The South African Constitutional Court's death penalty and rendition cases as tools for litigants abroad

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Abstract

Several cases of the South African Constitutional Court have become classics in comparative constitutional law scholarship and the Court's participation in global judicial dialogue has been documented. Indeed, since the Court's founding, Justices have referred to and discussed many foreign judicial decisions. But how has the Constitutional Court's case law influenced debates before other courts? This contribution scrutinises some landmark cases of the US Supreme Court and the European Court of Human Rights on two issues similar as those decided by the South African Constitutional Court to see whether the South African precedents were considered. It is found that South African precedents, which themselves encapsulate external influences, now serve litigants worldwide to argue their point of views. The groundbreaking cases coming from a relatively young Court are used, mainly in amicus curiae briefs, as resources to advance the interpretation of human rights. However, these references do not (yet?) find an explicit and engaging echo in the judgments of the US Supreme Court and the European Court of Human Rights.

INTRODUCTION

Judicial dialogue (and other closely related topics such as comparative constitutional law, transnational cross-referencing *etc*) has become the cradle of a huge volume of academic scholarship. Although the South African

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Constitutional Court (SACC) holds an important place in this landscape,[1] and has been singled out by many legal scholars (along with the Canadian Supreme Court) as 'increasingly influential',[2] its activity has been analysed mainly as a 'receiver'[3] and not as a 'contributor' to judicial dialogue. According to Lollini, 'there are signs of what might become a new trend in the future. In some cases, the SACC has moved from the simple act of 'learning' from important foreign constitutional experiences to 'teaching' other countries within the liberal-democratic tradition'.[4] This article thus looks at South African jurisprudence from the other perspective: how do the SACC cases nourish litigation elsewhere?[5] The hypothesis is that South African precedents, which themselves encapsulate external influences, now serve litigants worldwide in arguing their points of view. The ground-breaking cases coming from a relatively young court, can be used as resources to advance the interpretation of human rights elsewhere and feed an ever-growing transnational judicial dialogue.

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1 As Kwasi Prempeh frames it, the South African Constitutional Court 'has emerged as the undisputed favorite of comparative constitutional law scholars and social scientists'; Prempeh 'African judges, in their own cause: reconstituting independent courts in contemporary Africa' (2006) 4 *Int J of Constitutional Law* 592.

2 Liptak 'US Court, a longtime beacon, is now guiding fewer nations' *New York Times,* 18 September 2008.

3 See for example Webb 'The Constitutional Court of South Africa: rights interpretation and comparative constitutional law' (1998) 1 *Univ of Pennsylvania J of Constitutional Law* 205; Lollini 'Legal argumentation based on foreign law: an example from case law of the South African Constitutional Court' (2007) 3 *Utrecht LR* 60; Lollini 'The South African Constitutional Court experience: reasoning patterns based on foreign law' (2012) 8 *Utrecht LR* 55; Rautenbach 'South Africa: teaching an "old dog" new tricks? An empirical study of the use of foreign precedents by the South African Constitutional Court (1995–2010)' in Groppi & Ponthoreau (eds) *The use of foreign precedents by constitutional judges* (2013) 185; Davis 'Constitutional borrowing: the influence of legal culture and local history in the reconstitution of comparative influence: the South African experience' (2003) 1 *Int J of Constitutional Law* 181; Bentele 'Mining for gold: the Constitutional Court of South Africa's experience with comparative constitutional law' (2009) 37/2 *Georgia Journal of International and Comparative Law* 219–65.

4 Lollini 'From import to export? Some signs of the external circulation of South African constitutional jurisprudence' in Corder, Federico & Orrù (eds) *The quest for constitutionalism: South Africa since 1994* (2014) 255. He investigated the Israeli and Canadian constitutional jurisprudence.

5 There are authors who have adopted a similar approach, but they merely point out that foreign jurisdictions *could* be inspired by South African cases. However, they have not examined if such an inspiration has already taken place. See Wing 'The South African Constitution as a Role Model for the United States' (2008) 24 *Harvard BlackLetter Law Journal* 73; Wing 'The fifth anniversary of the South African Constitution: a role model on sexual orientation' (2002) 26 *Vermont LR* 821; Kende *Constitutional rights in two worlds* (2009); Kende 'The constitutionality of the death penalty: South Africa as a model for the United States' (2006) 38 *George Washington Int LR* 209; Steiker 'Pretoria, not Peoria – *S v Makwanyane and Another* (1995) 3 SA 391' (1996) 74 *Texas LR* 1285.

I have chosen to look for traces of references to SACC case law in the activities of two important and influential courts:[6] the United States Supreme Court (USSC) and the European Court of Human Rights (ECtHR).[7] I expressly look at the *litigation activity* before the courts and not only their judgments, as has indeed been repeated numerous times, by focusing on *end references – ie* cross references in the judgments – one might miss the complete picture, as comparative elements may be discussed even if not ultimately cited. I chose to narrow the number of cases by focusing on the death penalty and the issue of rendition.[8] These topics were chosen for various reasons. First, because the death penalty is one of the themes that has spurred heated debate on cross-references in the US and it has been identified as a strong example of sites where judicial dialogue could take place, in particular because they revolve around the fundamental notions of humanity and dignity.[9] Secondly, the SACC has decided cases on these issues that have been labelled 'landmark cases'.[10] And finally, these issues have been dealt by the two other courts post the South African cases and

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6 See for the choice to compare these courts: Wintemute *Sexual orientation and human rights. The United States Constitution, the European Convention and the Canadian Charter* (2002) 3–4 and Kende n 5 above at 4.

7 In another research, it would also be of interest to look at South African judgments' influence within the Commonwealth or African countries. The website of the now closed NGO Interights, which published human rights digests, allows searching for references and shows that South African cases are cited by many jurisdictions. See http://www.interights.org/search/index.html (last accessed 22 November 2016).

8 Rendition here refers to involuntary physical transfer of an individual between two states for any law enforcement, military or intelligence purpose (definition inspired by Sadoff *Bringing international fugitives to justice. Extradition and its alternatives* (2016) 370 and regarding the distinction in the case of *Mohamed* hereafter Botha 'Deportation, extradition and the role of the state' (2001) 26 *South African Yearbook of International Law* 227–238).

9 See for example Gray 'A prayer for constitutional comparativism in Eighth Amendment cases' (2006) 18 *Federal Sentencing Reporter* 237; Carozza '"My friend is a stranger": the death penalty and the global ius commune of human rights' (2003) 81 *Texas LR* 1031; Grove 'The international judicial dialogue: when domestic constitutional courts join the conversation' (2001) 114 *Harvard Law Review* 2050. Ursula Bentele for example, suggested that if American courts choose to look for persuasive authority on what constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution, 'the thoughtful and comprehensive decision of the South African Constitutional Court on this difficult issue might be useful'; Bentele 'Back to an international perspective on the death penalty as a cruel punishment: the example of South Africa' 73 *Tul L Rev* 251 73 (1998) 254.

10 It is difficult to rely on a specific criterion to determine what a 'landmark' case is, but here, the South African Constitutional Court's website itself lists some 'landmark cases'. Under the theme ' death penalty', it lists *State v Makwanyane* and *Mohamed v President of the Republic.* See: http://www.constitutionalcourt.org.za/site/thecourt/history.htm#cases (last accessed 22 November 2016).

they remain on the agenda: capital cases continue finding their way to the Justices of the USSC, and the ECtHR Court is increasingly called upon to rule on victims of 'extraordinary rendition'.[11] The method has been to look for traces of the two following cases outside their birthplace: *State v Makwanyane,*[12] and *Mohamed v President of the Republic.*[13]

The lengthy ruling in *State v Makwanyane* was delivered on 6 June 1995 and unanimously declared the death penalty unconstitutional. Even before it had been fully established, the SACC was confronted with the issue of capital punishment.[14] The majority judgment was written by the President of the Court, Justice Chaskalson. All the other justices concurred in the outcome, but each wrote a separate opinion, emphasising different points.[15] Authors commented the court's choice as 'remarkable in its self-confidence, particularly in such a young democracy where fundamental political decisions are still being made',[16] resolving its interpretive dilemma by means of a normative and transparent discussion about values, so situating itself at the very centre of value-formation.[17] This famous case has indeed been thoroughly analysed[18] and some foresaw that it could 'act as persuasive authority'[19] for other courts. Indeed, it addresses many issues – for example, the state of public opinion, the issues of deterrence and retribution, proportionality, *etc*.[20] Moreover, comparative law makes up a significant portion of the various opinions.[21] According to Heinz Klug, international and comparative materials were used 'as a source for specific lines of argument and justification and in a more general source for supporting the general role

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11 Ambos 'The European Court of Human Rights and extraordinary renditions' 2015 *EuCLR European Criminal Law Review* 107–121.

12 *S v Makwanyane and Another* n 5 above.

13 *Mohamed & Another v President & Others* 2001 3 SA 893 (CC).

14 For a history of capital punishment in South Africa, a review of the negotiations on these issues and more on the facts of this case *see* Bouckaert 'Shutting down the death factory: the abolition of capital punishment in South Africa' (1996) 32 *Stanford J of Int Law* 287.

15 Sarkin 'Problems and challenges facing South Africa's Constitutional Court: an evaluation of its decisions on capital and corporal punishment' 1996 *SALJ* 75.

16 Harcourt 'Mature adjudication?: Interpretive choice in recent death penalty cases' (1996) 9 *Harvard Human Rights Journal* 259.

17 *Id* at 260.

18 For example, on the interpretative approach followed in *State v Makwanyane*, see Webb n 3 above at 227–256.

19 Chenwi, *Towards the abolition of the death penalty in Africa. A human rights perspective* (2007).

20 See for a summary: Hatchard 'Constitutionality of the death penalty and penal policy' (1995) 39/2 *Journal of African Law* 192–197.

21 Harcourt n 16 above at 266.

of the court and judicial review in particular'.[22] The justices entered into dialogue with many other jurisdictions, to draw inspiration, but also to note the differences among the constitutional provisions: the Hungarian and Canadian Constitutional Court; the USSC and state courts; the ECtHR; the Indian Supreme Court; the UN Human Rights Committee; *etc*.[23]

Six years after *Makwanyane*, the SACC dealt with a case in which a suspect terrorist had been handed over to US authorities, which transferred him to New York where he stood trial on a number of capital charges. In *Mohamed v President of the Republic of South Africa*, the court again mobilised various foreign cases to reach its decision that '[i]n handing Mohamed over to the United States without securing an assurance that he would not be sentenced to death, the immigration authorities failed to give any value to Mohamed's right to life, his right to have his human dignity respected and protected and his right not to be subjected to cruel, inhuman or degrading punishment.'[24]

Nine cases were selected on these issues in the two other jurisdictions post the South African cases.[25] I collected the parties' submissions and the *amicus curiae* briefs – 53 in total – related to these European and American cases, and analysed their content, looking specifically for cross-references to the two identified South African precedents. The results are presented chronologically per jurisdiction. The analysis examines the type of reference found; the profiles of those who used these references, and what influences these references have had on foreign courts. With the empirical picture at hand, a few points are suggested to open a broader discussion before concluding.

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22 Klug 'Striking down the death penalty: *S v Makwanyane and Another*' (1996) 12 *SAJHR* 68.

23 The Harvard Law Review 'Developments in the law' authors also asserted that '[t]he South African Constitutional Court's decision in *Makwanyane* illustrates that participating in the dialogue can help a national court gain international influence'; 'Developments in the law: international criminal law' (2001) 114/7 *Harvard Law Review* 1943–2073 at 2061.

24 *Mohamed v President of the Republic of South Africa and Others,* CCT 17/01 [2001] ZACC 18 at par 49.

25 For the United States Supreme Court: *Atkins v Virginia* (536 US 304 (2002)), *Roper v Simmons* (543 US 551 (2005)), *Baze v Rees* (553 US 35 (2008)) and *Kennedy v Louisiana* (554 US 407 (2008)). For the European Court of Human Rights: *Öcalan v Turkey*, Appl No 46221/99, 12 May 2005, *Boumediene and Others v Bosnia and Herzgovina*, Appl No 38703/06 and others, 18 November 2008, *Al-Saadoon and Mufdhi v the United Kingdom*, Appl No 61498/08, 2 March 2010; *Al Nashiri v Poland*, Appl No 28761/11, 24 July 2014 and *Al Nashiri v Romania* Appl 33234/12, pending.

RESULTS: LOOKING FOR SOUTH AFRICAN ECHOES ABROAD

United States

As everyone knows, capital punishment in the US does not belong to the past.[26] The Eighth Amendment to the US Constitution stipulates that: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'. In 1958, in *Trop v Dulles*, the USSC explained that '[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society',[27] but did not enunciate a clear justification for their use.[28] For some, this quote licensed the use of comparative legal materials in Eighth Amendment jurisprudence;[29] for others the issue is not settled and the role of comparative analysis in adjudication remains hotly disputed.[30] In 1976, only four years after *Furman*,[31] which struck down the death penalty under the cruel and unusual punishment clause, the Supreme Court reaffirmed the constitutionality of the death penalty[32] and rejected claims that capital punishment was unconstitutional *per se.* Ever since it has been 'involved in the ongoing business of determining which state schemes could pass constitutional muster.'[33]

Among the records of the four US cases examined, two involved references to the SACC judgments and in both cases by key *amici curiae*.

First, in the 2002 case of *Atkins v Virginia,*[34] in which the constitutionality of executing mentally retarded individuals was at stake. One striking element of this case is that for the first time, the European Union submitted an *amicus curiae* brief to the USSC and that it was quoted in the judgment. In the main, this brief argues that there is growing international consensus against the execution of persons suffering from mental retardation, which the US was invited to join.

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26 As of November 2016, 31 States and the US Federal Government and the US military retain the death penalty. 18 States have abolished it; 'Facts about the death penalty' Death Penalty Information Center (17 November 2016).

27 *Trop v Dulles*, 356 US 86 (1958) 101.

28 Blum 'Mixed signals: the limited role of comparative analysis in constitutional adjudication' (2012) 39 *San Diego Law Review* 157, 159.

29 Segal 'The death penalty and the debate over the US Supreme Court's citation of foreign and international law' (2005) 33 *Fordham Urban Law J* 101, 110.

30 Blum n 28 above at 159.

31 *Furman v Georgia,* 408 US 238 (1972).

32 *Gregg v Georgia*, 428 US 153 (1976).

33 *Ibid*.

34 *Atkins v Virginia,* 536 US 304 (2002).

According to the brief, there is an 'overall trend toward the general abolition of the death penalty throughout the world. That trend among the nations of the world accelerated over the last decade. In every corner of the globe countries have limited or abolished the imposition of the death penalty'.[35] It cites the example of South Africa which abolished the death penalty in 1995. It further argued that the USSC decision in this case will unquestionably affect the extradition practices from other countries. Indeed, many countries are demanding assurances that individuals extradited from their countries to the United States be protected from the possible imposition of the death penalty. The European Union referred to the provision in the EU Charter of Fundamental Rights of the European Union, a recent Canadian case, and the South African case of *Mohamed and another v President of South Africa*.[36]

The US Supreme Court found the practice of executing mentally retarded individuals to be unconstitutional. In a footnote, after finding that a national consensus had developed against the execution of mentally retarded offenders, Justice Stevens, who delivered the opinion of the court, wrote:

> Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for European Union as *Amicus Curiae* 4. […] Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.[37]

This quote shows that the court reinforced its finding by relying, among others, upon the observation that other nations overwhelmingly disapprove of the practice and, by the same token, locates the source of this information in an *amicus curiae* brief.

The other case is *Roper v Simmons*,[38] an important case that concerned the execution of a person who was under eighteen years of age at the time of the offence. The case attracted widespread attention from the international community, and attracted many *amici curiae* briefs. One of them, in particular, was submitted by seventeen Nobel Peace Prize Laureates. They tried to convince the court that international opinion and state practice

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35 Brief of Amicus Curiae European Union in, *McCarver v North Carolina*,13. The briefs were then considered in *Atkins v Virginia* n 34 above.

36 *Id* at 14.

37 *Atkins* n 34 above at 316.

38 *Roper v Simmons* 543 US 551 (2005).

condemn the death penalty for child offenders. Under the heading 'Practice of the British Commonwealth and Europe' the brief develops the case of South Africa:

> In South Africa, during apartheid, national law prohibited the death sentence for offenders under age eighteen. […] When South Africa completed the transition to full democracy, a new South African Constitution was adopted. The basic premise of its Bill of Rights is similar to that of the United States Constitution – it 'enshrines […] and affirms the democratic values of human dignity, equality, and freedom.' […] In 1995, the Constitutional Court abolished the death penalty for all offences, holding that it was incompatible with the new constitution's rights to life and dignity.[39]

It might have been influential that among the Nobel Peace Prize Laureates, two were from South Africa – former President De Klerk, and Archbishop Tutu.

The issue of the relevance of citing foreign and international law was salient in the judgment[40] which found that executing minors is 'cruel and unusual punishment' prohibited by the Eighth Amendment.

Council of Europe

Today, Europe is described as a 'death-penalty-free zone'.[41] This was not the case at the creation of the Council of Europe, and it is due, among others, to the actions of the member states, the active role of the Parliamentary Assembly of the Council of Europe, and the jurisprudence of the ECtHR. The latter indeed held in 1989, in *Soering v the United Kingdom*,[42] that the extradition of an individual to the US to stand trial for an offence attracting the death penalty would constitute inhuman and degrading treatment or punishment contrary to the Convention.

The first time the conventionality of the death penalty was challenged as such, was in the case of *Öcalan v Turkey*.[43] Öcalan, the leader of the Worker's Party of Kurdistan, was sentenced to death. He turned to the

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39 Brief of Amici Curiae Nobel Peace Prize Laureates in *Roper* n 38 above at 13 (citations omitted).

40 Justice Kennedy, who delivered the opinion of the Court pointed out that 'the United States is the only country in the world that continues to give official sanction to the juvenile death penalty'; *Roper* n 38 above at 575.

41 Badinter *et al Death penalty: beyond abolition* (2004).

42 ECtHR *Soering v the United Kingdom*, Appl No 14038/88, 7 July 1989.

43 ECtHR *Öcalan v Turkey*, Appl No 46221/99, 12 May 2005.

ECtHR with a team of lawyers that included Sir Sydney Kentridge. Sir Sydney Kentridge, a South African-born lawyer, had been part of Nelson Mandela's legal team and is one of the founding trustees of the Legal Resources Centre (LRC) established in 1978 in South Africa.[44] He also sat as an acting judge of the SACC, delivered the first reported judgment delivered by the court,[45] and has written on comparative constitutional law.[46] Öcalan's application contains many comparative references. For example, he claimed that his deprivation of liberty was unlawful relying, among others, on *Mohamed v President of the Republic of South Africa*.[47] Regarding the death penalty more precisely, the applicant argued that '[d]evelopments in international and comparative law showed that the death penalty could also be seen to be contrary to international law',[48] and in that respect, referred, inter alia, to *S v Makwanyane.*[49] These references are cited in the judgment, but only in the summaries of the parties' submissions, not in the analysis of the merits. This is quite common in the ECtHR's style of judgment and renders the assessment of the weight of this information on the reasoning difficult. The ECtHR held that the imposition of a death sentence following an unfair trial would amount to inhuman treatment contrary to the Convention.[50] Judge Garlicki dissented. For him, the court should have decided that article 3 had been violated because any imposition of the death penalty represents *per se* inhuman and degrading treatment prohibited by the Convention. Writing that constitutional courts have adopted the position 'that the inability of the political branches of government to take a clear decision on the matter should not impede the judicial branch from doing so' he adds : 'A similar approach was taken by the Constitutional Court of South Africa. I am firmly convinced that the European Court of Human Rights should have followed the same path in the present judgment'.[51] Although not explicitly cited, it is clearly the case of *S v Makwanyane* to which Garlicki was referring.

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44 'Prior to the 1994 elections, the LRC primarily used litigation to assert the rights of disadvantaged South Africans and reasserted its position in post-apartheid South Africa too'; McQuoid-Mason 'The delivery of civil legal aid services in South Africa' (2000) 24 *Fordham Int Law J* 111.

45 *S v Zuma and Others* (CCT5/94) [1995] 2 SA 642.

46 See for example, Kentridge 'Comparative law in constitutional adjudication: the South African experience' (2005) 80 *Tulane LR* 80 245.

47 *Öcalan* n 43 above at par 79.

48 *Id* at par 159.

49 *Ibid*.

50 *Id* at par 175.

51 *Öcalan* n 43 above, Dissenting opinion of Judge Garlicki at par 7.

Then, in 2008, an event that mobilised both the USSC and the ECtHR involved the extradition of Algerian and Bosnia and Herzegovian citizens to Guantanamo Bay.[52] At stake before the ECtHR was the failure to enforce a decision ordering Bosnia and Herzegovina to protect the well-being of the terrorist suspects.

Two well-known NGOs – Interights and the International Commission of Jurists (ICJ) – submitted an *amicus curiae* brief to the court. Among the many points they develop, one concerns the duty to restore the situation of a wrongfully transferred person. After considering Convention and international law practice, the brief looks to two 'domestic practices' – the South African and the Canadian. It was stated that:

> With regard to practice before domestic courts, the jurisprudence of the South African Constitutional Court supports the view that there where the State has wrongfully facilitated the transfer, it has a duty to remedy the breach. In *Mohamed & Another v President & Ors*, where the South African government had worked with US agents to unlawfully render to US custody a Tanzanian national seeking asylum in South Africa, the Court placed a duty on the relevant organs of South Africa 'to do whatever may be in their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him'. The principle was confirmed in *Kaunda v President of the Republic of South Africa*, although in that case no obligation to take measures to protect rights was held to arise as '*no wrong has been done to the applicants by the South African government that has to be remedied, nor is there a consequence of unlawful conduct that has to be ameliorated'*.[53] (Emphasis original.)

The court responded (negatively) to the suggestion by Interights and the ICJ that it examine whether the state authorities had an obligation to intervene on behalf of the applicants even in the absence of domestic decisions compelling it to do so,[54] but without mentioning the South African cases. The court concluded that Bosnia and Herzegovina had obtained assurances that the applicants would not be subjected to inhuman or degrading

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52 *Boumediene v Bush*, 553 US 723 (2008) and ECtHR, *Boumediene and Others v Bosnia and Herzegovina*, Appl No 38703/06 and others, 18 November 2008.

53 *Amicus curiae* brief of Interights and the ICJ in *Boumediene* n 52 above at 8 (citations omitted).

54 *Boumediene* n 52 above at par 62.

treatment or punishment, and had taken all possible steps to protect their basic rights and so declared the application ill-founded.[55]

The final case found, was the recent judgment in *Al Nashiri* which also involved the transfer of suspected terrorists to the United States. Currently detained at Guantanamo, Al Nashiri, represented by three lawyers affiliated to the Open Society Justice Initiative based in New York,[56] alleged before the ECtHR that Poland and Romania had participated in the US Central Intelligence Agency's 'extraordinary renditions programs'.[57] Arguing that Romania had a post-transfer obligation to ensure that Al Nashiri not be subject to the death penalty, or receive a flagrantly unfair trial, the applicant cited the court's case law and emphasised that '[o]ther courts have realised that time is of the essence in order to affect a capital trial for terrorism charges in the United States'.[58] He developed the facts at issue in *Mohamed & Another v President & Others* and how the SACC had reacted:

> The South African Constitutional Court expedited the case and 'foreshortened' the preliminary steps for a hearing based on the express recognition that the relief sought by the applicant in South Africa 'could have a bearing' on the criminal trial in New York. The Court rejected the argument that it should not give instructions to the executive, and held that 'it would not necessarily be futile for this Court to pronounce on the illegality of the governmental conduct in issue in this case', as 'important issues of legality and policy [were] involved and it [was] necessary that [the court] say plainly what [its] conclusions as to those issues [were]'.

Moreover, the court observed that:

> [It] [was] desirable that [its] views be appropriately conveyed to the trial court, in light of the fact that the Constitutional Court's decision had a bearing on the case pending in New York. The court further directed that the full text of its judgment be drawn to the attention of the federal court in New York 'as a matter of urgency.'[59]

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55 *Id* at par 67.

56 These lawyers are James Goldston, who has extensively written about the use of strategic litigation, Rupert Skilbeck and Amrit Singh.

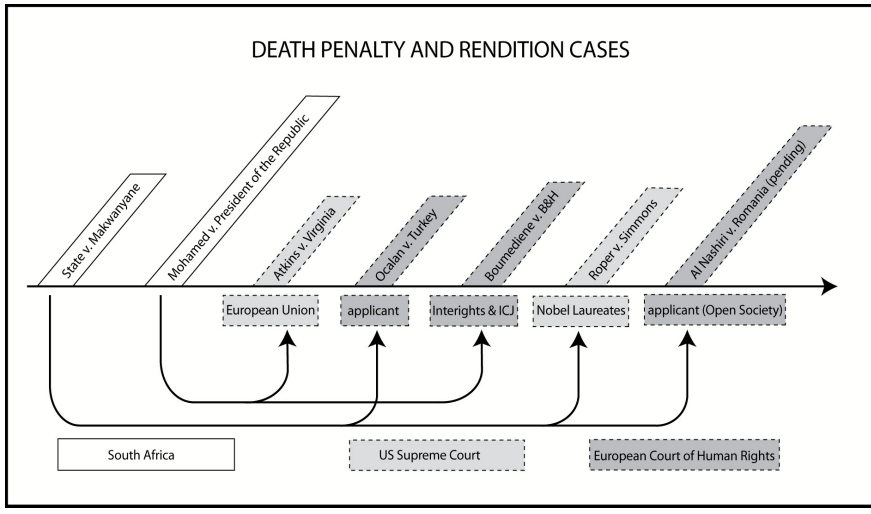
57 ECtHR, *Al Nashiri v Poland* Appl 28761/11, 24 July 2014 and *Al Nashiri v Romania*, Appl 33234/12, pending.

58 Application in *Al Nashiri v Romania* n 57 above at par 355 (citations omitted).

59 *Ibid* (citations omitted).

At the time of writing, the case of *Al Nashiri v Romania* is still pending, it is thus unknown whether the references to the SACC will find an echo in the ECtHR's judgment.[60]

This figure illustrates the cross-references found in death penalty and extradition cases.



ANALYSIS

This brief overview of traces of South African landmark cases outside of the Republic indicates that indeed these decisions feed judicial debates elsewhere.

What kind of references are found and what purpose(s) do they serve?

First, the references to the South African cases found in the submissions mostly appear in briefs with a general comparative approach. These applications or briefs contain many different references and those from South Africa blend into a more-or-less extended mix of international and foreign citations. Generally, it can also be said that the briefs actively engage with the comparative material – which extends beyond mere passing reference or footnotes – in that a fair number of briefs contextualise and develop the facts of the foreign case, an aspect of the reasoning held, and finally the ruling. The purposes fulfilled by the references to South African case law in the submissions are very difficult to categorise. Among the non-

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60 The hearing was held on 29 June 2016.

mandatory uses of foreign references by judges, many scholars have attempted to draw typologies,[61] and the exercise of classifying the references is often hazardous. In the cases examined, the references to South African precedent serve to sustain and detail the existence of an international consensus, to establish facts (for example on the hesitation to extradite to the US), and to inform the moral reading of provisions forbidding inhuman and degrading treatment.[62] It should also be stressed that all the references to South African cases are positive, in the sense that they are presented 'with approval'.[63]

Who refers to South African Constitutional Court cases?

The following actors have made use of South African cases: the European Union, individuals and NGOs, recipients of the Nobel Peace Prize, a South African lawyer, and several NGOs, most of which are large, transnational NGOs with a universal mandate (such as Amnesty International, Open Society Justice Initiative, and the ICJ). The fact that the South African material is mainly provided by a few large transnational human rights NGOs and individual intervenors with a strong 'internationalist' outlook (such as the Nobel Laureates), is not unsurprising. These transnational actors[64] often work in networks[65] and share information, facilitating the exchange of cross-national material. The large NGOs' inclination towards diverse sources of legal material can stem from their international structure, staff, location, and bases of operations.[66] It is noteworthy that no 'local' American or European NGO has made use of South African jurisprudence (in particular in the

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61 See, for a short overview Whytock 'Foreign law in domestic courts: different uses, different implications' in Jackson & *et al* (ed) *Globalising justice: critical perspectives on transnational law and cross-border migration of legal norms* (2010) 45.

62 Sunstein, *A Constitution of Many Minds: Why the Founding Document Doesn't Mean What It Meant Before* (2011) 199.

63 Positive comparativism involves looking to comparative constitutional law with approval, looking to see if the domestic system can borrow. By contrast, negative comparativism looks to comparative constitutional law as a way of devising principles of domestic law by testing what it is not and/or by looking to the failures of other constitutional regimes; Fontana 'Refined comparativism in constitutional law' (2001) 49 *UCLA Law Review* 539–551.

64 As defined by Sidney Tarrow as 'individuals and groups who mobilize domestic and international resources and opportunities to advance claims on behalf of external actors, against external opponents, or in favour of goals they hold in common with transnational allies' Tarrow, *The new transnational activism* (2005) 43.

65 Koh 'Complementarity between international organisations on human rights/the rise of transnational networks as the "third globalization"' (2000) 21/8 *Human Rights Law Journal* 307 Boli 'International nongovernmental organizations' in *The nonprofit sector* (2006) 333–352.

66 See for example Open Society Justice Initiative, *Global Human Rights Litigation* (October 2013), http://www.opensocietyfoundations.org/reports/global-human-rights-litigation-report (last accessed 22 November 2016).

United States, given the very large number of *amici* involved at the USSC level).[67]

The influence of these references on the foreign courts

As the references to South African cases are found in litigants' material and *amici curiae* briefs, the logical question is to what extent these cases have influenced judges. For many reasons that have been outlined by others, measuring influence and causation on judicial decision-making is particularly difficult,[68] specifically when it comes to material brought by *amici curiae*. However, different elements such as previous studies (mostly conducted in the US), interviews with judges, and references found in the judgments, affirm that the *amici curiae* submissions are a method through which judges learn about foreign law, and that their briefs can influence the extent, content, and purposes of comparison in judicial decision-making.

In the USSC cases dealing with the death penalty, there are frequently broad references to 'the world community' and 'the international consensus' which certainly include South Africa. Regarding the ECtHR, there is mention of the legal situation in South Africa, but as part of summaries of the application or the third-party intervention, rather than in dealing with the merits.[69] The fact that the *amici curiae* briefs containing cross-references are quoted in the judgment, or that the interventions are summarised, shows that the briefs are read by the judges. But then, ultimately, explicit references to the SACC case law are absent in the USSC rulings, and the weight accorded to these references in the European context remains unclear and are similarly absent in the merits section of the judgments. In the following paragraph, I analyse this observation further.

DISCUSSION

South African constitutionalism has achieved a lot during its first twenty years. The SACC has delivered ground-breaking rulings that engage extensively in the comparative enterprise. By so doing, the South African justices have proved themselves the 'peers'[70] of other courts.

The analysis shows that these cases may be considered by applicants and their supporters in the USA and in Europe who use them in their

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67 For example, regarding the 2014–2015 term, nearly 800 *amicus curiae* briefs were filed before the US Supreme Court; Franze & Andersen 'Record Breaking Term for Amicus Curiae in Supreme Court Reflects New Norm', *The National Law Journal* (19 August 2015).

68 Duxbury *Jurists and judges: an essay on influence* (2001) 7.

69 See, however, n 8 above.

70 Harcourt n 16 above at 266.

argumentative arsenal before courts. They thus relay the information to other judges – although, to date, the judges do not appear to have responded (at least, not in the cluster of cases examined). This echoes the observation of Lourens du Plessis and Christa Rautenbach that the SACC has been considering far more foreign jurisprudence, than any non-South African constitutional court has been considering South African jurisprudence – 'a case of one-way traffic'.[71] This opens a few points for discussion.

First, the reason why the USSC and the ECtHR have not (yet?) really engaged with South African case law, goes well beyond the case of South Africa. As has been said, the citation of foreign references in judgments have become controversial and many factors influence the opportunity to cross-cite.

In line with this, the fact that South African precedents are not mentioned in cases addressing similar issues does not necessarily indicate that these cases were not considered. On the contrary, the fact that these cases are referred to in the applications and in the *amici curiae* briefs – of which there is evidence that they are indeed read – reinforces the incentive for judges to look for these cases. At the very least, one should not underestimate the weight of the simple knowledge that other courts have ruled in a particular way. This is especially true if they have ruled in the direction in which the foreign judge is leaning, so reassuring him or her that '[s]/he wouldn't be alone'. Jeremy Waldron, stating that references to foreign sources actually draw upon a sort *ius gentium,* explains that foreign authorities 'rescue judges from a feeling of intellectual nakedness'.[72] This seems equally valid even when the foreign decisions are not expressly cited – at least from the perspective of the judges.

Although the South African cases do not find an explicit place in the foreign judgments, another point should be stressed: to a certain extent, the mention of the cases in the litigants' briefs shows that they are already part of a collective narrative about the very difficult questions surrounding capital punishment and the current abolitionist dynamic.[73] These narratives, as

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71 Rautenbach & Du Plessis 'In the name of comparative constitutional jurisprudence: the consideration of German precedents by South African Constitutional Court judges' (2013) 14 *German Law Journal* 1539–1540. See however the findings of Lollini evidencing borrowings of South African judicial elements in the case law of the Canadian Supreme Court; Lollini n 4 above at 264.

72 Waldron 'Foreign law and the modern ius gentium' (2005) 119 *Harvard Law Review* 129, 137.

73 Hood & Hoyle, 'Abolishing the death penalty worldwide: the impact of a "new dynamic"' (2009) 38/1 *Crime and Justice* 1–63. These two authors also contend that South Africa might be a more successful model in the Commonwealth as 'one of the

Austin Sarat points out, 'take on special significance because they become part of the public record'[74] and have staying power. Some would even argue that these cases participate in constructing a global *ius commune*, with all the difficulties of the meaning of this concept.[75] Whether these cross-references are evidence that some fundamental rights guarantees are cut from a universal cloth, with all courts engaged in the identification of its principles,[76] is a matter open for debate.

It remains puzzling that despite the SACC's 'international acclaim and the commonality of rights issues',[77] its decisions have not been extensively cited in the Western part of the hemisphere. First, it was recognised early that for the court, 'becoming part of a global judicial conversation has become a badge of legitimacy'.[78] However, one can wonder about the type of conversation at play here? The answer of necessity feeds into the criticism that 'global judicial dialogue' actually excludes many courts – especially those in the South.[79] Even though the SACC had no ambition of being a 'product of export', or a desire to 'please' or to encourage other jurisdictions to follow its example,[80] there is empirical evidence in support of the idea that reciprocity underlies judicial citation[81] – in other words, judges cite judges who cite them. This implies 'that there should be no large asymmetries in citation patterns between pairs of courts'.[82] There are clearly other factors at play, but this could also explain the decline in comparative references in the SACC's judgments.[83] There is an ironic vicious circle, in

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barriers to abolition appears to be the perception that other (mainly European) countries are seeking to impose their worldview on countries that retain capital punishment in law' at 44.

74 Sarat 'Narrative strategy and death penalty advocacy' (1996) 31 *Harvard Civil Rights-Civil Liberties LR* 353–368.

75 See for example Carozza n 9 above at 1043, who also insists on 'the broad variety of actors' in the use of this ius commune.

76 Choudhry 'Globalization in search of justification: toward a theory of comparative constitutional interpretation (1999) 74 *Indiana LJ* 819, 833.

77 Kende n 5 above at xi.

78 Slaughter *A new world order* (2004) 74–75.

79 Du Bois de Gaudusson 'La complexité de la participation des cours suprêmes des pays en voie de développement au dialogue des juges' (4 June 2008) 22 *Petites Affiches*; Delahunty & Yoo 'Against foreign law'(2005) 29 *Harvard Journal of Law & Public Policy* 291–297.

80 Philippe 'La motivation des décisions de la cour constitutionnelle sud africaine: Essai d'analyse de la construction d'une jurisprudence de protection des droits fondamentaux' in Hourquebie & Ponthoreau (eds) *La motivation des décisions des cours suprêmes et cours constitutionnelles* (2012) 282.

81 Choi & Mitu Gulati 'Bias in judicial citations: a window into the behavior of judges?' (2008) 37 *The Journal of Legal Studies* 87.

82 Slaughter n 78 above.

83 Foster 'The use of foreign law in constitutional interpretation: lessons from South Africa' (2010) 45 *Univ of San Francisco LR* 79 90; Rautenbach n 4 above at 195.

that the less judges participate in the trans-judicial dialogue, the less they will be able to influence other courts.[84]

The analysis presented above offers a nuance to these statements: The SACC's judgments are scrutinised by institutions, academics, activists, NGOs, and in all likelihood also by judges. The narrative the court adopted early on – of including views from distant shores when deciding hard cases – is shared by lawyers and activists around the world who believe that these decisions contribute to their arguments. This narrative is important and might continue to work, even if in the shadowy corners of the courtroom, towards the realisation of an approach of engagement on fundamental rights issues.[85]

CONCLUSION

The judgments of the SACC have often been in the spotlight, and rightly so. Many not only embrace the belief in transformation through law, but also engage with many other foreign decisions. This contribution aimed at looking to the legacy of two landmark cases outside of South Africa in order better to assess the SACC's participation within the global judicial dialogue.

This exercise was conducted using cases involving the death penalty and the related issue of rendition. I first scrutinised the documents submitted by parties and by *amici curiae* before the USSC and the ECtHR, and then analysed the judgments themselves. References to South African precedents were found in an application, and in several *amici curiae* briefs. It was found that references to South African cases habitually coexist with other international and comparative material, and that the presentation of the South African precedent is often quite articulated. The SACC judgments, when they are presented, are substantive and positive – *ie* they are cited with approval to help define the content or the interpretation of a provision. The *amici curiae* briefs citing South African cases in the results' list, are signed by transnational actors many of whom are 'repeat-players' in the courts examined.

These findings therefore confirm the hypothesis that South African decisions may serve as tools for litigants worldwide. This can provide food for thought on how information circulates and on the identity and methods

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[84] Slaughter n 78 above. Such a reciprocity has often ben suggested to explain why the US Supreme Court loses its international influence; L'Heureux-Dubé 'The importance of dialogue: globalisation and the international impact of the Rehnquist Court' (1998) 34 *Tulsa Law J* 15.

[85] See for more on this, Jackson *Constitutional engagement in a transnational era* (2010).

of actors who are often overlooked in the debates on 'judicial dialogue'.[86] But what may be more complex to explore and to explain, is the finding that, despite being 'served' with these references, the Strasbourg and Washington judges have been timid in citing them in their opinions. The fact that these references do not (yet?) find an explicit and 'engaging' echo in the judgments of the USSC and the ECtHR raises various questions which are presented here as subjects for discussion.

If one believes that transnational judicial dialogue may contribute to the interpretation of fundamental rights, this analysis shows that it is a task which lies on the shoulders of many: on South African and foreign judges; on South African and foreign scholars to educate in comparative law and to disseminate the judgments; and on South African and foreign lawyers and organisations to use these precedents. A parallel can be drawn with the call formulated by Justice Mokgoro in *S v Makwanyane* for whom [t]he broad legal profession, academia and those sectors of organised civil society particularly concerned with public interest law, have an equally important responsibility and role to play by combining efforts and resources to place the required evidence in argument before the courts.[87]

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86 Black & Epstein '(Re-)setting the scholarly agenda on transjudicial communication' (2007) 32 *Law & Social Inquiry* 791.

87 *State v Makwanyane and Another* n 5 above at par 306.