16 *Eur J Int L* 907, 920.

¹¹See eg SP Croley and JH Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments' (1996) 90 *Am J Int L* 193, 211–213, and Shany (n 10) 910. As a conceptualization of the dilemma between the constant push towards unity and the corresponding pull to limit intervention, Carrozza suggests that the idea of subsidiarity, as an affirmation of a degree of pluralism, underlies all human rights law, PG Carrozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *Am J Int L* 38, 75.

¹²For other examples, see eg McLean (n 16) 78–81.

¹³von Staden (n 9) 1027. In this respect, although the Appellate Body of the WTO can make authoritative interpretations of the WTO agreements, the Body has indicated that it would sometimes find guidance by members on a disputed provision of the agreements useful in making its own interpretation. I Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21 *Eur J Int L* 605, 611.

¹⁴See eg TJ Melish, 'From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies' (2009) 34 *Yale J Int L* 389, and Shany (n 10) 918–919. In respect of the ECtHR, see LR Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale LJ* 273, 316. R Bercroft, *The Standard of Review in WTO Dispute Settlement* (Edward Elgar, 2012) 147 discusses this as 'institutional sensitivity'.

¹⁵B Griffey, 'The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) 11 *HRL Rev* 275, 292–293.

¹⁶S McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (Pretoria University Law Press, 2009) 63. A Peters, 'The Meaning, Measure, and Misuse of Standards of Review' (2009) 13 *Lewis & Clark L Rev* 233, 234–236.

¹⁷J Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 *Eur LJ* 80, 88.

¹⁸Or as Melish puts it: it is constituted both of 'the non-interference principle and that of intervention', Melish (n 14) 454 (emphasis in original). In a similar way Legg characterizes the margin of appreciation both as a forum for the contestation of sovereignty, and as an 'outworking of the principle of subsidiarity', Legg (n 5) 58–60. Also see D Shelton, 'Subsidiarity and Human Rights Law' (2006) 27 *HRLJ* 4.

3. Defining the Degree – Standard of Review

The concept of standard of review refers to the intensity of the review by an international court or tribunal of a decision made by national authorities or courts. The standard of review defines the degree of deference shown to the decision of domestic authorities and at the same time determines the extent of the discretion enjoyed by those authorities.¹⁹ In domestic administrative law (and especially in the common law tradition), the issue of standard of review typically arises when a decision is appealed.²⁰ At the far ends of the spectrum, review can range from *de novo* review to full deference. *De novo* review means that the reviewing body examines the case as if no prior decision had been made, whereas total deference means accepting the findings of the original decision, unless there is a serious procedural flaw.²¹ In between these extremes there is a wide array of intermediate degrees. The review is based on the application of particular ‘terms of art’, that is, express or implied criteria.²² For example, in US appellate courts, up to 30 different standards have been identified. The applied terms differ between branches of law, as well as between legal systems. These terms are meant to guide the reviewing institution in determining the extent of deference, and therefore to add a degree of predictability, efficiency and consistency to the review process.²³

In the context of international institutions, the standard of review has been extensively discussed in respect of the World Trade Organization. Article 11 of the Dispute Settlement Understanding states that ‘a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . .’²⁴ In addition to this general rule, article 17.6 of the Anti-Dumping Agreement further specifies:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.²⁵

These standards (proper establishment of facts, unbiased and objective evaluation), are intended to prevent panels from performing a *de novo* review of facts, unless there are special circumstances that would warrant such review.²⁶ In its first decision addressing the meaning of article 11 DSU, the Appellate Body concluded that the intensity of the review:

¹⁹For an overview of different ways of explaining standard of review, see L Gruszczynski and W Werner, ‘Introduction’ in Gruszczynski and Werner (n 4) 2–5.

²⁰Peters (n 16) 234–236, and J Bohanes and N Lockhart, ‘Standard of Review in WTO Law’, in DL Betlehem (ed), *The Oxford Handbook of International Trade Law* (OUP 2009) 379. For examples in national legal systems, see eg Becroft (n 14) 13–20.

²¹Becroft (n 14) 6–7, and Peters (n 16) 243. For examples on the variation in degree of intrusiveness in US administrative law, see TW Merrill, ‘Judicial Deference to Executive Precedent’ (1992) 101 *Yale LJ* 969, 971.

²²They are called ‘terms of art’ by Peters (n 16) 243.

²³See eg Peters (n 16) 238–242, and Becroft (n 14) 146.

²⁴Understanding on rules and procedures governing the settlement of disputes, 15 April, Annex 2 to the Agreement Establishing the World Trade Organization, 1869 UNTS 401.

²⁵Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, 1868 UNTS 201.

²⁶See Becroft (n 14) 59–64, and VD Dye, ‘“Deference as Respect” in WTO Standard of Review’ (2013) 12 *J Int Trade L and Pol Info* 23, 24.

... must reflect the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves.²⁷

As to international human rights law, a discussion on deference and standard of review has been prominent especially in the context of the ECtHR. The margin of appreciation doctrine is by far one of the most well-documented mechanisms for deferring to domestic authorities, with a large body of case law before the court. The margin of appreciation of states and standard of review of the court both serve as tools for expressing the degree of deference granted to states.²⁸

Limitation clauses in the European Convention on Human Rights require that any restrictions should be prescribed by law, have a legitimate aim, and be necessary in a democratic society.²⁹ The last of these criteria can be viewed as an effort to balance different values. In its substantive use, the margin of appreciation expresses the discretion given to states in striking this balance. Domestic authorities must demonstrate that the limitation was ‘necessary in a democratic society’, supported by ‘relevant and sufficient’ reasons, and that the measures were proportionate to the aim pursued.³⁰

It has proved difficult to introduce the margin of appreciation to human rights treaty bodies. In the drafting of the Optional Protocol on individual communications to the CESCR, a proposal for explicitly introducing the margin of appreciation doctrine was rejected. However, article 8(4) of the Optional Protocol states that:

When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.³¹

By recognizing that states may adopt a range of measures in implementing their obligations, the article expresses a deferential approach to examining communications. The article opens up for government discretion, but imposes a limit on that discretion through the reasonableness standard.³² The latest human rights convention to adopt a communications procedure – the Convention on the Rights of the Child – introduced the same ‘reasonableness’ test in respect of economic, social and cultural rights.³³ The

²⁷Appellate Body Report, European Communities – Measures Concerning Meat and Meat Products (EC – Hormones), WT/DS26/AB/R&WT/DS48/AB/R (16 January 1998), para 115 (footnote omitted). Also see Dye (n 26) 28–30. See further, Becroft (n 14) 57–59. Also see eg E-U Petersmann, ‘Judicial Standards of Review and Administration of Justice in Trade and Investment Law and Adjudication’, in Gruszczynski and Werner (n 4) 26–31.

²⁸With the notable difference that the margin of appreciation acknowledges a degree of deference whereas the standard of review can also be non-deferential. Gruszczynski and Werner, ‘Introduction’ (n 19) 4.

²⁹See eg P van Dijk, F van Hoof, A van Rijn and L Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006) 333–350.

³⁰*Handyside v UK* (App no 5493/72) (1976) 1 EHRR 737, paras 48–49. See eg M Ambrus, ‘The European Court of Human Rights and Standards of Proof: An Evidentiary Approach towards the Margin of Appreciation’, in Gruszczynski and Werner (n 4) 235–236, J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff, 2009) 236, D Harris, M O’Boyle, E Bates and C Buckley, *Law of the European Convention on Human Rights* (OUP 2009) 11.

³¹UN General Assembly Resolution, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, A/RES/63/117 (5 March 2009).

³²Griffey (n 15) 301 and 304.

³³Optional Protocol to the Convention on the Rights of the Child on a communications procedure, UN General Assembly Resolution A/RES/66/138 (19 December 2011), article 10(4).

test was explicitly inserted as a way of taking into account justiciability-issues of economic, social and cultural rights.³⁴

4. The Functions of the Human Rights Committee

The Human Rights Committee can be regarded as the most significant body attached to a universal human rights treaty.³⁵ This status can be traced to the function of considering individual communications.³⁶ While it is often emphasized that the HRC is not a court of law, it is commonly acknowledged that its work in many respects resembles the way in which a court of law operates. In clarifying the nature of individual communications in General Comment 33, the Committee emphasized that the HRC's Views 'exhibit some important characteristics of a judicial decision' and therefore resemble judgments of courts.³⁷ Whereas individual communications are based on the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), periodic reporting is the one obligation that all ICCPR parties must fulfill upon becoming state parties. The submission of reports is followed by a dialogue, which attempts to assess the human rights situation in the reporting country, ensure exchange of information, and acknowledge the obligations of the state. In comparison with individual communications, the reporting procedure is therefore more of a cooperative nature, sometimes even referred to as 'diplomatic' activity.³⁸

In accordance with article 2(2) of the Covenant, a state party 'undertakes to take the necessary steps . . . to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant'. As specified in General Comment 31, the Committee generally allows state parties to choose their method of implementation of Covenant rights, through 'legislative, judicial, administrative, educative and other appropriate measures'.³⁹ All of these measures are subject to discussion. As a result, the consideration of state reports is neither procedurally nor substantively comparable to the communications procedure.⁴⁰ Despite the differences in nature of the reporting and complaint procedures, the question of deference can arise in both contexts. The Committee on Economic, Social and Cultural Rights even linked the two explicitly by stating that it will, in considering individual communications, follow the same methodology as when discussing state reports, meaning *inter alia* that the Committee 'always respects the margin of appreciation of States to take steps and adopt measures most suited to their specific circumstances'.⁴¹

³⁴G de Beco, 'The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: Good News?' (2013) 13 *HRL Rev* 367, 378.

³⁵HJ Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee', in P Alston and J Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (CUP 2000) 16.

³⁶UNGA, Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 302.

³⁷See General Comment No 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, CCPR/C/GC/33, 5 November 2008, paras 11 and 13. Also see G Ulfstein, 'The Legal Status of Views Adopted by the Human Rights Committee – From Genesis to Adoption of General Comment No 33', in A Eide, JT Möller, and I Ziemele (eds), *Making Peoples Heard: Essays in Honour of Gudmundur Alfredsson* (Martinus Nijhoff 2011) 166.

³⁸M O'Flaherty, 'The United Nations Human Rights Treaty Bodies as Diplomatic Actors', in M O'Flaherty, Z Kędzia, A Müller and G Ulrich (eds), *Human Rights Diplomacy: Contemporary Perspectives* (Martinus Nijhoff 2011).

³⁹General Comment No 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Adopted on 29 March 2004, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para 7.

⁴⁰M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel 2005) 731.

⁴¹UN Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources', under an Optional Protocol to the Covenant*, UN Doc E/C.12/2007/1, 10 May 2007, para 11.

5. The Committee as a 'Fourth instance'

The question of deference can arise in Committee cases in various contexts. To begin with, deference arises as a structural question through the fourth instance doctrine whereby the Committee will not substantively scrutinize domestic law or decisions of national authorities in accordance with the principle of subsidiarity.⁴² Only under specific circumstances will the Committee seek a re-evaluation of facts and evidence or an interpretation of domestic legislation.⁴³ As the Committee stated in *Ahani*, its role in assessing facts and evidence is limited, unless there are elements of bad faith, abuse of power or other arbitrariness which would vitiate an assessment of the reasonableness of the domestic decision.⁴⁴

General Comment 32 (Right to equality before courts and tribunals and to a fair trial) expresses this explicitly:

It is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality . . .⁴⁵

The doctrine of deference is also applicable with respect to administrative authorities. In *Hamida v Canada* and *Pillai et al v Canada*, the Committee deferred to immigration authorities to appreciate the evidence before them, in determining whether the applicants face a real risk of violation of their right to life (article 6) or freedom from torture (article 7) if deported to their country of origin.⁴⁶ Only in cases of serious irregularities in the decision-making procedure or a manifestly unreasonable or arbitrary outcome can deference be denied. Schlütter characterizes this as a 'denial of justice' test, whereby facts are considered established, unless the deliberation on them violated the fair trial rights of the applicant.⁴⁷ In deportation cases, manifest unreasonableness or arbitrariness has been found, for instance, in the form of serious procedural flaws in the conduct of the domestic review proceedings, insufficient consideration of Covenant rights, insufficient consideration of evidence or information, a failure to take properly into account a relevant risk factor, or the inability of the state party to provide a reasonable justification for its decision.⁴⁸

⁴²G Letsas, *A Theory of Interpretation of the European Convention of Human Rights* (OUP 2007) 90.

⁴³Nowak (n 40) 828. T Zwart, *The Admissibility of Human Rights Petitions: The Case Law of the European Commission of Human Rights and the Human Rights Committee* (Martinus Nijhoff 1994) 150–152. As to the Inter-American Court of Human Rights, see B Duhaime, 'Subsidiarity in the Americas: What Room Is There for Deference in the Inter-American System?', in Gruszczynski and Werner (n 4) 291.

⁴⁴*Mansour Ahani v Canada*, Communication No 1051/2002, para 10.5. Also see *Anna Maroufidou v Sweden*, Communication No 58/1979, paras 6.2, 10.1, and *Ms G v Canada*, Communication No 934/2000, para 4(3). For a long list of similar cases, see Nowak (n 40) 828.

⁴⁵Human Rights Committee, General Comment No 32, article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32 (2007).

⁴⁶*Mehrez Ben Abde Hamida v Canada*, Communication No 1544/2007, paras 8.4–8.6, and *Ernest Sigman Pillai et al v Canada*, Communication No 1763/2008, paras 11.2–11.4.

⁴⁷B Schlütter, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies', in H Keller and G Ulfstein (eds), *UN Human Rights Treaty Bodies, Law and Legitimacy* (CUP 2012) 307–308 with a vast number of case references.

⁴⁸See *Masih Shakeel v Canada*, Communication No 1881/2009, Individual opinion of Committee member Yuval Shany, joined by Committee members Cornelis Flinterman, Walter Kälin, Sir Nigel Rodley, Anja Seibert-Fohr and Konstantine Vardzelashvili (dissenting), para 3. *Y v Canada*, Communication No 2280/2013, para 7.6. *X v Denmark*, 2389/2014, and especially Individual opinion of Committee members Yuval Shany, Yuji Iwasawa and Konstantine Vardzelashvili (dissenting), para 3.

6. Deference and Limitations on Rights

In addition to constituting an expression of subsidiarity, deference is explicitly built into the interpretation of the ICCPR through derogation and limitation clauses, which makes deference a tool for balancing collective goals with individual rights. The right of states to derogate from or impose limitations on the rights of individuals is explicitly provided for in the ICCPR. Through specific grounds for exception, states are invited to define the realm of acceptable derogations. Not unsurprisingly therefore many individual communications concern situations where states have imposed limitations on rights in the name of a collective good.⁴⁹

The ICCPR's general suspension clause sets forth that states may derogate from their obligations 'In time of public emergency which threatens the life of the nation' to the extent 'strictly required by the exigencies of the situation', provided that the measures comply with international law and are non-discriminatory.⁵⁰ However, the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR express a rather strict approach to deference: 'In determining whether derogation measures are strictly required by the exigencies of the situation the judgment of the national authorities cannot be accepted as conclusive'.⁵¹ In addition, article 4 ICCPR specifies that no derogation can be made for example from articles 6 (right to life) and 7 (prohibition against torture), both of which are central to deportation cases.⁵²

Despite the fact that deportation cases often concern articles 6 and 7, the question of deference and limitations on rights is interesting as it reveals the Committee's attitude towards the margin of appreciation doctrine. Some limitation clauses are included in the very text of the right itself. For example, article 19(3) (freedom of expression) of the ICCPR states that the right may be subject to certain restrictions, as long as the restrictions are provided by law and necessary for respect of the rights or reputations of others, for the protection of national security or of public order, or for public health or morals.⁵³ In addition, reasons of public safety, consistency with the rights in the ICCPR, or necessity in a democratic society, serve as justifications for limiting particular rights.⁵⁴ The Committee has often granted states a certain degree of discretion based on these clauses. For example, in terms of derogating from rights because of national security concerns, the Committee in *VMRB v Canada* (1987) considered that it was not for the Committee to test a sovereign State's evaluation of an alien's security rating.⁵⁵

In respect of public morals, paragraph 27 of the Siracusa Principles states:

Since public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.⁵⁶

⁴⁹Y Tyagi, *The UN Human Rights Committee: Practice and Procedure* (CUP 2011) 663.

⁵⁰International Covenant on Civil and Political Rights, 16 December 1966, in force 23 March 1976, 999 UNTS 171, art 4.

⁵¹United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985), para 57.

⁵²See eg *Masih Shakeel v Canada*, Communication No 1881/2009, para 8.6.

⁵³ICCPR, art 19(3).

⁵⁴For a list of limitation grounds and corresponding articles, see Tyagi (n 49) 654–655.

⁵⁵*VMRB v Canada*, Communication No 236/1987, para 6.3.

⁵⁶Siracusa Principles (n 51) para 27.

This reflects the reasoning for example in *Hertzberg v Finland* where the Committee concluded (in determining whether censoring of television programs by the state complied with freedom of expression), that in the absence of a universally applicable moral standard guiding the matter ‘a certain margin of appreciation must be accorded to the responsible national authorities’.⁵⁷

Yet, when the state party in *Toonen* was faced with a similar balancing task in respect of the right to privacy (article 17) (which does not contain an explicit limitation clause), the Committee argued that the absence of a universal standard did not mean that the Committee would defer to the decision of the state.⁵⁸ The same year in *Länsman v Finland* the Committee concluded (when assessing whether the impact of quarrying denied the applicants their right to enjoy their cultural rights) that while a state may understandably wish to encourage development or allow economic activity by enterprises:

The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27.⁵⁹

Similarly, in *Vjatseslav Borzov v Estonia* (2004), the Committee held that the decision on whether or not to defer must be made *in casu* and in relation to the provision invoked:

While the Committee recognizes that the Covenant explicitly permits, in certain circumstances, considerations of national security to be invoked as a justification for certain actions on the part of a State party, the Committee emphasizes that invocation of national security on the part of a State party does not, ipso facto, remove an issue wholly from the Committee’s scrutiny. Accordingly, the Committee’s decision . . . should not be understood as the Committee divesting itself of the jurisdiction to inquire, as appropriate, into the weight to be accorded to an argument of national security. While the Committee cannot leave it to the unfettered discretion of a State party whether reasons related to national security existed in an individual case, it recognizes that its own role in reviewing the existence and relevance of such considerations will depend on the circumstances of the case and the relevant provision of the Covenant.⁶⁰

While the wording in *Toonen* could be interpreted as to only reject *exclusive* deference of moral issues to states, the *Hertzberg v Finland* endorsement of the margin of appreciation has come to be regarded as something of an anomaly.⁶¹ Some authors have regarded the express rejection of the margin of appreciation doctrine by the Committee as unimportant, arguing that there is a vast body of cases that indicate that the HRC nevertheless has ‘silently’ applied the doctrine.⁶² However, the recent Draft General Comment 34 on the freedom of opinion and freedom of expression is further evidence of the Committee’s cautious approach to the margin of appreciation. Draft General Comment 34 confirms that it is for the state party to demonstrate the legal basis of any restrictions on rights, provide evidence that the restriction is provided by law, and to demonstrate the necessity of the restriction for the achievement of a legitimate purpose.⁶³ However, the General Comment explicitly reserves for the Committee the assessment of whether the

⁵⁷*Leo Hertzberg et al v Finland*, Communication No 61/1979, para 10.3.

⁵⁸*Toonen v Australia*, Communication No 488/1992, para 8.6.

⁵⁹*Länsman et al v Finland*, Communication No 511/1992, para 9.4.

⁶⁰*Vjatseslav Borzov v Estonia*, Communication No 1136/2002, para 7.3. Also see Legg (n 5) 163.

⁶¹See eg Shany (n 10) 929.

⁶²See Crawford preface to Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) ix.

⁶³Human Rights Committee, Draft General Comment No 34, UN Doc CCPR/C/GC/34/CRP.2 (2010), paras 27–28.

circumstances support the necessity-test by stating that ‘The test of necessity is not to be applied by reference to a margin of appreciation . . .’⁶⁴

7. Articulating Deference

The exact degree of deference is always established on a case by case basis. In determining the degree of deference, criteria such as reasonableness, proportionality, arbitrariness and necessity are used, all of which are inherently vague.⁶⁵ With regards to limitations, the principles of proportionality and necessity are essential elements in the limitation of all rights.⁶⁶ In *De Morais v Angola* the Committee specified that:

... the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect.⁶⁷

The requirements of necessity and proportionality re-emerge in different ways in the context of derogations/limitations. In cases of public emergencies, article 4 ICCPR sets forth that derogations can only be made to the ‘extent strictly required by the exigencies of the situation’. General Comment 29 (Derogations during a State of Emergency) clarifies the meaning of that requirement by stating that the measure must be proportionate to the specific threat.⁶⁸ Paragraph 6 of General Comment 29 specifies that:

The legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes both for States parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation.⁶⁹

This indicates that the Committee does not defer the proportionality assessment to states.⁷⁰

The proportionality test has been characterized as an overarching principle of constitutional adjudication and the preferred procedure for managing disputes involving a conflict between rights and other interests.⁷¹ Proportionality can also be regarded as the leading manifestation of reasonableness.⁷² In *Toonen v Australia* the Committee stated

⁶⁴Human Rights Committee, Draft General Comment No 34, para 30. The Draft General Comment explicitly refers to *Jong-Kyu Sohn v Republic of Korea*, Communication No 518/1992. For a discussion on various explanations for why the Committee has rejected the margin of appreciation doctrine, see D McGoldrick, ‘A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee’ (2016) 65 *Int & Comp L Qu* 21, 52.

⁶⁵Shany (n 10) 914–917.

⁶⁶General Comment No 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant) para 6 states that: ‘Where . . . restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuit of legitimate aims in order to ensure continuous and effective protection of Covenant rights’. Conte and Burchill (n 6) 51–57. Limitations derived from the expressions of particular rights include a number of criteria by which to assess the permissibility of the derogation, such as ‘fairness’ (art 14(1)), ‘reasonableness’ (arts 9 (3) and 25), ‘arbitrariness’ (arts 6(1), 9(1), 12(4), 17(1)), ‘promptness’ (arts 9 and 14), and ‘adequacy’ (art 14(3)(b)). Conte and Burchill (n 5) 52.

⁶⁷*Rafael Marques de Morais v Angola*, Communication No 1128/2002, para 6.8.

⁶⁸General Comment No 29 (2001), para 4. Also see Siracusa Principles (n 51) para 3, Nowak (n 40) 97, and Conte and Burchill (n 5) 42–51.

⁶⁹General Comment No 29 (2001), para 6.

⁷⁰Also see Siracusa Principles (n 51) para 57: ‘In determining whether derogation measures are strictly required by the exigencies of the situation the judgment of the national authorities cannot be accepted as conclusive’.

⁷¹A Stone Sweet and J Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia J of Trans L* 73.

⁷²I Porat, ‘Some Critical Thoughts on Proportionality’, in G Bongiovanni, G Sartor and C Valentini (eds), *Reasonableness and Law* (Springer 2009) 243.

that the requirement of reasonableness implies that ‘any interference with privacy must be proportional to the end sought and be necessary in the circumstances of the given case’.⁷³ The reasonableness assessment is prominent in non-discrimination cases (article 26 ICCPR).⁷⁴ In General Comment 18 the Committee observes that:

... not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.⁷⁵

In its assessment of national security concerns as a justification for limitation of article 26 in *Vjateslav Borzov v Estonia* (2004), the Committee first of all emphasized the Committee’s right to inquire into the matter. The Committee furthermore touched upon the conceptual distinction between limitation mechanisms more generally:

Whereas articles 19, 21 and 22 of the Covenant establish a criterion of necessity in respect of restrictions based on national security, the criteria applicable under article 26 are more general in nature, requiring reasonable and objective justification and a legitimate aim for distinctions . . .⁷⁶

‘Reasonableness’ is often perceived as a deference doctrine and a more relaxed test, only testing whether the decision-maker acted irrationally.⁷⁷ In its most extreme form (*Wednesbury* reasonableness) a reviewing court can only set a decision aside if that decision is ‘so unreasonable that no reasonable authority could ever have come to it’.⁷⁸ This, however, the ECtHR has concluded, places the threshold ‘so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants’ rights answered a pressing social need or was proportionate to the national security and public order aims pursued . . .’⁷⁹

In comparison, when making the proportionality assessment, the court cannot satisfy itself with considering whether the decision is within the range of reasonable decisions. In addition, the court needs to assess the balance of measures and the weight accorded to

⁷³*Toonen v Australia*, Communication No 488/1992, para 8.3.

⁷⁴In addition to non-discrimination, a reasonableness assessment can be found in Committee practice in many contexts, such as when assessing jurisdictional issues (where the Committee eg requires that a ‘convincing’ or ‘reasonable’ explanation must be provided in order to justify a significant delay in bringing a communication, art 41), in exercising political and participatory rights (art 25 ICCPR stating that the rights are enjoyed without ‘unreasonable’ restrictions), protecting minorities (art 27), in ensuring the right to trial (within reasonable time, art 9(3)), and in detention issues (detention must not only be lawful, but also ‘necessary’ and ‘reasonable’). On detention, see eg *Rafael Marques de Morais v Angola*, Communication No 1128/2002, para 6.1. Draft General Comment 34 (Freedoms of opinion and expression) states that conditions and fees on the broadcast media should be reasonable and objective, Human Rights Committee, Draft General Comment No 34, UN Doc CCPR/C/GC/34/CRP.2 (2010), para 39. As to art 27, see *Sandra Lovelace v Canada*, Communication No R.6/24, para 16. On non-discrimination cases implying a margin of discretion, see eg Tyagi (n 49) 672–674.

⁷⁵HRC General Comment No 18 (Non-discrimination), UN Doc HRI/GEN/1/Rev.1 (1994), para 13. Also see eg *Irina Fedotova v Russian Federation*, Communication No 1932/2010, para 10.6, and especially fn 38 for a reference to a vast body of cases. Also see eg *Haraldsson and Sveinsson v Iceland*, Communication No 1306/2004, para 10.2.

⁷⁶*Vjateslav Borzov v Estonia*, Communication No 1136/2002, para 7.3. It could be noted that in *Oulajin & Kaiss v The Netherlands*, Communications Nos 406/1990 and 426/1990, para 7.4, the Committee also distinguished between reasonableness and objectivity. This, however, seems to be the exception to the more common practice of not distinguishing between the two. Conte and Burchill (n 5) 310.

⁷⁷Sweet and Mathews (n 71) 79. For example Legg finds evidence in the Committee case law of a rather deferential approach in respect of the reasonableness assessment. Legg (n 5) 88 (discussing *Wackenheim v France*, Communication No 854/1999).

⁷⁸*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

⁷⁹*Smith and Grady v United Kingdom*, Applications Nos. 33985/96 and 33986/96, European Court of Human Rights, 27 September 1999, paras 137–138.

competing interests.⁸⁰ In this respect, for example in *Althammer et al v Austria* the Committee found no violation of article 26, since:

... rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds. In the circumstances of the instant case, the abolition of monthly household payments combined with an increase of children's benefits is not only detrimental for retirees but also for active employees not (yet or no longer) having children in the relevant age bracket, and the authors have not shown that the impact of this measure on them was disproportionate. Even assuming, for the sake of argument, that such impact could be shown, the Committee considers that the measure, as was stressed by the Austrian courts (paragraph 2.3 above), was based on objective and reasonable grounds.⁸¹

Reasonableness is also often linked with the element of arbitrariness. A number of rights prohibit the arbitrary interference with rights (such as the right to life, article 6(1)). Furthermore, no limitations are to be applied in an arbitrary manner.⁸² In order to find a measure arbitrary, there has to be an act or omission which is against the law, unreasonable, or in non-accordance with the ICCPR.⁸³

The point of departure in deportation cases is that the Committee defers to the assessment of facts and evidence conducted by the state, 'unless it can be established that the assessment was arbitrary or amounted to a manifest error or denial of justice'.⁸⁴ It falls upon the applicant to demonstrate that the factual conclusions of the State party are 'manifestly unreasonable'.⁸⁵ Although the Committee itself has not been very elaborate on its findings of unreasonableness, Committee member Yuval Shany in *AHG v Canada* explained the underlying logic in more detail. According to Shany, the deportation decision was a disproportionate response since it caused an extremely vulnerable person significant harm, on account of a risk for which he was only partly responsible. As the Canadian authorities failed to consider other means of protecting the general public that would be less harmful to the applicant than deportation, and instead assigned undue weight to speculative possibilities, they hereby failed to strike a reasonable balance. As a result, the decision was found to be 'manifestly disproportionate and thus arbitrary in nature'.⁸⁶ In general, the Committee has been noted to apply the proportionality and reasonableness tests in a rather non-deferential manner.⁸⁷

⁸⁰*R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 WLR 1622, para 27. Also see McLean (n 17) 43–46, and eg TRS Allan, *Constitutional Justice* (OUP, 2001) at 132.

⁸¹*Rupert Althammer et al v Austria*, Communication No 998/2001, para 10.2. Also see SL Nystrom, Communication No 1557/2007, and especially the Individual opinion of Committee members Gerald L. Neuman and Yuji Iwasawa (dissenting), para 2.1.

⁸²*Siracusa Principles* (n 51) para 7.

⁸³Conte and Burchill (n 5) 51–53.

⁸⁴*Ernest Sigman Pillai et al v Canada*, Communication No 1763/2008, paras 11.2–11.4, and *Fan Biao Lin v Australia*, Communication No 1957/2010, para 9.3 are commonly referred to in this respect. See eg *X v Denmark*, Communication No 2280/2013, para 7.2.

⁸⁵*PT v Denmark*, Communication No 2280/2013, para 7.4, *Y v Canada*, Communication No 2280/2013, para 7.6.

⁸⁶*AHG v Canada*, Communication No 2091/2011, Individual opinion of Committee member Yuval Shany (concurring), paras 4–7.

⁸⁷D Baldinger, *Vertical Judicial Dialogues in Asylum Cases: Standards on Judicial Scrutiny* (Brill 2015) 97. S Joseph, 'Human Rights Committee: General Comment 29' (2002) 2 *HRL Rev* 81, 86. Christoffersen (n 30) 42 and Griffey (n 15) 324. Also see Tyagi (n 49) 679.

8. Patterns of Justification

By studying the practice of deference the aim is to add to the predictability of future decisions, and to better inform national authorities of what is expected from them.⁸⁸ However, the identification of patterns in the practice of courts and judicial bodies has proved to be an elusive task, due to the case-specific nature of the decision on whether or not to defer.⁸⁹ The degree of deference granted can vary widely across different judicial bodies, even when dealing with the same right.⁹⁰

In his study of deference in the case law of the ECtHR, IACtHR, and the Human Rights Committee, Legg identifies three types of (external) reasons for deference in particular – democratic legitimacy, the common practice of states and institutions, and the expertise of domestic authorities.⁹¹ Out of these, deference due to expertise has been found, for example, in some decisions concerning national security, child protection, health care, education, and economic policies. Legg finds traces of a less deferential approach in issues concerning legal proceedings, but also when determining the legality of state action.⁹² Deportation cases seem to fit this pattern. Deportation cases before the Committee are guided by the general rule to accord more weight to the state party's assessment, and that it is generally for the organs of states to evaluate facts and evidence in order to determine whether there is a risk of irreparable harm on return to one's country of origin.⁹³ The reason for this is that the expertise in assessing the nature of the risk that the individual faces upon deportation, resides with state authorities.⁹⁴

Studies of Committee case law fail to identify any clear trends in the practice of deference, apart perhaps from noting a general reluctance of the Committee to grant states a wide margin of appreciation.⁹⁵ At best, these studies identify some circumstances that *may* cause a human rights body to defer, but fail to offer means to predict Committee deference decisions. This is not too surprising. After all, the question of deference draws both upon the understanding of the role and competence of the reviewing body, as well as on the substance and nature of the matter before the court. Identifying matters that 'trigger the deference question' does not necessarily fully explain the degree of deference. In fact, in some cases it may even be unclear whether the Committee has deferred at all. For example, with respect to the *Maroufidou* case (where the Committee refused to re-evaluate whether the competent authorities of the State party had interpreted and applied domestic law

⁸⁸See eg Gerards (n 17) 89.

⁸⁹Ioannidis (n 7) 95 for this reason suggests that the search for general categories in order to predict the degree of deference may be futile. Also see eg McLean (n 16) 64.

⁹⁰For a recent study in the context of freedom of speech, see eg M Ajevski, 'Freedom of Speech as Related to Journalists in the ECtHR, IACtHR and the Human Rights Committee – a Study of Fragmentation' (2014) 32 *Nordic J HR* 118.

⁹¹Legg (n 5). Also see Shany (n 10) 927 in respect of the ECtHR and Tyagi (n 49) 679.

⁹²Legg (n 5) 167–174.

⁹³*Ernest Sigman Pillai et al v Canada*, Communication No 1763/2008, paras 11.211.4, and *Fan Biao Lin v Australia*, Communication No 1957/2010, para 9.3.

⁹⁴As indicated eg in *Ganesaratnam Thuraisamy v Canada*, Communication No 1912/2009, paras 7.6–7.7.

⁹⁵As to the 'reasonable and objective' test, see S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (OUP 2004) 700. Also see Conte and Burchill (n 5) 309–315. In *Sandra Lovelace v Canada*, Communication No R.6/24, para 16, the Committee affirmed that the assessment of reasonableness must be both purposive and contextual. The Committee's General Comment No 32 (On the right to equality before the courts and to a fair trial) states that reasonableness is not only contextual, but must take into account also 'the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities', HRC, General Comment No 32 (2007) on the right to equality before the courts and to a fair trial (*Official Records of the General Assembly, Sixty-second Session, Supplement No 40*, vol. I [A/62/40 (Vol.I)] Annex VI). Also see B Porter, 'Reasonableness in the Optional Protocol to the ICESCR', 2012 SRAC Working Paper, 29.

correctly), Legg suggests that although the case appears quite deferential, the Committee paid close attention to the rationale of the state as well as to the communicant in its decision.⁹⁶ Furthermore, as recent deportation cases demonstrate, the very characterization of the dispute can also be subject to debate in a disagreement on the proper extent of review.

9. Disputing Deference

A notable feature of many recent deportation cases is that they have given rise to dissent on the extent of review. Though the Committee affirmed the general rule that deference is granted to immigration authorities when assessing evidence before them in *Masih Shakeel v Canada* (2009), the dissenting members nonetheless saw the Committee's review as a reassessment of the facts of those authorities. The Committee argued that the state had failed to substantiate its claims, and to examine the authenticity of evidence. As a consequence, the Committee concluded, the state paid insufficient attention to the real risk that the applicant might face if deported. In the individual opinion attached to the decision, the dissenting committee members strongly disagreed with the conclusion that the decision of the Canadian authorities demonstrated a serious procedural defect. In their mind, in making a *de novo* review, the decision explicitly undermines the idea of comparative advantage of domestic authorities in making factual findings, and positions the Committee as a court of fourth instance.⁹⁷

In two other views delivered in the same year, the question of whether or not the Committee should be deferential to fact-based assessments by national immigration authorities also raised dissent. In *Thuraisamy v Canada*, whereas the state found no evidence of a real risk for the applicant's life or security if returned to Sri Lanka, the Committee found that the authorities had failed to further examine physical evidence such as scars on the applicant's chest. In *Choudhary v Canada*, the Committee argued that the assessment of refugee status by domestic authorities was not as thorough as it would have been if performed by the Immigration and Refugee Board. The Committee also referred to 'recent reports' pointing to the fact that religious minorities face persecution and insecurity in Pakistan. The dissenting members, however, claimed that all relevant risk factors had been duly considered and did not find the decision of Canadian authorities to be manifestly unreasonable or arbitrary. Nor were they convinced by the claim of the Committee that members of the Shia community in Pakistan would be subject to a particular risk of physical harm, even in light of the new information.⁹⁸ In *X v Denmark*, the Committee referred to

⁹⁶The Committee went on to state: 'In the light of all written information made available to it by the individual and the explanations and observations of the State party concerned, the Committee is satisfied that in reaching the decision to expel Anna Maroufidou the Swedish authorities did interpret and apply the relevant provisions of Swedish law in good faith and in a reasonable manner and consequently that the decision was made "in accordance with law" as required by article 13 of the Covenant'. *Anna Maroufidou v Sweden*, Communication No 58/1979, para 10.1 and 10.2. Legg (n 5) 173–174.

⁹⁷*Masih Shakeel v Canada*, Communication No 1881/2009, para 8.4–8.5, and Individual opinion of Committee member Yuval Shany, joined by Committee members Cornelis Flinterman, Walter Kälin, Sir Nigel Rodley, Anja Seibert-Fohr and Konstantine Vardzelashvili (dissenting).

⁹⁸*Naveed Akram Choudhary v Canada*, Communication No 1898/2009, paras 9.7–9.8, and Individual opinion of Committee members Yuval Shany, Anja Seibert-Fohr, Konstantine Vardzelashvili, Cornelis Flinterman, Gerald L. Neuman and Walter Kälin (dissenting), paras 5–6. *Ganesaratnam Thuraisamy v Canada*, Communication No 1912/2009, paras 7.5–7.6, and Individual (dissenting) opinion of Krister Thelin.

publicly available information and documents of different countries' immigration authorities in order to make a reassessment of the persecution threat of the applicant. It also referred to the cumulative effect of facts, none of which by themselves substantiated a real risk but which taken together did so. By doing this, the dissenting judges argued, the Committee was actually reassessing the facts.⁹⁹

In its reasoning on the merits, the Committee typically avoids elaborating at any length on the reasons for (or against) deferral. While this leaves much to hope for in terms of assessing the relative weight of the arguments of the majority and the dissenters, the way in which the disagreement is phrased is nevertheless illustrative of the structure of the deference argument. Whereas the majority seeks to build its decision on due process violations, dissenters emphasize the Committee's lack of expertise and the fourth instance rule. The logic of the Committee seems to be that if only the investigations had been taken further; or if another authority had performed the investigation; or if the authorities had read the evidence in a different light, then the facts would have more clearly supported the claim of the applicant. The dissenting member(s) do not agree that there has been a procedural irregularity or an oversight of evidence, and do not find evidence of manifest unreasonableness or arbitrariness. As a consequence, the dissenting members claim that the Committee exceeds its proper review function.

While there are several points of disagreement between the Committee and the dissenters in these cases, for example concerning the relevance and weight of information, the disagreement on the proper extent of Committee review boils down to different characterizations of the dispute. When it comes to introducing new evidence in proceedings before the Committee, article 5(1) of the Optional Protocol and rule 100 (1) of the Rules of Procedure require the Committee to consider a communication 'in light of all written information made available to it by the individual and by the state party concerned'.¹⁰⁰ The written submissions are the exclusive sources of information. However, this does not exclude the introduction of information from other sources, as long as one of the parties submits that information. In *HEAK v Denmark*, new evidence brought in by the applicant led the Committee to reassess the nature of the risk for the applicant upon deportation, and to the finding that the initial risk assessment by the State party was unreasonable. This information was in the reasoning mixed with the procedural flaw of failing to address an important piece of evidence (the re-characterized nature of the group of which the applicant was a member).¹⁰¹ It would however seem that the Committee can also make use of new, external information, as in *Choudhary v Canada*.¹⁰²

The reliance on the cumulative effect of facts as a way of demonstrating a failure to consider evidence and information is closely related to the question of introducing new facts. In *X v Denmark*, the reference by the Committee to the state's failure to sufficiently take into account the totality of facts, does not refer to a failure to consider evidence. The Committee seems to add to the grounds for non-deference, or is acting as a court of fourth instance.¹⁰³ The 'totality of facts' was also seen by the Committee to reveal a real risk of

⁹⁹*X v Denmark*, Communication No 2389/2014, paras 7.6 and 7.7, and Individual opinion of Committee members Yuval Shany, Yuji Iwasawa and Konstantine Vardzelashvili (dissenting).

¹⁰⁰Also see *AH v Denmark*, Communication No 2370/2014, para 8.5.

¹⁰¹*HEAK v Denmark*, Communication No 2343/2014, para 8.5.

¹⁰²*Naveed Akram Choudhary v Canada*, Communication No 1898/2009, para 9.7. Also see Tyagi (n 49) 529.

¹⁰³*X v Denmark*, Communication No 2389/2014, Individual opinion of Committee members Yuval Shany, Yuji Iwasawa and Konstantine Vardzelashvili (dissenting), para 3.

violation of covenant rights in *AH v Denmark*.¹⁰⁴ In this case, however, there was no dissent. One of the reasons for this may be that in *AH v Denmark* the failure to consider the totality of facts was accompanied by a finding of absence of comprehensive and objective verification by the State party's authorities of evidence submitted by the applicant. This renders the finding of a violation, at least partly, a procedural matter, thereby legitimizing a less deferential approach.

The dissenting opinions in these cases do not only concern the Committee's decision to accept new evidence or whether or not that information changes the outcome of the case. More fundamentally, the dissenters challenge the idea of whether or not taking 'recent reports' into account constitutes a failure to examine information. Similarly, whether the 'totality of facts' intensifies the threat that the applicant would face upon deportation or not, is essentially a question of whether the 'totality' can be seen to constitute an independent piece of information (that the authorities had failed to take into account). The very subject of disagreement hereby shifts from the substance (of the new information or the totality of facts), into whether the dispute is about procedure or substance to begin with. The disagreement on the relevance of new information (or on the nature of the 'totality of facts') also demonstrates the limited guidance that standards such as 'reasonableness' can provide.¹⁰⁵

10. Conclusion

The growing interest in the question of deference seems only a natural consequence of the judicialization that many areas of international law are experiencing.¹⁰⁶ Deportation cases before the Committee are guided by the general rule that it is generally for the authorities of states to review or evaluate facts and evidence, unless it can be established that the state authority's assessment was manifestly unreasonable or arbitrary, amounting to a denial of justice. However, the actual degree of deference is determined by the reviewing body's characterization of the dispute. To oversimplify a bit; if the reviewing body wishes to reverse a decision, it characterizes the dispute as a mix of procedure and substance, whereas if it wants to affirm, it characterizes the dispute as one of substance only, and applies a more deferential standard. In order to deny deference, without violating the basic rule of deferring assessments of evidence to state authorities, the dispute must be portrayed as procedural.¹⁰⁷ Yet, as procedure and substance can neither be defined nor separated in the abstract, any characterization of the dispute along this distinction is bound to be contested.¹⁰⁸ The reasoning in recent deportation cases before the Committee nicely illustrate how the characterization of the dispute can be construed to either legitimize or question review. In this equation, a search for predictability seems futile. The most a focus on deference/standard of review can hope to reveal is therefore to sort out the structure of this uncertainty, and to show the function of the doctrine of deference as a mechanism for expressing disagreement.

¹⁰⁴*AH v Denmark*, Communication No 2370/2014, para 8.8.

¹⁰⁵As reasonableness turns into yet another means for disagreeing, reasonableness review can never be uncontroversial, PP Craig, 'The Nature of Reasonableness Review' (2013) *Current Legal Probs* 1, 37. Also see Ioannidis (n 7).

¹⁰⁶S Zleptnig, 'The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority' (2002) 6 *Eur Integ online Papers* 7.

¹⁰⁷K McCall-Smith, 'Human Rights Treaty Bodies, Proceduralisation and the Development of Human Rights Jus Commune', ESIL Conference Paper Series 1/2015, even considers it a 'strategy'.

¹⁰⁸K Kunsch, 'Standard of Review (State and Federal): A Primer' (1994) 18 *SULR* 11, 12, and J Klabbers, 'Straddling Law and Politics: Judicial Review in International Law' in R StJ Macdonald and DM Johnston (eds), *Towards World Constitutionalism* (Brill, 2005) 809, 813.